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Book Review: Constitutional Reform in America:
Essays on the Separation of Powers. by Charles
Hardin.

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Bloom's synthesis of the materialist and nationalist accounts of the civil rights movement is more credible than either taken separately, and, though it may not completely rout the competing elitist-ideological account, to which Bloom devotes little attention, it does show the persuasive power of a coherent alternative account. It deserves consideration by a wide audience.

CONSTITUTIONAL REFORM IN AMERICA: ESSAYS ON THE SEPARATION OF POWERS. By Charles Hardin.¹ Ames, Iowa: Iowa State University Press. 1989. Pp. 236. \$27.95.

*Robert G. Kaufman*²

Is there something seriously wrong with the American political system? Many observers think so. Most can agree on some or all of the symptoms of the problem: the weakening of political parties, the diffusion of power within Congress, the erosion of presidential authority, the growing influence of special interests, money, and lobbyists, a burgeoning bureaucracy largely beyond executive or congressional control, political gridlock between a predominantly Republican presidency and a Democratic congress. Yet no consensus exists about the solution.³

Reformers fall into two distinct groups, which sharply disagree about the requisite reforms. Moderate critics defend the principle of separation of powers, the existence of three independent political institutions with separate constitutional standing. They argue against constitutional change, and wish instead to revise the "Unwritten Constitution," those customs and arrangements that enable a government of separate institutions to function, such as the internal arrangements of the Congress.⁴

Others argue, however, that the separation of powers is the root cause of America's constitutional problems. Charles Hardin is a longtime advocate of this more radical challenge to the existing system. Drawing on the analysis of constitutional scholar Charles McIlwain, Hardin argues, in this compilation of essays which summarizes his extensive work on the subject, that the separation of

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3. For a sound journalistic assessment of these problems, see H. SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* (1987).

4. D. PRICE, *AMERICA'S UNWRITTEN CONSTITUTION* (1983).

powers is a threat to constitutionalism itself: it prevents us from finding an effective way of replacing an incapacitated president who has failed politically; it fosters deadlock and lack of accountability by hopelessly dividing authority between legislative and executive branches; it promotes the interests of "iron triangles" and special interests over the national interest; it precludes the formulation and implementation of an effective foreign policy. He suggests that we adopt some variant of the parliamentary system, which unifies executive and legislative authority, eliminates fixed-calendar elections, allows for elections at the discretion of the government-of-the-day, and establishes the procedure of removing failed executives by votes of no confidence.

Although Hardin offers some compelling criticisms of the separation of powers, his argument for abolishing the principle ultimately fails. Separation of powers has not worked perfectly, but it has given us two hundred years of stable and effective government. Hardin's "cure" would impose costs which we should not and would not accept. He rests his case for parliamentary democracy on an excessively restrictive view of the purposes of constitutional government. His case also rests on the dubious premise that parliamentary systems have performed better than our system. The evidence he marshals in support of this premise, particularly in the realm of foreign affairs, is unpersuasive, because Hardin's policy preferences overwhelm his objectivity.

Like many who make the case against separation of powers, Hardin combines two distinct, though interrelated, lines of argument. One is rationalist: separation of powers is inconsistent with the imperative of making policy rationally, decisively, and efficiently; whatever rationality separation of powers may have had in the relatively simple world of the framers, it is outmoded in today's dangerous and interdependent world.

The other line of argument is liberal. Before Watergate and the paralyzing debate over the Vietnam War, many argued that the separation of powers thwarted the large and active role that the federal government should play in expanding the welfare state. This led some to advocate a stronger (presumably liberal) presidency and a weaker (presumably obstructionist) congress.⁵ Thereafter, however, the rationale shifted as reformers sought to restrict an Imperial Presidency which supposedly had brought about the Watergate crisis and the Vietnam debacle.

5. For this classification of the rationalist and liberal arguments against separation of powers, I owe James Q. Wilson. See, e.g., Wilson, *Does the Separation of Powers Still Work?*, PUB. INTEREST, Winter, 1987, at 36, 37-39.

Hardin argues, on the one hand, that the separation of powers has allowed "iron triangles" of congressmen, special interests, and bureaucrats to deadlock arms control negotiations and other critical foreign policy initiatives. From this perspective, it makes sense to strengthen the power of the president. Yet he also argues that the separation has "deified" the presidency, led to government by "presidential whim," and institutionalized "a constitutional flaw of first importance" because it precludes the replacement of a president who has become politically disabled. Such arguments are consistent with the rationalist case against the separation.

In discussing the foreign policy implications of separation of powers, however, Hardin's arguments are also consistent with the post-Watergate liberal critique of the Imperial Presidency. Thus, he blames Ronald Reagan and the military-industrial complex for the breakdown of arms control negotiations during the early 1980s, negotiations whose virtues he considers self-evident. Similarly, he blames hawks in Congress and iron triangles for blocking the SALT II Treaty of 1979, another arms control endeavor which, according to Hardin, was obviously in the national interest. His treatment of the CIA and the Vietnam War also reflects the post-Vietnam liberal agenda.

There are ample grounds to dispute Hardin's rationalist case. The framers did not consider efficiency an absolute value; hence, they established a system based on the separation of powers, or what Richard Neustadt more accurately describes as separate institutions sharing powers, which protected against the tyranny of the majority, or of a faction, or of the national government. Nor have conditions changed so dramatically as to render the framers' concerns and solutions frivolous. George Washington and Abraham Lincoln faced problems no less daunting than today's budgetary and security issues. The separation of powers is still the main bulwark protecting individual and community rights from abuse by a powerful federal government. Hardin devotes too little attention to these competing concerns.

There are even more substantial grounds for rejecting Hardin's liberal interpretation of current events. Because much of his critique focuses on foreign affairs, his tendentiousness on the subject deserves special mention. Consider his discussion of arms control. It is not self-evident, to this writer among many others, that the SALT II Treaty whose failure Hardin laments did not deserve to fail. If the treaty was a bad one, then perhaps its defeat vindicated our traditional system.

Similarly, events have demolished the premises and arguments

of Hardin's essay on the Strategic Arms Reduction Talks (START) between 1981 and 1985. Both Hardin and Strobe Talbott, on whose questionable journalistic account of the negotiations Hardin relies, regard the breakdown of arms control negotiations between 1981 and 1985 as a disaster attributable to the American stance on such negotiations.⁶ Why? Reagan's success in achieving the Intermediate Ranged Ballistic Missile (INF) Treaty of 1987 on terms Talbott and others thought impossible seems to vindicate the very negotiating stance that Hardin condemns. Furthermore, Hardin and Talbott misread the motives of those who persuaded President Reagan to take his hard and successful line. It was the policy attitudes of men like Richard Perles and Casper Weinberger, not the "iron triangle," that were the main reason for the Reagan Administration's *successful* arms control strategy.⁷ Thus, the outcome of the Reagan Administration's phase of nuclear arms talks may stand as another example of how separation of powers works. Our system implements only those goals that can survive a process of protracted bargaining and consultation, and this apparent weakness spared the United States a hasty and ill-advised arms treaty on less favorable terms.

Hardin fails to demonstrate that a parliamentary system would perform better. He concedes that Britain's experience is "critical to the evaluation of parliamentarianism," which by his own admission raises some difficulties for his argument. Samuel Beer, S.E. Finer and others have argued that the parliamentary system was one of the causes of the rise of Great Britain's socialist welfare state, the convergence on collectivism of the political parties, and concomitant social and economic problems. Hardin offers a plausible rebuttal of this indictment.

Hardin, however, does not stop there: "even if Great Britain were to go broke tomorrow, its record . . . might still make it an exemplary one, superior to the American system." Have parliamentary democracy in general and Great Britain's variant in particular more effectively addressed major problems, such as deficits, economic policy, and foreign policy? The evidence does not support this assertion. Neither Great Britain nor most parliamentary democracies have deficits smaller than ours, measured as a percentage of GNP.⁸ Similarly, our aggregate economic performance com-

6. S. TALBOTT, *DEADLY GAMBITS* (1984). For a compelling criticism of the book and its methods, see Draper, *Journalism, History, and Journalistic History*, N.Y. Times, Dec. 9, 1984, (Review of Books) at 3.

7. For an excellent inside account of the negotiations, see K. ADELMAN, *THE GREAT UNIVERSAL EMBRACE: ARMS SUMMITRY — A SKEPTIC'S ACCOUNT* (1989).

8. Wilson, *supra* note 5, at 44-47.

pares favorably to most of our parliamentary competitors, particularly during the 1980s.⁹

Nor does the record of American foreign policy compare unfavorably to that of parliamentary democracies. Again, Hardin attributes too many of our mistakes to the particulars of our constitutional system rather than to the flaws inherent in all democracies. Consider his argument that the inability to replace a politically disabled president is a major flaw in our system relative to parliamentary systems. Sometimes this inability is, to be sure, a disadvantage—recall Woodrow Wilson's incapacity after his series of strokes. Sometimes, parliamentary systems have benefited from the ability to replace a politically disabled leader—recall the replacement of Neville Chamberlain during the Nazi invasion of France. Sometimes, Congress has gone too far in constraining presidential authority in foreign affairs—consider the Neutrality Legislation of the 1930s, and the War Powers Act of 1974. Overall, however, parliamentary systems have done no better and often considerably worse. British foreign policy has suffered from grave mistakes no less frequent or persistent than ours: appeasement during the 1930s, the Suez adventure, and several aspects of post-war decolonization.

Hardin gives American foreign policy too little credit. His apocalyptic tone suggests a system on the brink of crisis. This is false. Despite obvious problems, we enjoy a remarkable prosperity. Anyone pondering the case for constitutional reform must consider the extraordinary success of the American post-war policy of containing communism. True, some believe that the policy of global containment rested on an exaggerated estimate of the Soviet threat, or produced counterproductive excesses in American foreign policy. Even granting this, we deserve great credit for maintaining the post-war system at less cost and risk than the history of this century and the record of peacetime democracies, including Great Britain, would have given anyone the right to expect. Who would have predicted, at the onset of the Cold War, that we would manage to bring its end in sight on terms favorable to the West? We achieved this outcome against an implacable ideological adversary, a military colossus, without having to fight another world war. This is a record which any parliamentary democracy should envy.¹⁰

Even if we assume that a parliamentary system could have

9. For a more optimistic assessment of the relative performance of the U.S. system, see J. NYE, *BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER*, 201-30 (1990).

10. For a similar, although more qualified, argument along these lines, see J. GADDIS, *THE LONG PEACE* 215-35 (1987).

done as well, the record suggests that our constitutional procedures can produce a largely successful foreign policy in perilous circumstances, without jeopardizing individual liberty.

Granted, our system could use some fundamental reform. A combination of the weakening of political parties and dilution of the president's authority vis-à-vis Congress, and the diffusion of authority within Congress, has excessively fragmented the power and responsibility necessary for effective government. We probably should strengthen presidential and congressional leadership, to help reverse "the tides of individualization and decentralization that have engulfed the Congress."¹¹ As James Q. Wilson has written, however, "it is in this area of the unwritten constitution that remedies for the defects of the separation of powers must be found. There are no constitutional remedies short of the abolition of the principle itself, and that is a price that two hundred years of successful constitutional government should have taught us is too high to pay."¹²

REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM. By Larry W. Yackle.¹ New York, N.Y.: Oxford University Press. 1989. Pp. xii, 322. \$35.00.

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As a decidedly minor character in the drama, I read Professor Larry Yackle's history of the Alabama prison litigation with special interest. This litigation arguably set the mold for most of the significant "conditions of confinement" litigation. Professor Yackle's treatment of it is both thorough and accurate. He shares with me a deep ambivalence about the outcome of the litigation, which can now be read as a cautionary tale about the limitations of litigation as an instrument for meaningful social reform.

The book begins by describing the horrible conditions in the Alabama prison system at the time the litigation began, including the filthy, overcrowded punishment cells known as dog houses where prisoners were deprived of clothing, light, and running water.

11. Wilson, *supra* note 5, at 52.

12. *Id.* at 52.

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