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How many “branches” are there in the federal government of the United States? Standard civic education dogma, for young people or immigrants, is that there are three. That may be strictly correct, according to some schemes. But the matter is not so simple.

The Constitution of the United States does not refer to “branches” of government. When it refers to the interactive parts of the structure, it uses the term, “department.” The metaphor is not a tree, but a space.

In general public discourse, there may be other accounts besides “three.” Even a nominal counting (and numbering) of so-called branches can produce controversy. For instance, members of Congress regularly refer to their institution as having two branches. That would plausibly result in a total of four. The Supreme Court of the United States, conventionally referred to as the Third Branch, has persistently and somewhat ironically held that in terms of international affairs, there are really only two branches of government, the President and the Senate, or the President and Congress. And, for a long time, there have been alternative candidates for a Fourth Branch, outside of the nominal three, as a way to designate the full governmental effects of other centers of power — for instance, the federal
Every form of government represents something besides itself. In that respect, it replicates something else. If it, in effect, "represents" or "replicates" only itself, it is no "government" at all. It is a tyranny. And tyranny is not properly a constitution at all, for Aristotle, in that it defies any sense of acting on behalf of all of the country. For Locke, a king who purports to rule outside or above the law is not a part of the social compact, but an enemy operating in the state of nature, and in a state of war with his people. There are, thus, two aspects of the highest level of political thought, which focuses on the establishment and maintenance of communities of justice: wholeness and order. The combined enterprise may be generally conceived of in modern terms as "rule-of-law government-by-the-people." Neither of the two terms can exist coherently without the other, and they are in a powerful sense reflections of each other in the way that body and spirit are combined. This overlaid form is more commonly referred to today as "constitutional democracy." It is also reflected in the older concept of "good government" or "free government" — where each of the terms of the binomial has substantial meaning.

The ultimate standard for governmental structure in democratic constitutionalism is one that authentically models or replicates the people's lively wholeness in an array of institutions that achieve a durable process of public reasoning. As re-presentation of the social compact, such an institutional array should carry out this public reasoning — organized as "law-making," which is conceived of not only as ordering but also as life-giving — more practically, reliably, and effectively than if the people did it themselves directly.

Seen in this perspective, all well-conceived human enterprises (including the social compacts of communities of justice) may be thought of as being in proportion harmonically with Nature's wholeness and order, as Cicero explained. Extending that view, the structure and principles of government need to be proportional to the People's fundamental character and values.

This sort of successive replication (reflecting democracy) and modeling (crafting constitutionalism) make for a far more powerful understanding of constitutional democracy than could be grasped by mechanical conceptions of elections and mandates, backed up by transient majoritarian components of a population, although this is what "democracy" is often taken to mean today.

But to get to these deeper dimensions of constitutional democracy, we need to focus not merely on how a system works, but also on how it was made or could be re-made. A revealing comparativity will be achieved not only through a serious system-to-system assessment at the constitutional level (Aristotle), but also from the perspective of the makers, the Founder's
perspective (James Madison). Maker’s knowledge must be allied with user’s knowledge.

Creative constitutional awareness and constructive constitutional change can be accomplished in a country when both the people and their leaders achieve this “Founder’s perspective.” This is a quality of public mentality that moves well beyond the analysis of problems of institutional performance, toward the reinforcement or re-design of the structures of governmental power, based on a strategic understanding of deeper constitutional purposes. It marks a momentous time in the progress of a People toward its chosen destiny, recovering a vision of the future from the past, or opening up possibilities previously unseen.

A Constitution is effective, under normal conditions, only when it reflects (and cultivates) the animating spirit of its people. In reverse, citizens and leaders think “constitutional thoughts” almost naturally, without deciding each time to do so. We know this from Aristotle, Montesquieu, Rousseau, and James Madison. And we have seen that Constitutions which do not reflect a people’s spirit may be lovely to read but useless in practice—in John Marshall’s phrase, “splendid baubles.”

But, in extraordinary times, when a political system begins to produce anomalies or to malfunction by failing to fulfill the principles that lie behind its institutional design, the country enters a different state of mind. Citizens and politicians begin to reason critically about their constitutional order. One alternative is to reassert the terms of the existing Constitution more deliberately and carefully. The other is to imagine new Constitutional arrangements.

The imagination of significant constitutional reform can come into being only when a country begins to think in a different way from its normal political calculus of partisanship and public-policy advocacy. The Founder’s perspective requires that both political leaders and the people try to achieve a different kind of political reasoning. They begin to think like makers and not just users of the constitutional world in which they conduct their political life. Thus, the Founder’s perspective is a category shift in political thinking.

In the constitutional history of the United States in the late 18th Century, development of this way of thinking for its own sake was cultivated with full intention—as a central feature of the agenda for political transformation. As the stages of planning, drafting, ratifying, and interpreting the Constitution moved on, each was focused deliberately on making a shift of constitutional thinking occur, not only among political leaders but also among citizens. The Federalist Papers reflect this strategy quite openly, for instance, at the stage of the ratification debate. A very large part of the Federalists’ effort to gain the approval of the American people for the Constitution was to get their readers to think in a different way—not only as mutual citizens of the United States but also as fellow makers of the Constitution, people who had the liberty and capacity to do things that had never been done before. The insights that can be gained from this perspective of the maker of the Constitution (as a state of mind potentially available to all constitutional citizens) even today continue to constrain what the Constitution can authoritatively mean and how it should be enforced. So the perspective of the maker has been durably annexed to the perspective of the user of the Constitution.

This aspect of the American experience is, in my view, far more important to citizens of other nations seeking to achieve a better constitutional state of affairs for themselves than any of the specific solutions that can be found in the Constitution of the United States, or in its constitutional practice. The important lesson for constitutional reformers in other countries is not the substance of constitutional provisions in the United States, or the American governmental model itself but, instead, the approach to constitution-making that is exemplified by the American Founding and in its elaboration over time, as it enables the experience of civic and political life under that Constitution. The same could be said for the understanding that Americans need to have for purposes of keeping the Constitution true to its deeper nature.

THINKING AS A CONSTITUTION-MAKER

To illustrate what I mean by the perspective of the Founder, I draw out four zones of constitutional thinking. The Founder must be able not only to reason at each of these levels but also to make rigorous connections among them. They move from the abstract to the concrete.

These zones are:

A. **Constitutionalism**, the science of constitutions in general. In this more universal theoretical zone, one finds a collection of the broader concepts that are reflected in a vision of the well-ordered human community.

B. **Constitution-Making**, the sovereignty of the people as a whole. This somewhat more specific, civic zone is focused on the overall defining character of a particular population, expressed through the fundamental values chosen as the foundation for their public world.

C. **Constitution**, the form of the political system. This political zone contains the animating purposes that authorize and constrain the use of power exercised in the name of the people,
enforced as a trust held in their behalf and with respect for their rights.

D. Institutions, the structure of power. This governmental zone reflects the defining principles that channel these powers practically through effective institutions that address the needs and wants of the country.

These four zones are framed within two others: one could be called “pre-constitutional” in a formal sense (the ultimate order of Natural Law/Human Rights) because it exists independently, prior to constitutional thinking and flows into it; the other is “post-constitutional” (the eventual substance of Law-Making/Public Policy) because it is dependent on constitutional thinking and flows from it.

Issues concerning the structure of governmental power — e.g., “Presidential” (France) vs. “Parliamentary” (Germany) vs. “Coordinate-Powers” or “Coordinate-Departments” (United States) — are preoccupied with Zone D. But, from the perspective of constitution-making that I am setting out here, for political leaders and citizens to engage in deliberations only about the comparative (abstract) merits at this level is to miss out on some of the most important insights and questions that might guide “reflection” about the most valuable aspects of “choice” pertaining to the proper structure of “good government” for a particular country’s conditions (Federalist, No. 1, Alexander Hamilton). And, in fact, it is not possible to understand these contrasting structural options, for purposes of comparison with an aim toward making constitutional choices and critical evaluations, without looking to the other zones for deeper explanation.

I will try to illustrate what I mean by these four zones, with attention to their relevance for issues regarding the structure of government power. My overall point is that it is not enough merely to study and debate about the structure of powers itself, focusing on the functioning of government on its own terms — in isolation from the three zones that lie in its constitutional background.

A. Constitutionalism

This zone of thinking focuses on the overall framework of a politically ordered society. As the foundation of “maker’s knowledge,” it aims at a science of constitutions, or what Cicero referred to as the “establishment and maintenance of communities of justice.” In this zone, one would inquire into the architectonic principles of a well-ordered human community. These may be summed up in the concept of “ordered liberty,” the binomial phrase used by George Washington which was picked up later by American Supreme Court Justice Benjamin Cardozo to denote the a priori but practical standard that any good Constitution must authentically instantiate. The key is to make an order of liberty, a reflection of the social-compact theorists’ basic agenda to establish political authority on the basis of human freedom. Consistently, the Great Seal of the United States includes the phrase, Novus Ordo Seclorum (a “New Order of the Ages”) to refer to the newly invented constitutional enterprise.

In its modern version, the order of constitutionalism joined with the liberty of human beings takes the more substantive form of Democratic Constitutionalism or Constitutional Democracy, joining “rule of law” to “government by the people.” From this perspective, the ultimate concern of all well-intentioned constitution-makers for “good government” cannot be centered on the structure of government solely on its own terms. Instead, it must embrace a sequence of constitutive relationships in an overall framework of constitutionalism, moving from the general to the specific: The connection of (a) the people, the culture, or the society [Zone B in this essay] with (b) the political character of the Constitution [Zone C], and then with (c) the structure of governmental institutions and their powers [Zone D]. Thus there are three phases of order, sequenced within a constraining background of principles for establishing and maintaining a well-ordered community [Zone A], which is itself subordinated to the Law of Nature.²

Constitutionalism is preoccupied not just with order but also with representation (or, literally, “re-presentation”), in its fullest sense — how to set up something that stands for something else, reflecting and perhaps intensifying the essential characteristics of the make-up of what it stands for. All forms of political order and governmental structures offer a representation of their societies. These may be arbitrary (tyrannical) or deliberate (constitutional). In a tyranny, the government’s claims to represent the country are asserted as being valid on the government’s own terms (and for its sake), because it says so. In a constitutional system, all of the phases of political order should be subject to justification for their authentic reflection of the country. A formal Constitution structures this relationship by intention and design — (c) the representation by government of (a) the people as a whole, through (b) the Constitution. As a Constitution purports to model the society’s fundamental traits to preserve and to advance them, it may reflect or distort the character of the people.

² In the European context, this constraining background might more properly be seen as Human Rights. And the relationship between Zone B and Zone D might be more appropriately understood as parallel, with Zone B characterized as “Society” and Zone D as the “State,” the one reflecting the community and the other reflecting order. In this context, the purpose of a Constitution or, more properly, the Basic Law is to coordinate the animating energy of the one with the ordering form of the other.

In previous essays for the German-American Conference, especially in my papers for 2007 and 2009, I have set out a more systematic framework of seven zones, with which the present analysis is coordinated.
fact, it must always choose some characteristics to emphasize over others — as in any portrait. And so, it may be progressive, extending beyond what the society has achieved so far. It may also be creative, in setting out a vision of the people’s tradition and destiny. Laying out the design of institutions is not the first function of a real Constitution. The first function is to set out those characteristics that are to be fundamental and, thereby, to serve as the animating purposes of this political enterprise, as a reflection of the values of a particular people. The design of institutions or the structure of power is, therefore, a practical reflection and realization of these constitutional purposes and these sovereign values. In addition, it is here that one is most likely to find this people’s most forward-thinking vision of themselves and often, as well, the statement of an aspiration to contribute to the general benefit of humanity by their good, constitutionally faithful, example.

The knowledge that gives substance to a science of constitutions is generated by comparison of political systems. But, as I have said, this knowledge is vested in a real comparativity of systems from the perspective of constitutionalism, not merely the juxtaposition and contrasting of differing institutions. This constitutional comparativity has been the enterprise of constitutional theory (or real political science) since Aristotle. Countering the conventional wisdom: We do compare apples and oranges — if the purpose is to better understand fruit.

B. Constitution-Making

The consequential involvement of the people in making constitutions is the ultimate democratic act, where they make choices that establish the ground rules of their political world. It is a basic attribute of human freedom, transformed into their social capacity, not just to participate in choosing governmental officials and approving matters of public policy, but to take part in the making of the the public order itself. The liberty of the individual (self-determination) is parallel to this power of the people (self-government). If this is so, political constitution-making is a consequence of human liberty, fully conceived.

But the population of a country is the Sovereign People only as the whole people, not in their partial (electoral) manifestations or in their practical (majoritarian) representations within government institutions. The crucial purpose of a Constitution from the perspective of American Federalist founders like James Madison is not primarily to proclaim a compelling statement of values or rights. It is to construct a scheme of representation that enhances, by practical devices, the effective approximation of wholeness as reflected by government institutions — so that when they act to carry out constitutional purposes and to make effective public policy, they more authentically represent the will and interests of the whole people. Thus government by the people can be brought into effect only by a good constitutional system. If the people attempt to govern directly, the likely effect is “tyranny of the majority,” which is the bad or “failed” form of republican governance. It is also a woefully efficient regime of oppression, in Madison’s (and Aristotle’s) view. Under a well-designed scheme of representation, however, as Madison states in Federalist, No. 10, “it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”

In its fundamentality, the Constitution [Zone C] is a first-derivative image of the Sovereign People [Zone B]; next, in its authority, law is their second-derivative image. The process of governmental action in making law [Zone D] is therefore an image of the sovereignty of the People — but only an image, with all of its potential imperfections and possible refinements. In a true constitutional order, it is important that these two images — Constitution and law-making — be kept as congruent as possible with each other, and with the ineffable wholeness of the People themselves, which cannot be observed directly, but seen only through constitutional manifestation and governmental translation.  

C. Constitution

The point of constitution-making is to make an effective transition from the values of the sovereign people to the principles reflected by governmental institutions, according to the purposes and designs of the political constitution. In the United States, this political constitution, or polity, takes the form of neither a “republic” nor a “democracy,” per se. Because constitution-making, from the American Federalist perspective, is able to achieve intentionally designed forms not available previously, this empirical Constitution has made modifications on the more pure alternatives. The Constitution’s framers proposed a “federal republic,” or a “compound republic.” And this has evolved into a more substantial “constitutional representative democracy,” based on a union of the state peoples which has grown to approximate a union of one people, with the consolidation of a common national citizenship after the addition of the 14th Amendment in the 1860’s, following the Civil War.

In the American political system, the wholeness of the People is more fully approximated — through the Constitution — by the combination of governmental institutions, through the coordination of dispersed centers of
power, negotiating outcomes on an on-going basis. In the European model, the general interest of the people is to be achieved through the culmination of governmental institutions — by the unification of power, through an established sequence of phases of decision-making that is durable and predictable even when the parties that make it up remain at odds.

In turn, these contrasting models reveal deeper commitments about whether unity or division is to be found in the people or in government. The institutional arrangements set forth by a Constitution may also cultivate a certain version of unity or division among the people by rewarding one or the other.

In the American system, the strategy is to cultivate unity among the people and division within the structure of government. This embodies the oldest political maxim of “divide and rule,” with the accompanying idea that it is the people who should control government. That control should itself be an emblem of their collective self-interest. Madison, for instance in Federalist, No. 14, sets out an image of America as a union of citizens who are “mutual guardians of their mutual happiness.” He conceives of the structure of power in the central government, in Federalist, No. 51, as absorbing the competing ambitions of political leaders into a competition of the branches of government. From this perspective, even the political party structure appropriate to the American constitutional system will provide comprehensive but overlapping alternative visions, each of which offers a view of what would be good for the people as a whole (“big tent” parties). The very nature of partisan contention is that each of the parties is attempting to portray a preferred version of the overall public interest. It is important, then, that governmental institutions be able to reflect these multiple visions of the common good. The aim of law-making and public policy is to coordinate these differences into provisional compromises, though they may not be resolved in any lasting sense.

In the predominant European model, the society is itself riven into durable programmatic partisan segments. Through the ad hoc assemblage of coalitions, the representation of these segments of society may be transformed into an effective governmental unity through the structured coherence of the institutional processes themselves, which are sequenced and organized to produce rationally defensible outcomes.¹

¹ The European model of consolidating durable social segments may also be a reflection of a long tradition of representing the various “estates” of the society or convening constituent assemblies into “estates general,” constituent assemblies, moving through recent times when “round-table” meetings in Eastern European countries were called to work out new constitutional arrangements. As a strategy of representation, all of the constituent groups of the society are supposed to be present and part of the decision-making process.

D. Institutions

Even though, as I have argued, it is very important to consider the prior levels of constitutional thinking in the course of crafting and appraising the structure of powers for a political system, I will devote most of my attention to the arrangement of governmental institutions under the United States Constitution. At the same time, I intend to emphasize the basic constitutional characteristics of the model itself. I hope this approach will provide a strong sense of how the American system can be described more accurately in constitutional terms without over-emphasis on transient present-day issues of performance. That is to say, any cross-country comparison of (c) institutional design regarding the structure of power must take into account (b) the composition of the arrangement of the several key institutions that divide the power of the federal government of the United States. And this arrangement needs to be attentive to (a) the background of constitutional purposes and public values which give rise to the way the institutions are arrayed with respect to each other — especially since these continue to characterize and justify both the institutions and their arrangement.

Over the long history of political communities’ making judgments about better or worse ways of ordering power and rights — as well as establishing relationships between the people and their government, and among themselves — it has been crucial to compare ordered communities in terms of their constitutions. For constitution-makers, this includes comparisons made with other political systems (e.g., unitary republics, federal republics, representative democracies, or parliamentary democracies) and with other governmental structures (e.g., coordinate-departments, presidential, or parliamentary). In particular, it has been important to make these comparisons in terms of actual constitutional orders not just from the perspectives of theoretical systems and conceptual structures.

These considerations bring up the vexing issue of how to characterize what is very likely the most imaginative and carefully crafted constitutional order in history: one that is, nevertheless, poorly understood by both outsiders and insiders. For typical comparative purposes, the political system of the United States is characterized as a “presidential system” or a “presidential political system.” As I have said, doing so not only yields a distorted focus (on the governmental structure as if it were also the political system) but also falsely reports the character of the governmental structure itself. Both political system and governmental structure under the Constitution of the United States are inventions that either defied the historical precedents available to the constitution-makers in the 18th Century, or transformed them.

Appreciating that the American founders contrived a new form of polity and a new type of government may encourage constitution-makers or
constitutional reformers in other countries to open up their imaginations about how best to order civic life in their own place and time. And, as I have argued in that regard, the most important thing that could be learned from the American constitutional experiment is a comparison of its founding with other foundings. That is, not just comparative constitutions but comparative foundings — the process and product of constitution-making.4

More concretely, to characterize the American structure of powers, with its governmental functions distributed among separated and competitive branches, as “presidential” cannot be helpful for making thoughtful comparisons if its type or category is wrong or misleading. As it turns out, the other type that is sometimes offered to describe the American political structure is also distorting, as Richard Neustadt wrote in 1960. Characterizing the structure of the central government in either of these ways crucially misses the point of the American structure of power. And constitution-makers in other countries are not going to learn very effectively from this powerful case if their picture of the American constitutional alternative is distorted (in the first instance) or mischaracterized (in the second). This observation would be especially true if questions of institutional performance and practical experience are associated with erroneous types. Likewise, for citizens of the American constitutional order, it would be impossible to act on behalf of preserving or reforming a system that is misunderstood in its very form.

This constitutional error may occur because the “presidential system,” as the term for a structure of separate departments not dependent on each other, is given its name — and in effect defined — primarily by contrast with the parliamentary structure. Under such a structure, there is a strong president, which is not present in a parliamentary system. It is as if the parliamentary system is a natural constitutional default. But it is not a valid approach to comparative constitutions if independent systems are to be defined from the outset in terms of one of the examples. Under such an approach, the true character of this alternative structure, on its own terms, is not disclosed or accurately understood.

These problems also arise within the United States itself. There are two competing sets of founders in the United States: Antifederalists (associated with the republican political theory of the Declaration of Independence) and Federalists (advocates of the ratification of the Constitution as a new vision of political order, unprecedented in history). The legacy of these two founding visions continues to inform and constrain insights about the constitutional order of the United States. To characterize the Constitution’s design for the powers of the American central government as either “presidential” or “separation-of-powers,” however, is to adopt (unknowingly) the “nightmare version” of the Antifederalists (like Patrick Henry) in the first instance, or the “noble dream version” of the Federalists (like Thomas Jefferson) in the second. This leaves out entirely the new constitutional version of the arrangement of governmental powers advanced by the Federalist founders like Madison and Hamilton, who were in fact the ones who initiated and described the design.

In this paper, I will call the American Federalists’ design of powers in the central government, a structure of “Coordinate Departments.” The term is more complicated than the alternatives, but then so is the structure to which it refers. We also sometimes use the term, “Coordinate-Powers Structure” (see National Standards for Government and Civics and Res Publica: An International Framework for Education in Democracy, both available at www.civiced.org).

What is the constitutional difference between a “Presidential” structure of government and a structure of “Coordinate Departments”? And which is the appropriate model drawn from the founding of the Constitution of the United States?

A Presidential System incorporates the full set of governmental powers to act in the office of a chief executive, more like the model of the Chief Executive Officer of a business corporation (or the President of France). Such a President occupies a place at the apex of the structure of government, with other branches (Parliament, Judiciary, and/or others) subordinate, supplemental, or subsequent to it. That is, such a President has the autonomous power to accomplish governmental objectives on his or her own, though there may need to be additional authorization beforehand or further confirmation or review as an afterthought. Such a President directs the country, not just the government. It is not hard to see such a role as the historical successor to a prince or monarch and, prior to that, as the natural successor to a father or patriarch.

I will describe the similar structure of “separation of powers” in the next section because it is a one of the precedents that flow into the American Federalist model of “Coordinate Departments.”

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4 In the Preface to his Notes on the Federal Convention of 1787 (the most definitive available, day-by-day account of the American Constitutional Convention, which he edited as his final life’s work), Madison states that one of his purposes is to provide an account of the constitutional drafting process, with its earnest dispute and creative compromise, for others who would make Constitutions of ambitiousness comparable to that of his generation of founders. Madison believed that history provided precedents useful only in learning what to avoid and that the American constitution-makers needed to create an entirely new political “system,” as he termed it, building it on a new foundation of constitutional imagination. The legacy he documented was to be at least as much about the process of constitution-making as the substance of the new Constitution itself.
In a structure of Coordinate Departments, or separated branches of power, authority is shared and overlapping. Independent action by the Executive is subject to being balanced in its authority and substance by the complementary independent power of the other branches (Legislative and Judicial, or others), and governmental outcomes are achieved as the product of mutual negotiation, competition, and reiterated phasing. All branches are in effect makers of “law” and policy — jointly, interactively, and provisionally, subject to interplay and reconsideration by the other branches. Only in rare cases can any of the branches make law or policy entirely on its own.

BACKGROUND FOR THE AMERICAN MODEL OF COORDINATE DEPARTMENTS

As I have noted, neither the “presidential” nor the “separation of powers” model accurately describes the governmental structure established by the Constitution of the United States. The “presidential” model is simply inappropriate and best describes only a caricatured version of the actual design, though as I have mentioned it is one that might now be recognized as resembling the arguments for the “unitary presidency” (understood to be superior both to the Constitution and to the other two branches of government) that were advanced over the last decade in the United States.

From the perspective of standard “separation of powers” doctrines in the 1780s, the Antifederalist opponents of the ratification harshly criticized the arrangement of powers laid out in the Constitution for its overlapping allocations of functions to the separate branches and for the fuzzy boundaries marking out their respective authorities.

The Federalist founders of the new Constitution had contrived a new scheme, mostly through a process of compromise, problem-solving, and working out deals, both political and conceptual. I believe a coherent vision of what they designed came only later, when they had to explain and defend it. But a number of shifts in the logic of the composition of government had occurred. The subsequent evolution of this modified structure of governmental powers further consolidated the transformation of the older prototypes, and prompted new theories explaining and justifying it.

The process of political accommodation in the Convention and of constitutional justification in the Ratification period provides a classic example of creativity as “variation on a theme.” Such inventiveness does not arise because a brilliant theorist comes up with an entirely novel idea but by adaptation of a core concept, under pressure and through a sort of playfulness, with self-consciousness added to sum up and advocate the new version. In this process, the new version is both recognizable and somewhat strange. The danger is that subsequent interpreters will attempt to shift it back to its earlier version, destroying the innovation — or degrading the hybrid back to its primitive strains, recapturing the very defects that prompted the cross-breeding in the first place.

What I attempt to do here is to set forth the background logic of the “constitutional arrangement of separated departments with coordinated powers” that would accurately describe the American structure of government. To accomplish that, it will be helpful to summarize the precedent models and their underlying logic as sources for this distinctive constitutional arrangement of governmental powers.

One of my purposes, however, is not simply to explain the genesis of the American design, but to indicate how precedents (including those like the various institutional options presently available in the United States, France, and Germany, as well as others already practiced, for example, in the Republic of Korea under its successive Constitutions) may be used in advancing constitutional creativity that is adapted to a particular country. The point is to learn from the empirical experiments with these design options, to investigate their deeper principles, and to make adaptations whose culmination in a rational practice results in real creativity. Like the “presidential” and “parliamentary” models available today, the “separation of powers” model was the obviously “ready-to-wear” or “off-the-shelf” alternative readily available to the 18th-Century Americans. They chose to make something different out of it, based on their own imagination and needs.

My other purpose is to describe the American model authentically in terms of the “genetic material” that lies behind this structure of governmental powers. None of these substantially variant, precedent models fully define the American structure of coordinate departments, as articulated by the Federalist and sustained by the Constitution of the United States for the most part in subsequent practice. But they each contribute something substantial to the design, flowing into this new model through layers of qualities and meaning. Though they are hardly mutually consistent among themselves, the attributes of these precedents persist with later iterations of the model — making it more subtle and complex, like any valuable hybrid. Gaining intellectual access to these can help greatly in understanding the full constitutional force of the American model.

A. The Analytical “Model of Threes”

At the most basic and obvious level, the number “three” is the analytical design of stability itself, a device for order. The triangle is the strongest of geometric forms, a basic component of engineering. We speak of the structural integrity of a “three-legged stool.” “Three” is a primitive symbol, lodged deeply in the sense of what is ordinary and self-evident,
possibly beyond consciousness. A trinity or troika or triumvirate, all import images of completeness and balance. There is also the “three-part structure” whose composition may seem to touch an underlying “constitution” of the universe, exemplified in what seem to be profoundly natural triads: like the sun, the moon, and the earth; past, present, future; or the format of organized expression in a text’s beginning, middle, and end.

This structure is so constitutive of things in general that it shows up crucially in Plato’s account of the make-up of the human personality, embracing three complementary and competing parts to comprise a whole: the rational (deliberation, planning, judgment), the militant (assertiveness, aggressiveness, protectiveness), and the appetitive (passions, wants, desires).

When government takes on the model of “three powers,” “three branches,” “three departments,” or “three functions,” the very morphology of the design seems to show up with its own affirmative argument already built into its structure. All of the metaphors of stability, balance, and completeness are attached to its character.

And when the components of this composition of three’s are set in motion or tension, there is the inherent possibility of a dynamically rebalancing interaction, where each of the parts of the stabilizing whole keeps the use of energy or power by the others within a constrained range of operative space.

I express this idea abstractly because it is the very concept of “three” that seems to be in play here. What also seems likely is that any arrangement which is set up according to this basic design and which then evolves over time in practice is likely to reinforce the balancing of three parts so that they are seen as equal. This has been the case with the three “branches” of government in the United States, which were not initially set out as equal but only separate — or, more precisely, merely independent of each other. As the equality inherent in the model evolved, the three departments (Congress, President, and Supreme Court) with their three governmental functions (legislative, executive, and judicial) also seem to have grown more equal to each other. It would have been hard to avoid the natural and intrinsic force of the model of threes itself.

B. Aristotle’s “Mixed Government”

A careful structuring of government power will likely need to take account of the most ancient insights about constitutional alternatives. The most elemental of these is the account that we ascribe to Aristotle (following Plato) who set out the most basic constitutional options of government by the one, by the few, or by the many — each of the three types with its fully matched good and bad versions.

These three options are not merely the forms that government can conceivably take: monarchy, aristocracy, or “polity” (today we would probably say, “democracy”). They also embody the spirit that each of the options can embrace, so that there is something of the psychological reflected in the character of the constitution, and in the defining traits of the citizen. Thus, for instance, one might expect to find in a monarchical form of politics a type of mentality that centers on singularity and decree. And so the three types might display character traits of a society that could be referred to as, alternatively, “unitary,” “plural,” or “multiplicitious.” And there would be traits of reasoning displayed differentially within each of these types.

Where Aristotle becomes especially important for the American arrangement of institutional powers is through his observation that it is possible to mix these types of government to enhance the stability of the form of politics, delaying its decay into its associated bad or diseased version. This could also allow the incorporation of the most valuable distinctive principles of mentality connected with each type into the overall empirical form of politics in a given country.

This possibility of mixtures seems to be something that Aristotle thought could be done on purpose, and not just discovered in empirical instances of naturally varying constitutions. Whether this is so, the American constitution-makers took up the option of designing such an arrangement. But, where, Aristotle advocated the desirability of mixing two of these types, the Americans attempted to mix all three. In this way, the Presidency reflects the principle of “government by the one;” the Senate and the Supreme Court, “government by the few;”5 and the House of Representatives, “government by the many.”

C. British “Balanced Government”

As government evolved in the common law experience of Great Britain, one of its actual “constitutional” qualities is that it literally represented the three essential constituents of the realm, understood as natural components of any well-balanced society. These components were not, in the first instance, parts of government but the basic elements of the country: the monarchical part, the aristocratic part, and the part called “commons.” All of the parts were needed separately to compose the whole. They were considered the constitutive classes of society not just empirically, as a product of English history, but even essentially: every well-ordered and

5 Thus the Americans attempted to double the “middle term” in a way that takes another step beyond Aristotle’s advocacy for moderating and mediating devices, as the proportional mean in the political composition.
complete society must have its monarchical, aristocratical, democratical elements, and they should be arrayed properly in relation to each other and to the whole of the country.

As it had turned out historically, and then as it was rationalized conceptually, these three essential components of the society had to be represented in the structure of government, in order for it to reflect the country as a whole. Each social component was allocated to a separate institution: the Monarch, along with a House of Lords and a House of Commons making up a Parliament. The balance among these (eventually) three institutions of government reflected the balance within the society. It is notable that each of these institutions represented solely a part of the society, so that it was only in their interaction that the whole of the realm would be reflected. The make-up of government would thus, in effect, stand for the country. And so government itself might be conceived of as sovereign, because only it could be considered as effectively complete — through the interaction of its institutions.

Here is where the concept of “checks and balances” arises. It is a concept connected not in the first instance with the interactive qualities of government on its own terms. And it is certainly not, at the outset, a checking and balancing of governmental powers or functions, in the later, derived sense that the representative components of government should interact to produce deliberative outputs. It seems true that this checking and balancing within the institutions of government does evolve to be the normal process, shifting the interaction to the institutions of government in terms of their different roles. But the underlying character of “checks and balances” arises from the necessity that all of the constitutive components of the society will be coordinated or brought into a negotiated agreement before public action goes forward. More significantly, it is not at all essentially about protecting rights.

This arrangement, where governmental institutions represent attributes of society, survives in the American context, although the Antifederalist opponents of the Constitution — with their insistence on a simple structure of powers and literal representation — criticized the arrangement for seeming to reflect the presence of social classes in an egalitarian country. And the process of “checks and balances,” now fully shifted over to be a pattern of government on its own terms, thrives in the American Federalist concept of competition and equilibrium among branches.

D. John Locke’s “Differentiated Functions”

Simply because institutions have separate parts to play in producing governmental outcomes does not mean that they have functionally different roles, only that their mutual interaction and agreement is provided for. For John Locke (in the late 1600s), however, the basic institutions of government are essential not because of what they represent in society but because of their source of origination and the resulting distinctive functions that they perform in completing an effective act of government.

This account is based on the theory of a social compact by which individuals agree to make a civil association, a “body politic,” or a “people” — a consolidated enterprise in the image of the unity of Nature. Here the legislative function carries out the primary power of government. For Locke, the nature of something is defined by its origin. The legislative power is born at the moment the social compact is set, a consequence of the need for each particular society to interpret the Law of Nature in specific ways reflecting its own best understanding of that more transcendent Law. Actual law-making under the social compact nurtures life, liberty, and property (arising under the Law of Nature) protectively within a community. It is entailed by the social necessity of survival and desire for prosperity, as well as the aspiration of every people to offer its own best version of the higher Law in the form of its own statutory regime, as a valid reflection of the order of Creation itself.

The American founders thought of the legislative as the “independent” power, not only because it was based on the social compact itself, a power held on behalf of the political association as a whole. It was analytically independent because it was the predicate for the operation of the other powers of government, although this is somewhat more closely associated with Antifederalist-republican theory. On this understanding, without the availability of a law as legislative enactment, there would be nothing to execute or to adjudicate. And so the executive and the judiciary were thought of as “dependent” powers, supplementary to the primary initiative and control of the legislature. It reinforced this concept that the legislative body was more evidently chosen by the people and more directly accountable to them. And it was for this reason — after all of the dispute about whether there could be a “senatorial” class in a society which aspired to political equality — that the Congress of the United States was divided into two houses. In this way, the main institutional holder of the legislative power would be divided against itself, thereby adjusting its relative power relationship to the other two branches, which were considered to be naturally weaker. Thus it is improper to refer to the two houses of Congress as “upper” and “lower” — a reflection of the older British notion of a house for the upper class and one for the lower class of society.

The other reason for differentiating between the legislative and the executive-judicial powers (which Locke kept substantially joined together

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6 But also see Hamilton in Federalist No. 78, ranking the powers of the three departments in terms of strength and weakness.
institutionally, though the functions were seen as differentiated phases of carrying out the law) was that the executive and judicial power of the government was not derived from the authority of the civil association arising from the social compact. Instead it originated from the powers that individuals held in the State of Nature, where each and every person has the right to interpret and enforce the Law of Nature. In contrast to the unity of the social-compact origin of the legislative power, the judicial-executive power is created by combining all of the multiplicitous personal powers which individuals give up, through the contractual institution of government, in order to establish a common enforcer and judge. And so there has been a sense that persists from the Lockean perspective, that the legislative power controls the initiative, holding the start-up role; while the executive power is meant to be responsive, in the enabling role; and the judicial power is delayed, in the role of after-thought.

Further, it is possible that Locke is beginning to see that the legislative, executive, and judicial functions are analytically essential phases of government. All must be in play for a legitimate and authoritative public act to be brought into effect. And so the three functions are mutually dependent on each other to accomplish things. In this respect, therefore, government is made up of a complete set of three phases. But these can be carried by a number of different institutional arrangements. Also, there is no assumption that these three phases are equal in any other respect besides the fact that they are all essential.

There are two other significant powers government in Locke’s theory, but these are episodic and extraordinary. They are independently exercised, standing outside the normal sequence of phases. They arise from the nature of the social compact, as a unity that must endure with a life of its own. One of these is the “prerogative power,” which Locke conceives of as an emergency power of the executive to act beyond the limits of law, in order to vindicate the law (at the level of the governmental contract) or, more expansively in extraordinary circumstances, to preserve the community as a whole (at the level of the social compact). The other power is called “federative,” which involves concluding agreements with other organized communities; that is, making treaty agreements, social-compact-to-social-compact.

In the American context, the first of these powers is sometimes associated with the Presidency, by an argument of natural necessity or as a heritage from the typical historical power of the prince, although the Constitution does not specify that there is any such power in the government. One plausible conclusion, therefore, would be that if it exists anywhere it is lodged in the three branches together, requiring the interactive concurrence of the whole government. In contrast, the second (“federative”) power is quite clearly shared between the President and the Senate.

E. Montesquieu’s “Separation of Powers”

Distinguishing the essential phases of governing as three powers was the key to avoiding oppression, according to the Baron de Montesquieu (in the mid-1700s). And so the allocation of these analytically distinct powers to politically separate institutions of governance, each with its exclusive authority, was seen as the indispensable element of a polity committed to the protection of liberty. Adopting this view, the American Antifederalists advocated clear boundaries among the institutional bodies, with rigorous distinctions among the functions. They were dismayed by what they saw as the overlapping of powers and the blurred lines of demarcation between the branches of government in the Federalist Constitution proposed in 1787.

Behind the motivation to preserve liberty, Montesquieu’s structure attempts to “rationalize” what he thought was the underlying established British practice on its best terms, generating an efficient layout of the constitutive components of government (i.e., not of society). This arrangement requires that there be operationally differentiated bodies designed to carry out the functionally differentiated powers. Making, applying, and interpreting law are seen as not only separate phases but distinctly different institutional capacities, along with a character of thinking appropriate to each one. These institutional bodies should work in an ordered sequence of separate stages — in effect, as one, two, three. It is not hard to see how this view could evolve into the American Constitution’s First, Second, and Third “branches” of government, for Montesquieu was at least initially considered to be the source-book for the design of government powers under the Constitution.

Montesquieu’s approach, however, transitions more directly into that of the American Antifederalist, with three systematically separated non-overlapping branches, where all of the powers of governance are allocated coherently and precisely, with defined boundaries for the authority of each branch, each adjacent to the others, with nothing left out and nothing duplicated. The metaphor of a three-way scale is a reflection of this model; it suggests a carefully contrived Newtonian balance of equal weights. And so there is a strong tendency, from the perspective of Montesquieu’s more pure adherents, to conceive of the separation of powers as a horizontal triangle. For them, the critical task of constitution-makers is to make a design of separate and equal parts, in orderly sequence.
F. American Federalist “Coordinate Departments”

To call something a “department” is to suggest that it is an intentionally subdivided part of a whole. And to think of departments as “coordinate” is to imply not so much their equality of weight but the mutuality of their interaction.

In important respects, the structure of powers now extant in the Federalist political system is the culmination of all of the preceding streams of the tri-partite organization of power. The design that has evolved from the logic of the Federalist founding, in tension and sometimes in confusion with the Antifederalist constitutional understanding, has produced a complex overlay of alternative models, crucial parts of which seem to be available for use at different stages of American political history. In any given account of the structure of government powers, it would take considerable effort to disentangle the strands of the picture, allocating some of them to precedents and others to new variations set in play by opportunities to advance the Constitution as the major tool for public problem-solving in America.

In the Federalist model, it is the departments that are separated, not the powers. As Neustadt famously framed it, there are “separate branches sharing powers.” What is produced, as pictured so profoundly by Madison in Federalist, No. 51, is a competitive equilibrium of forces, not a static balance of weights. There is a dynamic capacity for re-balancing as a consequence of the structured interaction, with some qualities of randomness or, at a minimum, unpredictability. The constitutional relationships are persistently in institutional flux. A concordat among the branches is only provisional, never a done deal. All of this is in contrast to the Antifederalists’ prescription of a carefully balanced allocation of commissions of power by definitive constitutional phrases. For the Federalists, it is the energy that is in tension, not the weight of each branch. They would replace Newton with Einstein (before his time, and therefore with no notice).

The constitution-making strategies of the Antifederalists and the Federalists are not the same.

For the Antifederalist, the goal is to make some refinements on what has been tested in the past, institutions whose practical contours and capacities over time have been vindicated by experience. For them the “naturally,” analytically essential, components of government need to be arrayed simply and efficiently. This constitutional knowledge is already available to those who study history, and it needs to be applied in the American project culminating human attempts to constitute good government.

The Federalists are inclined to make creative adjustment, and then to adjust further for the consequenes of the changes made. There is a strong sense that all of the requisite constitutional knowledge has not yet been generated by experience, for that seems to be more consistently marked by failures. Overall, Madison and his closest founding colleagues seem to commit to a vision of the constitutional order as a knowledge-generating system, more than a knowledge-based system (e.g., Federalist, No. 37). The new order is not simply to be an invention; its very character is to continue to innovate on its own terms, especially on behalf of new understandings about the nature of the well-ordered community, and then to incorporate these insights into the maintenance and advancement of the Constitution.

More concretely, the constitutional plans that they advance so confidently in contrast to conventional wisdom may arise from their ambition to found a complex system — one that will not only respond to change in the future but even generate the changes that it will need to accommodate. This would be a very secure and stable order indeed, though it would be quite regularly marked by uncertainty that it created for itself, understanding that risk-taking is a predicate for progress.

As a result of these possible motivations, the Federalist founders make adjustments in the construction of the branches of government so as to equalize their relative energies, and to give each the capacity of independence and self-protection against the others. What they lay out is, in effect, a force-field of powers. At the same time, the branches are made dependent on each other (“sharing powers”) in order to accomplish anything for the people whose fundamental power they hold in trust. More than this, the overlapping of the three essential powers of government among the departments seems designed specifically to create problems — problems whose management advances the purposes of the constitutional system, increasing its capacities.

As one example, as I have noted earlier, in order to structure a competitive tension, it is necessary that the more naturally dominant branch of government (the “legislature,” according to the Lockeans) be divided against itself to weaken it relation to the others. And early on in the history of the Constitution, the branch that is considered weakest (see Federalist, No. 78) uses the logic of the composed system of three increasingly co-equal branches, in effect, to grow into the space required for the counterbalanced system of energies. Thus is established, by implication of the structure, a power of constitutional review by the Supreme Court in Marbury v. Madison.

In order to confirm the competitive capacities of the three branches, each not only gets its dedicated Article of the constitutional text (Article I, Article II, and Article III), but also each is specifically laid out by the document as an institution with its own proper name and its own constituted
character. Each is substantively “particularized” by design. That is, the departments of government are not the “legislative,” “executive,” and “judicial” branches. Instead they are:

- the Congress (with a limited list of national legislative powers, along with other powers of an executive or judicial nature);
- the President (with a grant of the entire “executive power of the United States” and some legislative and judicial powers);
- the Supreme Court (with the entire “judicial power” of the United States, held in conjunction with any inferior courts that Congress may create; and also with an effectively executive power over the federal judicial system; along with powers that it has assumed for itself which have a legislative character, as conventionally understood, in the discretionary determination of the constitutional validity of legislation).

It is not simply the case that each branch has its own independent warrant from the Constitution, along with the equilibrium of energies set out against each other as independent functions. Each also stands on its own foundation of representing the whole people — in contrast to precedent models where each component of government represented only a part of the people or an attribute of the society, and where all of the parts had to be brought together by negotiation for the entire government to reflect the whole. The effect, under the Constitution, is that the four major institutions of the central government (including the two bodies of Congress) thereby represent the people, holistically, four different ways, through four different schemes of selection and accountability. There is an overlay of representative redundancy so that when the departments interact — as they must, for government to operate in the normal course of affairs — it is as if the people are interacting with themselves under different configurations, through different versions of their own represented wholeness.

The interaction of these competitive representations of the people may then, in practice, approximate more completely whatever might actually be their common good. As a consequence, what can actually be represented at this derivative level of the interaction is, crucially, their division and conflict as a complexly associated “people.” This structure of reiterated representation set in competition at the institutional level, on its best account, may produce the effect of containing the inevitable conflict among the people by maintaining it — in translated form. That is, this dynamic structure not only absorbs conflict, but generates its own. Such an account of the American constitutional system resembles an elaborate engineering project where the dynamics of forces brought to bear internally against it are used to sustain the integrity of the construction.

As a result of the logic of this model of governmental institutions in conflict, the competition among them is not only a good thing; it is necessary. Otherwise the structure will fall apart. Periods in the history of the United States where governmental institutions seem to be malfunctioning are likely to be times when one or more of the branches were not brave or smart enough in the assertion of their powers. At those times, the system may fall out of balance.

All of this perspective is consistent with the Madisonian understanding that conflict and ambition are deeply embedded in the human character, that a constitutional order which reflects the nature of human beings will ineluctably carry these qualities into its representative institutions, and that the best way to manage these qualities is to convert them into energy that sustains the stabilizing equilibrium of the enterprise.

This constitutional dynamic, over time, has lead to a belief that the three branches of government are not only independent and competitive, but also equal — a quality not actually present in the accounts of the Federalist founders of the Constitution, as I have noted. For reasons that have to do with the logic of the system than with the intentions of the framers, this evolution over a period of practical experimentation was probably inevitable.

There is a further process that may be typically misread by observers inside and outside of the constitutional system. Over time, and in response to the logic of internal institutional design or the impact of outside conditions, there is a waxing and waning, a rising and falling, of the institutions of power in relation to each other. Since the Federalist model does not reflect the Antifederalists’ constitutional preference for a static balance or strict boundary conditions, any one of the three branches may be dominant at a given time — only to fall back in deference to, or defeat by, one of the others. As part of the riskiness of this constitutional venture, such a shifting of relative powers may occur after the overreaching of one of the branches (or the under-assertiveness of the other branches in response to its overreaching) has produced a near calamity. On a more positive view, this rising and falling of the branches is a positive attribute of the system, a constitutional resource adding to the capacity of the government, through its actual structure, to respond differentially to crises of fundamentally varying characteristics in the political life of the country. Throughout this process, however, it is important to reject with a knowing amusement any expert announcement that there has been a permanent ascendency of one branch over the others — as regularly occurs among scholars.

7 See, as one example, Theodore Lowi’s concept of “juridical democracy,” with the judiciary as the dominant government power defining the political regime.
In partial summary of the attributes of a “coordinate-departments” structure of government, each of the four major federal institutions in the United States (the House of Representatives and Senate, Presidency, and Supreme Court with inferior courts):

- represents the people as a whole (on a different scheme, with a different characterization of the “federation” of the people — the people in population-proportional districts, the peoples of the separate states, the people cumulated through districts and states in the Electoral College, the people as a Constitutional whole aspiring to achieve justice across time).

- needs to be activist in terms of its own dedicated function (pushing against its counterparts), and

- participates in making law (because public-policy outcomes cannot be effectuated by any one of them acting singly).

G. Evolved Inter-Institutional “Deference and Diplomacy”

This later, adaptive but substantial modification of the Federalist model of coordinate powers is based on the country’s eventual experience beyond the period of the Founding that, even though one department may not on its own achieve affirmative goals, it may use its allocated powers tactically to shut down government action and enforce the status quo. Precisely because of the interconnected sequencing of the law-making authority among the departments, with strategic action, any one of them may even curtail the effectiveness of the constitutionally legitimate power of one or both of the other departments. This outcome can work to produce a “balance of terror” equally among all of the departments.

Such an experience of stalemate and obstruction was a prominent feature of the federal structure during the 1920s and 30s, when the Supreme Court of the United States effectively shut down governmental action in response to the Great Depression. James Bradley Thayer’s seminal argument in 1893, “The Origins and Scope of the American Doctrine of Constitutional Law,” picking up the Antifederalist-style logic of Pennsylvania Supreme Court Justice John Gibson’s 1825 opinion in Eakin v. Raub, restored or established a strain of doctrine focused on the deference owed by one department to the others — especially, the elected ones, which are given preference under republican doctrine — based on the independent constitutional status of their functional roles. This approach was extended by justices like Felix Frankfurter and Louis Brandeis into a protocol of mutual institutional forbearance. In the hands of other justices, it was formulated in the so-called Famous Footnote 4 of United States v. Carolene Products in 1938.

This model of departmental interaction is based not on competition and conflict but deference and diplomacy — the self-restraint of “staying one’s hand,” instead of an ambitious assertiveness on behalf of departmental prerogatives — with an overarching awareness of the possibility of shared self-destructiveness. This then leads to a broad avoidance of actions that might produce the effects of bad government and dysfunctional institutions mimicking the conditions that prompted the original constitution-making and might do so again.

AN INTELLIGENCE SYSTEM

There is one other crucial, prospective trait of the American Federalist enterprise, moving the view back to Plato — or, perhaps, forward to Sigmund Freud.

If one phrase could be used to capture the set of problems that these constitutional founders wanted most urgently to address, it is that they wanted to replace what they termed the prevailing “imbecilic government” of the country with a deliberate design of “good government.” This detrimental quality referred not only to governmental incapacity and incompetence. It was also reflected in understandings that even human beings of intelligence and good will, who must do their work in a poorly constituted system, will produce the effects of ignorance and prejudice.

Adopting the ancient parallel between logos and polis from the Greek theorists, and the congruence of “reasoning” and “governing” from the social-compact theorists, the Federalist founders of the American Constitution aimed to establish a system of intelligent political thinking about public affairs. That is, the system itself would think; it would be a thinking system. One crucial aspect of their structure of coordinated departments of government was to project the attributes of a natural person reasoning well, institutionalizing these at a level of abstraction and comprehensiveness where an individual human being, even the most brilliant, cannot perform alone, relying on his or her own powers.

The four major institutions of the national government in the United States reflect four elemental components of the right-thinking person at the constitutional level: fact-finding and deliberation, decisiveness, and judgment. None of these capacities, however strong or essential they might be, can operate effectively in isolation from the others. As always, the focus is on interaction.

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