

One Person One Office: Separation of Powers or Separation of Personnel

Steven G. Calabresi

Joan L. Larsen

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ONE PERSON, ONE OFFICE: SEPARATION OF POWERS OR SEPARATION OF PERSONNEL?

Steven G. Calabresi† and Joan L. Larsen‡

“The accumulation of all powers, legislative, executive, and judiciary, *in the same hands* . . . whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹

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† Associate Professor, Northwestern University School of Law.

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¹ THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

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INTRODUCTION

The Framers of the American Constitution hated concentrations of government power. Through checks and balances, separation of powers, bicameralism, and federalism, they sought to preserve liberty by making it hard for government to act.² But while the Framers took great care to separate government power horizontally and vertically among different *institutions*, they took only the most limited steps to prevent particular individuals from amassing absolute power by jointly holding office in more than one institution of government at the same time.³ The Framers barred Members of Congress from holding federal executive or judicial offices,⁴ but the text they wrote allows joint office holding between: 1) the Executive and Judicial Departments,⁵ 2) the House of Representatives and the Senate, and 3) the federal government and the states. Accordingly, it might well be said that the original American doctrine of separation of powers contemplated more a separation of the institutions of government than a separation of personnel.⁶

Two hundred years of American history have added their gloss, and today we largely understand the separation of powers to include a one person, one office codicil. Unwritten traditions disfavor plural office holding of any kind.⁷ These traditions, together with the Incompatibility Clause itself, now form a vital part of America's struc-

² See Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 456-74 (1991); see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 J. PHIL. AND POL'Y 196, 210 (1991).

³ For a thoughtful defense of the separation of powers as primarily a separation of institutions (or "branches"), see Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225.

⁴ "[N]o Person holding any Office under the United States, shall be a Member of either house during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2 [hereinafter referred to as the "Incompatibility Clause"].

⁵ This Article will use the term "department" in referring to the three institutions of our national government rather than the more common term "branch." See Calabresi & Rhodes, *supra* note 2, at 1156 n.6 (explaining this choice of terminology).

⁶ It should also be remembered in this context that two of the three great departments of the national government share powers traditionally thought of as executive and legislative. Thus, the President shares in the legislative power by virtue of his veto, and the Congress shares in the executive power by virtue of the Senate's role in ratifying treaties and confirming nominees. It is accordingly a truism that ours is a government of constitutionally separated *and shared* powers. THE FEDERALIST NO. 47, *supra* note 1, at 322 (James Madison).

⁷ We do not mean to suggest that these unwritten traditions are judicially enforceable or that the text of the Constitution has somehow been "amended" *sub silentio*. Rather, we mean only that most Americans now assume that plural office holding is disallowed and therefore, as a practical matter, it does not generally occur.

tural "Constitution."⁸ In our view, the Incompatibility Principle has become one of the five great distinguishing structural features of our constitutional system, along with checks and balances, separation of powers, bicameralism, and federalism.

It is odd, therefore, that scholars to date have largely ignored the separation-of-powers implications of the Incompatibility Clause itself and, to a lesser degree, the unwritten incompatibility traditions. We propose to remedy this defect by describing the history of both components of the Incompatibility Principle and weighing their normative appeal. We consider first the Clause and second the traditions. The history and normative considerations differ significantly in each case. We treat them together in this one Article because of what they reveal about what the American doctrine of separation of powers has become.

George Mason described the Incompatibility Clause of Article I, Section 6 of the U.S. Constitution as "the *corner-stone* on which our liberties depend."⁹ "[I]f we strike it out," he said, "we are erecting a fabric for our destruction."¹⁰ We agree with Mason that the Incompatibility Clause plays a vital role in our constitutional scheme, although ironically not for the reasons Mason thought it would. We believe the true significance of the Incompatibility Clause is that it has almost single handedly prevented the emergence of "parliamentary government"¹¹ in this country by strengthening the Presidency and reinforcing the separation of powers. This is an ironic and unin-

⁸ The word "Constitution" appears in quotation marks here to indicate that we refer to something other than the written, judicially enforceable Constitution of 1787, as amended. Rather, we use "Constitution" here in its British sense, encompassing our unwritten, nonjusticiable fundamental traditions. By the phrase "the structural Constitution," we mean to refer to those aspects of the document that literally "constitute" and give shape to our institutions of government. Such aspects might be distinguished, in part, from the provisions of the amended Constitution that secure fundamental, individual rights. Compare Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 864-65 (1985) (advocating a different interpretive approach to words appearing in the structural Constitution as opposed to the Bill of Rights), with Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) (advocating a common interpretive approach and pointing out the many structural aspects of the Bill of Rights).

⁹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 381 (Max Farrand ed., rev. ed. 1987) (June 22, 1787) (emphasis added) [hereinafter RECORDS].

¹⁰ *Id.*

¹¹ As we explain below, "parliamentary government" in this country would, in practice, mean government by the congressional committee system. See *infra* notes 77, 318-37 and accompanying text. Congressional committees are our home-grown version of a hybrid legislature-executive. Thus, it might be more accurate to say that the true significance of the Incompatibility Clause is that it has almost single handedly prevented the emergence of *congressional committee government* in this country by strengthening the Presidency and reinforcing the separation of powers. We use the term "parliamentary government" only because it corresponds to the terminology often used in the political science literature. Its rosy connotations, however, are probably misleading in the American context as

tended consequence of our first and only constitutional ethics rule, a provision that was originally supposed to *weaken* the Presidency not to strengthen it.

Constitutional scholars have generally ignored the Incompatibility Clause. It generates no litigation¹² and has succeeded so thoroughly in dividing power that we sometimes forget it even exists. Like bicameralism, its very simplicity makes it a completely successful structural device.¹³ Accordingly, there is no sustained treatment of the Clause in the law reviews,¹⁴ and the major texts and treatises on constitutional law mention the Clause only in passing, if they refer to it at all.¹⁵ In fact, virtually the only discussion of the Clause in the legal academic literature has come from a group of constitutional reform-

the more accurate phrase "congressional committee government" suggests. Conversation with Professor Randy Barnett, Boston University School of Law (October 22, 1993).

¹² In *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the United States Supreme Court held that citizens lack standing to sue to enforce the Incompatibility Clause. In that case, an association of military reservists filed suit on behalf of "all taxpayers . . . and . . . citizens of the United States," alleging that the reserve membership of 107 Senators and Representatives violated the Clause. *Id.* at 211. The Court concluded that the plaintiffs lacked standing on the ground that their complaint raised only a "generalized grievance[]" about the conduct of Government," *id.* at 217, and, thus, did not present a proper case for judicial resolution, *id.* at 220-21.

We do not discuss the problem of standing and the Incompatibility Clause in this Article. Nonetheless, it may be worth pointing out that *Schlesinger* did not involve a situation where an Officer of the United States, who was also a Member of Congress, was taking government action that bore down on the life, liberty, or property rights of a private individual. If such a situation were ever to arise, we would have no doubt that the private individual so affected would have standing to defend against the government action on the ground that it was unconstitutional because of a violation of the Incompatibility Clause. Such an individual would be in precisely the same situation as an individual whose federal case or controversy was unconstitutionally adjudicated by an untenured, non-Article III judge.

¹³ Another example of such a device might be the constitutional rule that each state shall elect two Senators. The rule is so simple and unambiguous that it cannot be made the subject of litigation or dispute. Rules of this kind are, in effect, self-enforcing.

¹⁴ Daniel H. Pollitt does provide some discussion of the Clause in his article, *Senator/Attorney-General Saxbe and the "Ineligibility Clause" of the Constitution: An Encroachment Upon the Separation of Powers*, 53 N.C. L. REV. 111 (1974). However, as the title implies, that article's focus is the ineligibility rather than the incompatibility provision of article I, § 6. (For a recent, thought-provoking discussion of the Ineligibility Clause, see Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994)). Solomon Slonim likewise gives limited treatment to the Clause in his article on the extrajudicial activities of federal judges. See Solomon Slonim, *Extrajudicial Activities and the Principle of The Separation of Powers*, 49 CONN. B.J. 391, 396-401 (1975). Various articles advocating constitutional reform also acknowledge the existence of the Incompatibility Clause, but none have engaged in a sustained and critical exploration of the Clause. See generally works cited *infra* note 267.

¹⁵ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 124-26 (2d ed. 1988) (mentioning Incompatibility Clause only in the course of discussing Supreme Court's determination in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), that citizens lacked standing to sue for enforcement of the Clause); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 212(f), at 75 (4th ed. 1991) (same).

ers led by former White House Counsel Lloyd Cutler who, without full knowledge of the Clause's historical or contemporary purpose in our system of government, has launched a campaign for its repeal!¹⁶ It is our first project in this Article to rescue the Incompatibility Clause from its ill-deserved obscurity and to highlight its vital significance to the separation of powers.

Our second project in this Article is to explore how the Incompatibility Principle embodied in the Clause gradually expanded over time until it eventually came to include a number of unwritten incompatibility traditions. Included among these are traditions of: 1) executive-judicial incompatibility; 2) Senate-House of Representatives incompatibility; and 3) federal-state incompatibility. We believe these incompatibility traditions have come to play a vital role in our constitutional scheme by reinforcing the separation of powers as it is now understood.¹⁷ Our second task in this Article then is to explore and critique the process by which the incompatibility norm has expanded and informed our understanding of the separation of powers.

Ironically, when the Framers first met at Philadelphia they considered providing for broader incompatibility restrictions, but decided *against* doing so. Proposals to constitutionalize executive-judicial and federal-state incompatibility were made at the Constitutional Convention and were not approved. Two centuries of experience, however, suggest that today there exists a heavy presumption of one person, one office incompatibility. While we do not believe this presumption has the force of federal law,¹⁸ it clearly governs social expectations and behavior much the way the old two term tradition for Presidents did before adoption of the Twenty-Second Amendment.¹⁹ We wish to explore and critique the process by which the unwritten incompatibility traditions developed, giving added content to our conception of the separation of powers. We believe these traditions, like the Incompatibility Clause itself, have had the most profound effect on our structural Constitution.

We begin in Part I of this Article by laying out the British and colonial antecedents of the Incompatibility Principle. Interestingly,

¹⁶ See *infra* notes 265-87 and accompanying text. But see Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679 (1993) (rebutting, in general terms, the Lloyd Cutler critique).

¹⁷ For a thoughtful defense of executive-judicial incompatibility, see Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV. 299 (1989).

¹⁸ Not everyone agrees with our originalist-textualist presumption that the unwritten incompatibility traditions lack the force of federal law. See *infra* text accompanying notes 379-81. The federal-state incompatibility tradition, at least, has the force of *state* constitutional law in 47 out of 50 states. See *infra* note 536. In all of those 47 states, it is a violation of the *state* constitution for state officers to hold federal office.

¹⁹ See U.S. CONST. amend. XXII (constitutionalizing two-term limit for Presidents).

the Principle seems to have been grounded less in separation-of-powers theory than in the Framers' vivid memory of the British Kings' practice of "bribing" Members of Parliament (M.P.'s) and judges with joint appointments to lucrative executive posts. This corrupt practice was repeated in the colonies, which, after independence, enacted strict constitutional bans on plural office holding.

The background being laid, Parts II and III then focus on the Incompatibility Clause itself. Part II, Section A discusses the text of the Clause and its origins at the Philadelphia Convention. Part II, Section B evaluates the Clause's success in fulfilling its intended function as a constitutional ethics rule that would prevent corruption of Congress by the President. Part II, Section C describes the Clause's wholly unappreciated and unintended consequence of foreclosing "parliamentary" government in this country by making the President's Cabinet and Administration much more independent of Congress. And then Part III evaluates the normative critique of the Clause advanced by Lloyd Cutler, concluding that critique is largely unfounded. We conclude Part III with a ringing endorsement of the normative appeal of the Incompatibility Clause.

In Part IV, we shift the focus and turn to the separation-of-powers implications of the unwritten incompatibility traditions. Sections A.1. and B.1. describe the reasons why the Framers did *not* constitutionalize executive-judicial or federal-state incompatibility.²⁰ Sections A.2. and B.2. describe the process by which incompatibility traditions in these two areas grew up over time. And Sections A.3. and B.3. assess the normative case for and against expanding the Incompatibility Clause by writing the unwritten incompatibility traditions into the text of the Constitution. We conclude Part IV with a ringing endorsement of the normative appeal of constitutionalizing the unwritten incompatibility traditions.

Finally, in Part V we offer a few concluding observations regarding the separation-of-powers lessons of the American experiment with

²⁰ In the interest of brevity, we do not discuss the unwritten incompatibility tradition barring joint office holding in the U.S. Senate and House of Representatives. As best we can tell, it seems never to have occurred to anyone that the Constitution left open this possibility. We believe the normative case against joint service in the U.S. Senate and House would be very similar to the normative case we make against joint executive-judicial and federal-state service.

Because of space constraints, we are also unable to discuss a related and important doctrine of federal administrative law, the separation of functions doctrine within federal administrative agencies. This doctrine deals with the vital problem of how to separate agency personnel who perform rulemaking, law enforcement, and adjudicative functions. The separation of functions doctrine obviously serves "separation-of-personnel" goals within the context and constraints of the modern administrative state. Conversation with Professor Susan Paris Koniak, Boston University School of Law (October 22, 1993). An exhaustive book-length treatment of American incompatibility rules would necessarily have to deal with this doctrine.

incompatibility and plural office holding. We reach seven specific conclusions. First, the last two hundred years have seen a steady growth in support for the one person, one office principle: As a result, America has progressed from a separation of powers to a separation of institutions to a separation of personnel. Second, there is a close, unappreciated connection between the concerns underlying ethics rules and the concerns underlying the separation of powers: Both work in the contexts discussed herein to prevent corruption, abuse of power, and gross conflicts of interest. Third, a separation of *personnel*, as well as of *institutions*, is absolutely vital to the fostering of competition and to the deconcentration of power: It sets up a competitive, adversarial dialogue out of which good policy is more likely to emerge. Fourth, incompatibility clauses (and traditions) work to correct inequalities of bargaining power between government institutions: Such clauses and traditions will always benefit the *less* powerful government institution of any two institutions between which an incompatibility is set up. Fifth, the Incompatibility Clause thus benefits the President and weakens Congress, the most dangerous "branch," notwithstanding the contrary impression of both the Framers and of Lloyd Cutler. Sixth, executive-judicial incompatibility benefits the (least dangerous) judicial "branch," a fact that *is* widely recognized and appreciated. Seventh, federal-state incompatibility originally would have benefitted the federal government but today benefits the states. This explains why, in 1787, the advocates of states' rights opposed federal-state incompatibility, even though today a form of it has come to be required by the constitutional law of forty-seven out of the fifty states.

We end by noting that all of these arguments for one person, one office and for a separation of powers *and personnel* may be easily summed up in a single well-known sentence: "Power tends to corrupt and absolute power corrupts absolutely."²¹

I

BRITISH AND COLONIAL ANTECEDENTS TO THE INCOMPATIBILITY PRINCIPLE

When the Framers began work in Philadelphia in the summer of 1787, they were not writing on a blank slate. The backdrop of their experiences under the English Constitution, the state constitutions, and the Articles of Confederation shaped all that they were to create. Knowledge of these British and colonial antecedents is vital, therefore, to understanding both the origins of the Incompatibility Princi-

²¹ Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), *quoted in* GERTRUDE HIMMELFARB, *LORD ACTON: A STUDY IN CONSCIENCE AND POLITICS* 160-61 (1962).

ple embodied in our constitutional text and the traditions that have grown up around it.

A. The British Background

The Framers' hatred of plural office holding grew from bitter experience. English Whigs, who greatly influenced the Framers, had for years complained about the corrupting effect of plural office holding and royal patronage on the conduct of politics in seventeenth- and eighteenth-century England. It was these complaints, rather than abstract theories about the separation of powers, that led the Framers to ban plural office holding.

The issue arose in seventeenth- and eighteenth-century English politics because the Glorious Revolution of 1688 had shifted power from the King to Parliament and had, thus, impaired the royal prerogative. But, the English Kings held onto power by exploiting their status as the sole "fountain of honors, offices, and privileges."²² Eighteenth-century English monarchs retained the power to create offices and titles of nobility and to confer them on individuals without parliamentary approval. It should come as no surprise that they used this power to great political effect.

The King's patronage power gave him two key tools through which he could control Parliament. First, by promoting influential Members of Parliament (M.P.s) to ministerial office, the King could win their backing in Parliament for his programs. Second, by dangling the prospect of a lucrative office, pension, or title of nobility, the King could induce even non-office holding M.P.s to support him in hopes of benefiting from the royal largesse.²³

It would be hard to overstate the effect that the King's unscrupulous use of patronage (and the system of "royal influence") had on the conduct of politics in seventeenth- and eighteenth-century England. At a time when "political offices and emoluments were the major sources of social distinction and financial security,"²⁴ the allure of office was strong. A whole generation of young men went to Parliament with the express purpose of making their fortunes by obtaining an office.²⁵ One historian describes the Parliament of the day as being

²² GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 143 (1969).

²³ SIR DAVID L. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 283 (9th ed. 1969); Margaret A. Banks, *Drafting the American Constitution—Attitudes in the Philadelphia Convention Towards the British System of Government*, 10 AM. J. LEGAL HIST. 15, 31 (1966).

²⁴ WOOD, *supra* note 22, at 144.

²⁵ L.B. NAMIER, *THE STRUCTURE OF POLITICS AT THE ACCESSION OF GEORGE III 1-61* (1929). Namier recounts that, for most, a "seat in the House was not their ultimate goal, but a means to ulterior aims." *Id.* at 4. Yet, despite his biting descriptions of these political

filled with "parties, cliques, and factions of men, prowling and hunting for office in packs."²⁶

The unsurprising effect of this political gamesmanship was that representatives in Parliament routinely disregarded the wishes of the voters who elected them, instead casting their votes in favor of the King's often-abusive proposals.²⁷ As a result, parliamentary corruption was the "obsessive concern"²⁸ of both the left and the right in eighteenth century England, and the opposition literature from both ends of the political spectrum hurled invective at the corrupting system of royal influence.²⁹

The King's power over the Judiciary was no less infamous. Royal judges had traditionally held their posts *durante beneplacito* ("at the King's pleasure"), and the British Kings had often used their removal power to purge the bench of those judges who, in the name of "law," would dare to defy the King's exercise of the royal prerogative.³⁰ The Stuart Kings, who received particularly bad press for their political manipulation of the judiciary, were alleged to have transformed the English bench from a body of learned jurists to a cadre of political climbers.³¹ Holdsworth reports that the archetype of a Stuart judge

aspirants, Namier is quick to come to their defense. Remarking on the motivations of the would-be M.P.s, Namier writes: "Men went [to Parliament] 'to make a figure', and no more dreamt of a seat in the House in order to benefit humanity than a child dreams of a birthday cake that others may eat it; which is perfectly normal and in no way reprehensible." *Id.*

²⁶ GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 372 (1955).

²⁷ As early as 1720, Parliament's abdication of its representative duty led "Cato" to complain: "[P]ublic corruptions and abuses have grown upon us; fees in most, if not in all, offices, are immensely increased; . . . the public has run very much in debt; and as those debts have been increasing, and the people growing poor, salaries have been augmented, and pensions multiplied." *Cato's Letters* no. 20, March 11, 1720, vol. I, at 140 (5th ed. London 1748) quoted in BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 43 (1968) [hereinafter BAILYN, ORIGINS]; BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 48-49 (1967) [hereinafter BAILYN, IDEOLOGICAL]. Cato was the pen name signed to a series of 144 articles that appeared in *The London Journal* and *The British Journal* between 1720 and 1723. The articles' true authors were Whig activists John Trenchard and Thomas Gordon. These pieces, which later appeared in a four-volume work entitled *Cato's Letters*, became something of a credo for the "left" opposition both in England and America. See BAILYN, ORIGINS, *supra*, at 40, 43; BAILYN, IDEOLOGICAL, *supra*, at 35-36, 48-49. The Whiggish Cato was not alone in his hostility toward the system of royal influence that had "contributed every art to debauch and enervate the minds and morals of all ranks of men." CHARLESTON [S.C.] GAZETTE, Oct. 3, 1775, quoted in WOOD, *supra* note 22, at 143.

²⁸ BAILYN, IDEOLOGICAL, *supra* note 27, at 48.

²⁹ Henry St. John, Viscount Bolingbroke, *The Craftsman*, quoted in BAILYN, ORIGINS, *supra* note 27, at 46. See also BAILYN, IDEOLOGICAL, *supra* note 27, at 47-49 (discussing eighteenth century opposition literature); BAILYN, ORIGINS, *supra* note 27, at 45-52 (same).

³⁰ 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 213-16, 503-11 (2d ed. 1937); GEOFFREY R.Y. RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 393-94 (G.J. Hand & D.J. Bentley eds., 6th ed. 1977).

³¹ In 1684, Lord Halifax circulated a scathing critique of Charles II's unscrupulous use of the summary dismissal power. This pamphlet, entitled *The Character of a Trimmer*,

was the "political lawyer, without principles, with a fluent tongue, and with a little knowledge of law."³²

The Crown's corrupting influence did not go unaddressed by the newly powerful Parliament. Shortly after the Glorious Revolution, Parliament made several attempts to insulate both itself and the judiciary from the corrupting influence of the King. In 1701, Parliament passed the Act of Settlement, which along with the Bill of Rights of 1689, the Act of Toleration of 1689, and the Triennial Act of 1694, was designed to codify the reallocations of government power secured by the Revolution.³³ Two of the Settlement Act's most important provisions represented specific attempts to curtail the Crown's corrupt use of patronage.³⁴ First, the Act secured the independence of the Judiciary by providing that English judges would receive fixed salaries and would remain in office *quamdiu se bene gesserint* ("during good behavior"), subject to removal only for misconduct proved to the satisfaction of both houses of Parliament.³⁵ Second, and more remarkable given the structure of British government today, the Settlement Act contained a strict incompatibility rule that made all ministers, officers, and pensioners of the Crown ineligible to serve in the House of Commons.³⁶

demonstrates the contempt with which the people regarded the King's corruption of the system of justice:

The authority of a king, who is head of the law, as well as the dignity of public justice, is debased when the clear stream of law is puddled and disturbed by bunglers, or conveyed by unclean instruments to the people. . . . When men are made judges of what they do not understand the world censurcth such a choice [I]t will be thought that such men bought what they knew not how to deserve, or which is as bad, that obedience shall be looked upon as a better qualification in a judge than skill or sincerity. . . . To see the laws mangled, disguised, made speak quite another language than their own; to see them thrown from the dignity of protecting mankind to the disgraceful office of destroying them . . . will raise men's anger above the power of laying it down again

Quoted in 6 HOLDSWORTH, *supra* note 30, at 508-09.

Halifax's warnings to Charles II fell on deaf ears, and his brother, James II, perpetuated the practice of dismissing uncooperative judges. As he informed Sir Thomas Jones upon dismissing him from his position as Chief Justice of the Court of Common Pleas, James "was determined to have twelve justices of his opinion." 6 HOLDSWORTH, *supra* note 30, at 509.

³² 6 HOLDSWORTH, *supra* note 30, at 504.

³³ WILLI P. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 10 (Rita Kimber & Robert Kimber trans., 1980); KEIR, *supra* note 23, at 268. The Septennial Act of 1716 superseded the Triennial Act and replaced it as a major part of England's constitution.

³⁴ In addition, the Act of Settlement determined the Protestant succession to the throne and required that the Crown submit itself to the control of the Privy Council rather than transacting business through an informal body of advisors. KEIR, *supra* note 23, at 268-69. See also SMITH, *supra* note 26, at 378.

³⁵ SMITH, *supra* note 26, at 369; Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1048 (1987).

³⁶ The Act of Settlement, 12 & 13 Will. III, ch. 2, quoted in SMITH, *supra* note 26, at 370. This provision stated: "no person who has an office or other place of profit under the

This British incompatibility rule, however, was never put into effect.³⁷ Instead, Parliament adopted a compromise rule as part of the Regency Act of 1705.³⁸ That Act permitted the King's ministers to retain their seats in Parliament. However, the Act required any new ministers appointed from the ranks of Parliament to resign their legislative seats and stand for reelection, thus affording the electorate the opportunity to refuse the presence of the King's ministers in Parliament.³⁹

Unfortunately for the colonists, neither the Act of Settlement nor the Regency Act reached across the Atlantic to bind the Royal Governors, the King's representatives in America, who were as anxious as the King himself to "purchase" a reliable cadre of sycophantic legislators and judges. Accordingly, the Royal Governors were unrestrained in their ability to wield the "insidious and powerful weapon"⁴⁰ of patronage to buy support for the Crown. Moreover, the patronage problem was exacerbated in America because the absence of a hereditary nobility meant that appointive offices were often the main source of social distinction.⁴¹ In the New World, the Royal Governors' control over the colonial assemblies⁴² was rivaled only by their power over the social hierarchy.⁴³

As one might expect, Americans reacted quite badly to these arbitrary exercises of royal power. Just as Cato and Bolingbroke had

king or receives a pension from the crown shall be capable of serving as a member of the House of Commons." *Id.*

³⁷ Holdsworth suggests that Parliament enacted the incompatibility provision of the Settlement Act as part of a post-revolutionary attempt to ensure its new-found independence from, and supremacy over, the King. However, once Parliament believed its constitutional position secure, the legislators rethought the wisdom of foreclosing their linkage to the Crown. 6 HOLDSWORTH, *supra* note 30, at 242. See also SMITH, *supra* note 26, at 379 (enforcement of the incompatibility provision "was not practicable"); Banks, *supra* note 23, at 31 (Parliament realized that "the practical inconveniences would outweigh the advantages" of the incompatibility provision).

³⁸ 4 Anne, ch. 8 §§ 24, 25. The Regency Act was re-enacted in 1707 so that it might apply to the Royal succession and the Parliament created by the Act of Union with Scotland. Thus, the Act is often cited as the Regency Act of 1707, 6 Anne, ch. 41. Banks, *supra* note 23, at 31.

³⁹ Banks, *supra* note 23, at 31 n.64 (discussing Reelection of Ministers Act of 1919). The Regency Act remained in place until the early part of the twentieth century.

⁴⁰ WOOD, *supra* note 22, at 143.

⁴¹ *Id.*

⁴² Aside from the legislative control gained through the patronage power, the Royal Governors possessed and freely exercised an absolute veto over acts of the colonial legislature. See Robert F. Williams, "Experience Must Be Our Only Guide": *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 418 (1988). The Governor of Rhode Island was the sole exception. In that colony, neither the governor nor the Crown possessed the right to veto legislative acts. *Id.* at 418 n.97. In many of the colonies, the Royal Governor was also vested with power to dissolve the lower house of the assembly. See BAILY, ORIGINS, *supra* note 27, at 67-69.

⁴³ WOOD, *supra* note 22, at 145.

raged about the presence of "placemen" in the British Parliament,⁴⁴ so colonial Americans railed against the Royal Governors' "multiplication of officers to strengthen the court interest, . . . advancing to the most eminent stations men without education, and of dissolute manners,"⁴⁵ and "sporting with our persons and estates, by filling the highest seats of justice with bankrupts, bullies, and blockheads."⁴⁶ The conventional wisdom was that the lure of office had converted many colonial patriots into "implacable enemies to the liberties of their native country."⁴⁷

The corruption of the British system of influence had thus left an indelible impression on American memories. Designing a mechanism to prevent the emergence of a similar system in America would, therefore, become a primary concern in the formation of both the state and national governments.

B. The State Constitutions and the Articles of Confederation

A prime goal of constitution makers in the newly independent American states was the creation of limited executive authorities that would be unable to exercise the vast control that the British Kings and Royal Governors had asserted over legal and social arrangements.⁴⁸ The state constitution makers believed the accomplishment of this goal to be at the core of their mission of creating just government. By 1776, it had become axiomatic that "[h]e who has the giving of all places in a government . . . will always be master, . . . even if the constitution were in all other respects the best in the world."⁴⁹

In most state constitutions of the "founding decade,"⁵⁰ the power to appoint high officers⁵¹ was wrested from the executive and entrusted to the legislature.⁵² Although the state "governor" or "presi-

⁴⁴ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 199 (1985). See also BILLYN, *ORIGINS*, *supra* note 27, at 56-57 (describing the profound influence of English opposition writers on eighteenth-century Americans).

⁴⁵ PHILADELPHIA PA. PACKET, Mar. 4, 1777, *quoted in* WOOD, *supra* note 22, at 145 n.36.

⁴⁶ *Id.*

⁴⁷ BOSTON INDEPENDENT CHRON., Mar. 26, 1778, *quoted in* WOOD, *supra* note 22, at 146 n.38.

⁴⁸ WOOD, *supra* note 22, at 148.

⁴⁹ PHILADELPHIA PA. J., *quoted in* WOOD, *supra* note 22, at 143.

⁵⁰ Martin Diamond describes the period between 1776 and 1787 as America's "founding decade." See Martin Diamond, *Decent, Even Though Democratic*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 18, 24 (Robert Goldwin & William Schambra eds., 1980); Williams, *supra* note 42, at 409.

⁵¹ "High officers" included secretaries, state treasurers, judges of the state courts, and military officers. JAMES SCHOULER, *CONSTITUTIONAL STUDIES STATE AND FEDERAL* 63 (Da Capo Press 1971) (1897).

⁵² WOOD, *supra* note 22, at 148 n.41 (summarizing locus of appointment powers in several state constitutions).

dent"⁵³ generally retained the appointment power for lower state officials, even this limited executive prerogative was constrained by the requirement that he seek the advice and consent of his Executive Council⁵⁴ for any such appointments.⁵⁵ In addition, no state entrusted its executive with a power to create offices (or titles of nobility) at will. The office-creating power was in all cases vested with the legislature.

But the state constitutions did not stop with the reallocation of the appointment power and the office-creating power. Instead, with the exceptions of New York⁵⁶ and South Carolina,⁵⁷ all the state constitutions provided for strict incompatibility between service in the legislative and executive departments as an added precaution⁵⁸ against

⁵³ A majority of the states referred to their chief executives as "governors," borrowing the term from the English Royal Governors. In Pennsylvania, New Hampshire, South Carolina and Delaware, however, the state constitutions broke from this tradition and dubbed their chief executive "president." See DEL. CONST. OF 1776, art. 7, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 563 (Francis N. Thorpe ed., 1909) [hereinafter CONSTITUTIONS]; N.H. CONST. OF 1784, part II, *reprinted in* 4 *id.* at 2462; PA. CONST. OF 1776, ch. II, § 1, *reprinted in* 5 *id.* at 3084; S.C. CONST. OF 1775, art. iii, *reprinted in* 6 *id.* at 3243.

⁵⁴ With the exceptions of New Hampshire and New York, all the state governors were saddled with an Executive Council whose job was to "advise the Governor in the execution of his office." See, e.g., N.C. CONST. OF 1776, art. XIV, in 5 CONSTITUTIONS, *supra* note 53, at 2791. In practice, these councils severely limited the governors' independence, performing an "advice and consent" function for nearly every executive act. SCHOULER, *supra* note 51, at 61.

⁵⁵ SCHOULER, *supra* note 51, at 63. In New York, where the governor did not have an Executive Council, the appointment power was exercised by a Council of Appointments comprised of the Governor and one senator from each of the state legislature's four senatorial districts. ADAMS, *supra* note 33, at 274.

⁵⁶ In comparison with the other state constitutions, the New York Constitution of 1777 was surprisingly lax in its executive-legislative incompatibility provision. It excluded only the state treasurer from serving in either house of the legislature. N.Y. CONST. OF 1777, art. XXII, *reprinted in* 5 CONSTITUTIONS, *supra* note 53, at 2633.

⁵⁷ The South Carolina Constitution of 1776 allowed members of the legislature to retain their seats in the assembly even upon election to the Privy Council, which was a body of advisors to the president of the colony. S.C. CONST. OF 1776, art. V, *reprinted in* 6 CONSTITUTIONS, *supra* note 53, at 3244. Furthermore, although the South Carolina Constitution required that legislators appointed to other "places of emolument" resign their legislative seats until a new election, it followed the British practice of allowing members to hold both offices if the voters returned them to their legislative seats in a new election. S.C. CONST. OF 1776, art. X, *reprinted in* 6 *id.* at 3244. For a discussion of the British practice, see *supra* text accompanying notes 38-39. The South Carolina Constitution of 1790 abandoned this practice, forbidding membership in the legislature while holding "any office of profit or trust under this State [or] the United States." S.C. CONST. OF 1790, § 21, *reprinted in* 6 CONSTITUTIONS, *supra* note 53, at 3261.

⁵⁸ McDonald describes the incompatibility provisions as being added "[f]or good measure." McDONALD, *supra* note 44, at 86. Wood attributes a similar purpose to these constitutional provisions:

[S]o infecting and so incompatible with the public liberty or the representation of the people was magisterial power believed to be that the Americans felt compelled to isolate their legislatures from any sort of executive influ-

executive manipulation of the legislature.⁵⁹ For example, the New Jersey Constitution of 1776 emphatically declared its intention that all "persons possessed of any post of profit under the Government" be forbidden from service in the assembly so "[t]hat the legislative department of this Government may, as much as possible, be preserved from all suspicion of corruption."⁶⁰ Other states were even more careful to avoid the possibility of improper influence between the legislative and executive departments. Several states expressly excluded all military officers⁶¹ and government contractors⁶² from their assemblies. Some states carried the idea of constitutionally regulating conflicts of interest so far that they expressly prohibited members of the clergy from sitting in the legislature or holding any executive post.⁶³ The clergy provisions were apparently added to avoid any appearance of an established state church.⁶⁴

The state constitutions also sought to prevent the new state executives from manipulating the judiciary as had the English Kings and Royal Governors.⁶⁵ To this end, some of the state constitution writers incorporated provisions like those in the English Act of Settlement, granting judges tenure during good behavior and securing them

ence or impingement, thus setting American constitutional development in an entirely different direction from that of the former mother country.

WOOD, *supra* note 22, at 157-58.

⁵⁹ See DEL. CONST. OF 1776, art. 18, *reprinted in* 1 CONSTITUTIONS, *supra* note 53, at 565-66; GA. CONST. OF 1777, arts. XVII, XVIII, *reprinted in* 2 *id.* at 780-81; MD. DECLARATION OF RIGHTS OF 1776, art. XXX, *reprinted in* 3 *id.* at 1689; MD. CONST. OF 1776, art. XXXVII, *reprinted in id.* at 1697; MASS. CONST. OF 1780, art. II, ch. VI., pt. 2, *reprinted in id.* at 1909-10; N.H. CONST. OF 1784, pt. II, *reprinted in* 4 *id.* at 2469-70; N.J. CONST. OF 1776, art. XX, *reprinted in* 5 *id.* at 2598; N.C. CONST. OF 1776, arts. XXVII-XXIX, XXXV, *reprinted in id.* at 2792-93; PA. CONST. OF 1776 §§ 19, 23, *reprinted in id.* at 3087-88; VA. CONST. OF 1776, *reprinted in* 7 *id.* at 3817-18.

⁶⁰ N.J. CONST. OF 1776, art. XX, *reprinted in* 5 *id.* at 2598.

⁶¹ GA. CONST. OF 1777, art. XVII, *reprinted in* 2 *id.* at 780; MD. CONST. OF 1776, art. XXXVII, *reprinted in* 3 *id.* at 1697; N.C. CONST. OF 1776, art. XXVII, *reprinted in* 5 *id.* at 2792.

⁶² DEL. CONST. OF 1776, art. 18, *reprinted in* 1 *id.* at 565; MD. CONST. OF 1776, art. XXXVIII, *reprinted in* 3 *id.* at 1689 (military contractors); N.C. CONST. OF 1776, art. XXVII, *reprinted in* 5 *id.* at 2792.

⁶³ GA. CONST. OF 1777, art. LXII, *reprinted in* 2 *id.* at 785; MD. CONST. OF 1776, art. XXXVII, *reprinted in* 3 *id.* at 1697; N.C. CONST. OF 1776, art. XXXI, *reprinted in* 5 *id.* at 2793; S.C. CONST. OF 1778, art. XXI, *reprinted in* 6 *id.* at 3253. See Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989).

⁶⁴ WOOD, *supra* note 22, at 158 n.58. Of course, such prohibitions on clergy participation in political life would today be held unconstitutional. See *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down state constitutional amendment prohibiting ministers from participating in political conventions on the ground that states cannot "punish a religious professional with the privation of a civil right") (opinion of Burger, C.J.) (internal quotations deleted).

⁶⁵ See *supra* notes 30-32 and accompanying text (discussing Crown's influence over the judiciary).

against salary reductions.⁶⁶ Many of the state constitutions went even further, however, and included explicit judicial-executive incompatibility provisions to preclude the executive from corrupting judges through the lure of executive posts.⁶⁷

While the immediate goal of the state incompatibility clauses was to stop corruption and curb executive power, the clauses also expressed American egalitarianism and rejection of the English social hierarchy. Many people who previously had been denied the right to vote or hold political office believed that the primary purpose of the American Revolution had been "to abolish the political institutions by which privilege had been maintained in the colonial governments."⁶⁸ The state constitutions sought to discourage the formation of an office holding, courtier class that would be distinct from the public at large.⁶⁹ The new American office holder was to be a "virtuous amateur, who would put aside his plow for a time to serve the people."⁷⁰

The Pennsylvania Constitution of 1776 expressed disdain for the office-holding class in the most forthright terms: "As every freeman . . . ought to have some profession, calling, trade or farm, whereby he may honestly subsist, there can be no necessity for, nor use in establishing offices of profit, the usual effects of which are dependence and servility unbecoming freemen, in the possessors and expectants."⁷¹ Other state constitutions contained similar provisions. For example, the North Carolina Constitution of 1776 provided that "no person in the State shall hold more than one lucrative office at any one time."⁷²

It is important to note that broad bans on plural office holding of the type found in the North Carolina, Maryland, and New Jersey Constitutions were conceived first and foremost as anti-corruption measures. Surprisingly, the separation-of-powers aspect of incompatibility seems not to have been the major theme. Only one state constitution

⁶⁶ See *infra* note 394 (citing state constitutional provisions regarding judicial salary and tenure).

⁶⁷ DEL. CONST. OF 1776, art. 12, *reprinted in* 1 CONSTITUTIONS, *supra* note 53, at 564-65; MD. DECLARATION OF RIGHTS OF 1776, art. XXX, *reprinted in* 3 *id.* at 1689; MASS. CONST. OF 1780, pt. 2, ch. VI, art. II, *reprinted in id.* at 1909; N.Y. CONST. OF 1777, art. XXV, *reprinted in* 5 *id.* at 2634; N.C. CONST. OF 1776, art. XXIX, *reprinted in id.* at 2792; PA. CONST. OF 1776, § 23, *reprinted in id.* at 3088; VA. CONST. OF 1776, *reprinted in* 7 *id.*, at 3818.

⁶⁸ Williams, *supra* note 42, at 411 (quoting E. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION vi (1955)).

⁶⁹ SCHOULER, *supra* note 51, at 68.

⁷⁰ Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (1988).

⁷¹ PA. CONST OF 1776 § 36, *reprinted in* 5 CONSTITUTIONS, *supra* note 53, at 3090. The constitution further provided that "whenever an office, through increase of fees or otherwise, becomes so profitable as to occasion many to apply for it, the profits ought to be lessened by the legislature." *Id.*

⁷² N.C. CONST. OF 1776, art. XXXV, *reprinted in id.* at 2793.

appears to have framed its ban on plural office holding in separation-of-powers terms. The Virginia Constitution of 1776 provided that “[t]he legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time.”⁷³

Unsurprisingly, the prevalence of incompatibility clauses in the state constitutions appears to have inspired the insertion of a kindred clause in the Articles of Confederation.⁷⁴ That clause prohibited delegates to the Continental Congress from “holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.”⁷⁵ This provision is arguably a more sweeping anti-corruption measure than the Incompatibility Clause adopted at Philadelphia in 1787. It bars the receipt of “any salary, fees or emolument of any kind” and not the mere holding of office. And the bar applies not only to a Member of Congress but also to all others who might receive money “for his benefit.” The latter bar presumably would apply to congressional spouses, friends, and staff.

In sum, it can be said that although the incompatibility provisions of the various state constitutions and the Articles of Confederation differed in form and degree, by the time the delegates assembled at the Federal Convention, the idea of providing for some measure of interdepartment incompatibility had become something of an American constitutional tradition. Interestingly, it was a tradition that existed independently of the contemporaneous devotion to the separation of powers.

C. Summary of the Decisions at the Federal Convention

The Philadelphia Convention, drawing on the British and colonial antecedents described above, reached the following conclusions on interdepartment incompatibility. First, the Convention adopted the Incompatibility Clause forbidding Members of Congress (M.C.s) from serving simultaneously in the executive and judicial departments of the federal government. Second, the Convention did not adopt an incompatibility provision to preclude joint service between the executive and judicial departments, even though such an exclusion was proposed. Finally, the Convention did not adopt an incompatibility provision barring joint service in federal and state offices even though, again, such an exclusion was proposed. Part II.A.3., below describes the debate at the Federal Convention surrounding the first

⁷³ VA. CONST. OF 1776, reprinted in 7 *id.* at 3815.

⁷⁴ Donald S. Lutz, *The Articles of Confederation, in ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED* 227, 228 (Stephan L. Schecter ed., 1990).

⁷⁵ ARTICLES OF CONFEDERATION, art. V.

decision. The Convention's actions with respect to the second and third decisions are described below in Parts IV.A.1. and IV.B.1., respectively. This separate summation of the Convention's deliberations is unfortunately required by the close connection that exists in Parts II and IV between the discussion of the Convention's deliberations and the historical development of the Incompatibility Principle over the last two hundred years.

II

THE INCOMPATIBILITY CLAUSE

We turn first to a comprehensive textual and historical analysis of the Incompatibility Clause of the U.S. Constitution. Section A looks at the text and historical origins of the Clause. Section B weighs the Clause's actual historical impact on American government over the last two hundred years, considering whether it has been an ethics rule success. Finally, Section C addresses the Clause's historically unanticipated consequences: the creation of a strong presidency and the reinforcement of the separation of powers.

A. The Original Meaning and Purpose of the Incompatibility Clause

1. *Text and Context*

Any analysis of the original meaning and purpose of the Incompatibility Clause must begin with the constitutional text: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."⁷⁶ Thus, in twenty-one short words does an obscure constitutional provision foreclose even the most attenuated forms of "parliamentary government" in America.⁷⁷ Yet, the very words and context of the Incompatibility Clause make clear that it was intended to be a constitutional ethics

⁷⁶ U.S. CONST. art. I, § 6, cl. 2.

⁷⁷ The precise type of parliamentary government foreclosed by the Incompatibility Clause is that of the French Fifth Republic, which political scientist Arend Lijphart terms "semi-presidentialism": a technical term for a regime that combines presidential and parliamentary features. *See infra* note 235. The 1958 Gaullist Constitution creates a dual executive, with a Prime Minister and Cabinet accountable to the Parliament and a directly-elected President, accountable every seven years to the people. "Pure" parliamentary government of the kind practiced in Great Britain is foreclosed in this country not only by the Incompatibility Clause, but also by those provisions of Article II and of the Twelfth Amendment providing that the President will usually be elected indirectly by the people and not by Congress.

As is explained in Part IV, "parliamentary government" in this country would mean in practice government by the congressional committee system. *See infra* notes 318-37 and accompanying text. Thus described, perhaps the prospect of a hybrid U.S. legislative-executive sounds less euphonic and appealing. *See also supra* note 11 (rosy connotations of "parliamentary government" inapt in the American context).

rule not a mainstay of the separation of powers. This is the case for several reasons.

First, the Clause begins by imposing a disability on "Officers of the United States" not on Members of Congress. Like non-citizens and persons under the age of twenty-five, they are rendered ineligible to serve in either House of Congress.⁷⁸ The sentence structure, beginning with the key words "no person" and moving on to the phrase "holding any Office under the United States," clearly indicates that "Officers of the United States" are the suspect bad apples here. They are in the same position as Bills of Attainders, ex post facto laws, and Titles of Nobility:⁷⁹ They are mentioned in the Incompatibility Clause immediately after the constitutional commandment "No."⁸⁰

This phrasing is entirely different from that employed by a genuine separation-of-powers incompatibility clause, that of the 1776 Virginia Constitution. That document, which was well known to the Framers, provided that: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: *nor shall any person* exercise the powers of more than one of them, at the same time. . . ."⁸¹ The Virginia Clause mentions all three departments together and creates a total trinitarian separation of functions *and of personnel*. The U.S. Clause does not mention either the "Trinity" of departments or of powers,⁸² and creates no separation of institutional functions and only a limited, incidental separation of personnel. Accordingly, the text of the U.S. Clause strongly suggests that its purpose was to be about something other than the separation of powers.

If we step back a bit, and look at the words in context, the purpose of the Clause comes more clearly into focus. First, the Clause is

⁷⁸ See U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty-five Years. . . ."); U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years . . .").

⁷⁹ U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States. . . .").

⁸⁰ Compare U.S. CONST. art. I, § 9, cls. 4-7 ("*No capitation, or other direct, Tax shall be laid . . .*"); ("*No Tax or Duty shall be laid on Articles exported from any State*"); ("*No Preference shall be given . . .*"); ("*No Money shall be drawn . . .*") (emphasis added) and U.S. CONST. art. I, § 10, cls. 1-3 ("*No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal . . .*"); ("*No State shall . . . lay . . . any Imposts or Duties . . .*"); ("*No State shall . . . lay any Duty of Tonnage, keep Troops, or Ships of War . . .*") (emphasis added) with U.S. CONST. art. I, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

⁸¹ VA. CONST. OF 1776, in 7 CONSTITUTIONS, *supra* note 53, at 3815 (emphasis added).

⁸² See McDONALD, *supra* note 44, at 80, suggesting that "the almost mystical [Western] habit of thinking in threes" may have stemmed in part from "the concept of the Holy Trinity" and may have inclined many to the view that there could be only three powers of government.

conjoined in one sentence with an ineligibility provision that is plainly a constitutional ethics rule on its face. The Ineligibility Clause provides: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, *which shall have been created, or the Emoluments whereof shall have been increased* during such time."⁸³ The goal here is plainly to stop corruption by banning M.C.s from ever benefiting personally from the creation of new government offices or from general pay raise bills. It seems likely, therefore, that some similar anti-corruption purpose must animate the Incompatibility Clause.

This likelihood is enhanced when we step back further and notice that the Clause appears in Article I, Section 6, which begins by dealing with the delicate subject of how Senators and Representatives are to be paid. Clause 1 of Section 6 provides that congressional compensation shall be "ascertained by Law, and paid out of the Treasury of the United States."⁸⁴ This marked a key break with the Articles of Confederation, under which Members of Congress were paid by their respective states.⁸⁵ The carefully considered decision to pay Members of Congress out of the national treasury was critical to ensuring that M.C.s would view themselves as national officials who were truly independent of their state governments.⁸⁶ Thus, the salary provision and the Ineligibility Clause of Section 6 bespeak a common concern with the manner by which M.C.s were to be compensated and the possible corruption that might ensue therefrom. The likelihood increases that this too was the object of the Incompatibility Clause.

Expanding our focus further, we find the Foreign Incompatibility Clause of Article I, Section 9. This Clause warrants quotation in its full anti-corruption, ethics rule context:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, *Office*, or Title, of any kind whatever, from any King, Prince, or foreign State.⁸⁷

This provision is plainly an anti-bribery measure and was meant to have nothing to do with the separation of powers. If the Foreign Incompatibility Clause was so motivated, could not its domestic counterpart have the same purpose?

⁸³ U.S. CONST. art. I, § 6, cl. 2 (emphasis added).

⁸⁴ U.S. CONST. art. I, § 6, cl. 1.

⁸⁵ ARTICLES OF CONFEDERATION, art. V.

⁸⁶ MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES, 138 (1913).

⁸⁷ U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

Consider next the only other incompatibility rule in the amended Constitution: “[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector”⁸⁸ for the Offices of President and Vice-President. This electoral college incompatibility rule seems also designed to secure the financial and personal disinterestedness of those wise individuals whom the Framers expected would choose the President and Vice President. Persons with a direct, personal, political (in the case of M.C.s), or financial (in the case of Officers of the U.S.) stake in who won the Presidency were disqualified from being electors. Again, constitutional incompatibility of offices is presented as a problem involving conflicts of interest.

Finally, consider one additional, striking aspect about the twenty-one words of the Incompatibility Clause. They appear buried two-thirds of the way through the first Article of a seven article-long document—and that Article concerns only one of the three Departments of the entire government. If the separation-of-powers effect of incompatibility had at all been appreciated, one suspects the drafters would have placed the Clause in a separate Article, either before or after Articles I, II, and III. Plainly, the words and the context of the Incompatibility Clause suggest an anti-corruption purpose for the provision. Its momentous separation-of-powers impact was most likely an unintended consequence of this constitutional ethics rule.

2. *Public Statements Contemporaneous With Ratification*

Having considered text and context, we turn next in our quest for the original meaning and purpose of the Incompatibility Clause to public statements made contemporaneously with the ratification of the Constitution. The Incompatibility Clause did not by itself generate much controversy during the ratification debates.⁸⁹ The single reference to the Clause in the *Federalist Papers* is made only in passing. Along with the Ineligibility Clause, Hamilton describes the Incompatibility Clause as an “important guard[] against the danger of executive influence upon the legislative body.”⁹⁰ However, as Luther Martin explained in stating his objections to the Constitution, “there was a great

⁸⁸ U.S. CONST. art. II, § 1, cl. 2.

⁸⁹ Notably, however, the Virginia Ratifying Convention proposed to amend the Constitution to add a judicial incompatibility clause. III PAPERS OF GEORGE MASON: 1787-1792, at 1057 (R. Rutland ed., 1970).

⁹⁰ THE FEDERALIST NO. 76, *supra* note 1, at 459 (Alexander Hamilton). Madison also mentions the related Ineligibility Clause of Article I, Section 6 as a safeguard to prevent the President from subduing the “virtue” of the House of Representatives. THE FEDERALIST NO. 55, *supra* note 1, at 345-46 (James Madison).

diversity of sentiment among the members of the convention"⁹¹ on the general subject of legislators holding other offices. He made it clear to the general public that he, and other delegates, had favored a rule forbidding Members of Congress from holding any other office under the United States until one year after their departure from the legislature.⁹²

In the ratification debates, Martin continued to defend the position he had favored unsuccessfully at the Convention. He critiqued the Incompatibility Clause as written, in the most apocalyptic terms:

It is true, the acceptance of an office vacates their seat, nor can they be re-elected during their continuance in office; but it was said, that the evil would first take place, that the price for the office would be paid before it was obtained; that vacating the seat of the person who was appointed to office, made way for the admission of a new member, who would come there as desirous to obtain an office as him whom he succeeded, and as ready to pay the price necessary to obtain it; in fine, that it would be only driving away the flies who were *filled*, to make room for those that were *hungry*—And as the system is now reported, the *President* having the power to *nominate* to *all* offices, it must be evident, that there is *no possible security* for the *integrity* and *independence* of the *legislature*, but that they are most *unduly* placed under the *influence* of the *President*, and exposed to *bribery* and *corruption*.⁹³

Obviously, Martin, and those familiar with his views, understood the Incompatibility Clause to be an anti-corruption device, albeit it an inadequate one. They certainly did not perceive the Incompatibility Clause to be a general separation-of-powers provision.

3. *Private Statements Made Prior to Ratification: The Convention Debates*

We turn last in our quest for the original meaning and purpose of the Incompatibility Clause to the private statements made prior to ratification in the Convention debates. These statements are of historical rather than of legal interest. The little that is recorded in the Convention debates about the Incompatibility Clause⁹⁴ suggests that

⁹¹ Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland*, in 2 THE COMPLETE ANTI-FEDERALIST 19, 52 (H. Storing ed., 1981).

⁹² *Id.*

⁹³ *Id.* at 52-53.

⁹⁴ Understanding the Convention debate on the Incompatibility Clause is made hard by the delegates' tendency to use the single term "ineligibility" to refer to the ideas presently contained in both of the separate "Ineligibility" and "Incompatibility" clauses of Article I, Section 6, Clause 2 of the Constitution.

Although today these concepts are treated in separate clauses, when they were first introduced at the Convention as part of the Virginia Plan, they were the subject of a single provision rendering members of the legislature "ineligible" to certain offices "during their

the delegates may be divided into two camps, those for and those against the Clause. The first group, which we will call the "Republicans,"⁹⁵ favored strict incompatibility. These delegates feared executive corruption of the legislature if the lure of "Office" was not foreclosed. Following Bolingbroke and Montesquieu, the Republicans sought to build a government of public virtue and they fought all moves that risked any potential for governmental corruption.⁹⁶

Republicans were opposed on the issue of executive-legislative incompatibility by some followers of David Hume, whom we will call the "Federalists."⁹⁷ They assumed that public officials would often overlook the Republican call for "virtue" and, instead, follow their self-interest.⁹⁸ Thus, the Federalists thought a well-crafted government must appeal to man's baser passions, harnessing his self-interest for the common good.⁹⁹ The Republican and Federalist positions on legislative-executive incompatibility require detailed consideration.

term of service." See *infra* note 101 and accompanying text (quoting full text of the original Randolph Resolutions dealing with incompatibility). Indeed, the Incompatibility Clause was not separated from the rest of the text until the Clause emerged from the Committee of Eleven on September 1, 1787. See 2 RECORDS, *supra* note 9, at 483. After this clarification, some delegates became more precise in their speech, see, e.g., *id.* at 491 (Sept. 3, 1787). Before the Committee of Eleven's action, however, it is sometimes hard to be sure which concept the delegates were referring to in their speeches on the floor.

⁹⁵ Forrest McDonald refers to this group as the "republican idealogues." He includes in this group Abraham Baldwin of Georgia; Pierce Butler, John Rutledge and Charles Cotesworth Pinckney of South Carolina; Hugh Williamson of North Carolina; George Mason and Edmund Randolph of Virginia; Luther Martin and Daniel Jenifer of Maryland; John Lansing and Robert Yates of New York; Roger Sherman of Connecticut; and Elbridge Gerry of Massachusetts. McDONALD, *supra* note 44, at 200-01.

⁹⁶ *Id.* at 199-200. For McDonald's detailed discussion of the philosophical perspectives of this group, see *id.* at 199-203.

⁹⁷ McDonald refers to this group as the "court-party nationalists" for its ideological similarity to the Court party in England. *Id.* at 187. We use the more common term "Federalist" to describe the members of this camp. McDonald counts among this group John Langdon and Nicholas Gilman of New Hampshire; Nathaniel Gorham, Rufus King, and Caleb Strong of Massachusetts; Oliver Ellsworth of Connecticut; Alexander Hamilton of New York; James Wilson, Thomas Mifflin, and Gouverneur Morris of Pennsylvania; John Mercer of Maryland; Charles Pinckney of South Carolina; and William Few, William Pierce and William Houstoun of Georgia. McDonald characterizes James Madison of Virginia and Alexander Martin of North Carolina as falling somewhere between the Republican and court-party groups, although closer to the position of the latter contingent. *Id.* at 200.

⁹⁸ *Id.* at 188. For McDonald's detailed discussion of the philosophical perspectives of this group, see *id.* at 186-99. For a modern reiteration of the Federalists' philosophy, see Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 HARV. J.L. & PUB. POL'Y 1 (1993).

⁹⁹ Hamilton's speech on the passions, delivered during the debates on incompatibility, captures the essence of this Humean approach to politics:

Take mankind as they are, and what are they governed by? Their passions. There may be in every government a few choice spirits, who may act from more worthy motives. One great error is that we suppose mankind more honest than they are. Our prevailing passions are ambitions and interest; and it will ever be the duty of a wise government to avail itself of those

a. *Republican Idealism*

Legislative-executive incompatibility was a key part of Edmund Randolph's so-called Virginia Plan for a new Constitution.¹⁰⁰ Taking a much stronger stance against dual office holding than was ultimately adopted, Randolph's fourth and fifth resolutions would have barred Members of Congress from holding any *state* or federal office both during their term of service in the legislature *and for an unspecified period thereafter*.¹⁰¹

The Republican supporters of these resolutions feared that allowing Members of Congress to hold executive office would open the way for the President to "buy" their votes in exchange for attractive appointments, thus impairing public virtue. The honor and money to be gained from office holding was thought to create a powerful temptation for the legislators to sell. As Pierce Butler of South Carolina warned:

We have no way of judging of mankind but by experience. Look at the history of the government of Great Britain, where there is a very flimsy exclusion¹⁰²—Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption.¹⁰³

passions, in order to make them subservient to the public good—for these ever induce us to action.

1 RECORDS, *supra* note 9, at 381 (June 22, 1787).

¹⁰⁰ The fifteen resolutions that comprised the Virginia Plan are also often referred to as the "Randolph Plan" or the "Randolph Resolutions" in recognition of Edmund Randolph's introduction of the plan at the Federal Convention on May 29, 1787. *See id.* at 18-19. The Virginia delegates to the Federal Convention are thought to have jointly drafted these resolutions during the opening weeks of the Convention while they awaited the arrival of a quorum of delegates from the other states. Although there is some speculation that James Madison actually may have drafted the resolutions, Madison disclaimed full credit, stating that the plan resulted from "consultation among the deputies, the whole number, seven, being present." CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787*, at 38 (1966).

¹⁰¹ Randolph's fourth and fifth resolutions provided as follows:

4. Resd. that the members of the first branch of the National Legislature ought . . . to be ineligible to any office established by a particular State, or under the authority of the United States, except those beculiarly [sic] belonging to the functions of the first branch, during the term of service, and for the space of — after its expiration

5. Resold. that the members of the second branch of the National Legislature ought . . . to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of — after the expiration thereof.

1 RECORDS, *supra* note 9, at 20-21 (May 29, 1787).

¹⁰² Butler was apparently referring to the British requirement that ministers temporarily resign from Parliament and seek re-election in order to retain their legislative seats. *See supra* notes 38-39 and accompanying text.

¹⁰³ 1 RECORDS, *supra* note 9, at 379 (June 22, 1787) (footnote added).

George Mason of Virginia, also “enlarged on the abuses [and] corruption in the British Parliament, connected with the appointment of its members.”¹⁰⁴ “I admire many parts of the British constitution and government,” he said, “but I detest their corruption” which, through the system of influence, “pervades every town and village in the kingdom.”¹⁰⁵

Republicans thought Randolph’s incompatibility rules would block the replication of this English example on American soil.¹⁰⁶ They also hoped to forestall any gradual accretion of Presidential power. Knowing that the King’s “sole power of appointing the increased officers of government,” had “remarkably increased” the power of the Crown,¹⁰⁷ they feared a similar result in America.¹⁰⁸ Being more wary of executive power than their Federalist counterparts,¹⁰⁹ the Republicans naturally wanted strict legislative-executive incompatibility.¹¹⁰

b. *Federalist Skepticism*

The Federalist opponents of strict incompatibility were familiar with the Republicans’ worries. Similar reactions to the system of Royal “influence” had led to incompatibility clauses in the state constitutions and in the Articles of Confederation. Yet, by 1787, practical experience under these ineffective governments¹¹¹ had unraveled much of the radical republican theory that had inspired their design, leaving

¹⁰⁴ *Id.* at 387 (June 23, 1787).

¹⁰⁵ *Id.* at 380-81 (June 22, 1787).

¹⁰⁶ “[B]y shutting the door against appointments of its own members to offices, which was one source of its corruption,” the Republicans hoped to “preserv[e] the legislature as pure as possible.” *Id.* at 386 (June 23, 1787) (statement of John Rutledge).

¹⁰⁷ *Id.* at 380-81 (June 22, 1787) (statement of George Mason).

¹⁰⁸ Allowing M.C.s to serve in the executive department, they believed, “would give too much influence to the Executive.” 2 RECORDS, *supra* note 9, at 490 (Sept. 3, 1787) (statement of Roger Sherman). The legislators would then continually be “looking up to him for offices.” 1 *id.* at 393 (June 23, 1787) (statement of Elbridge Gerry).

¹⁰⁹ For example, while conceding the need to check the excesses of democracy that had wreaked havoc on the state governments, the Republicans wanted creation of either a plural executive or a single executive who would share power with an executive council. McDONALD, *supra* note 44, at 202.

¹¹⁰ Of course, providing for incompatibility between legislative and executive offices was just one way in which the Framers limited the patronage power of the President. In contrast with the British monarch, who was “emphatically and truly styled the fountain of honor,” THE FEDERALIST NO. 69, *supra* note 1, at 421 (Alexander Hamilton), the American president was deprived of the power to create offices, which was entrusted to Congress, and of the power to confer Titles of Nobility, which was abolished altogether. Thus, it would be a gross misstatement to say that prohibiting Members of Congress from serving simultaneously in executive office was the only mechanism by which the Framers sought to curb executive power.

¹¹¹ For a discussion of the corrupt condition of government under the state constitutions, see *infra* notes 116-19 and accompanying text.

the Federalist delegates willing to reexamine even the most fundamental tenets of the revolutionary political science.¹¹²

For example, the majoritarian excesses of the powerful assemblies under the state constitutions had convinced the Federalists of the need for a reenergized executive as a check on legislative power.¹¹³ Also, by 1787 everyone knew that the loose central government set up under the Articles of Confederation needed strengthening.¹¹⁴ This spirit of reevaluation influenced the Federalists' thinking about incompatibility and caused them to question whether the state constitutions' curtailment of corruption had endangered energetic government. Many Federalists became worried that strong incompatibility provisions might conflict with the Federalist goal of a reenergized executive and a stronger national government.

i. *Revitalizing the Executive*—In drafting the state constitutions, the American revolutionaries had put great trust in the legislature.¹¹⁵ Yet this trust soon proved naive. Despite the state constitutions' explicit invocation of the separation of powers,¹¹⁶ the state assemblies

¹¹² James Madison, for example, wrote that the excesses of the state legislatures had brought "into question the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of public Good and private rights." James Madison, *Vices of the Political System*, in 2 WRITINGS OF MADISON 366 (Gaillard Hunt ed., 1901) [hereinafter WRITINGS]; WOOD, *supra* note 22, at 410.

¹¹³ McDONALD, *supra* note 44, at 241; WOOD, *supra* note 22, at 550-51.

¹¹⁴ See WOOD, *supra* note 22, at 464-67 (discussing the need to reconstruct the central government). See also FARRAND, *supra* note 86, at 45 (noting that the "wretched condition of the government finances, and the unsatisfactory state of foreign and domestic trade" threatened the continuance of the Union). In varying degrees, all the delegates admitted that strengthening the national government was a necessary goal of the Philadelphia Convention. McDONALD, *supra* note 44, at 185.

¹¹⁵ Robert F. Williams, *Evolving State Legislative and Executive Power in the Founding Decade*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 52 (1988).

¹¹⁶ All the state constitutions were structured so as to incorporate the doctrine of the separation of powers. McDONALD, *supra* note 44, at 84. Six of the state constitutions contained explicit "separation of powers" clauses. See GA. CONST. OF 1777, *reprinted in* 2 CONSTITUTIONS, *supra* note 53, at 778; MARYLAND CONST. OF 1776, art. VI, *reprinted in* 3 *id.* at 1687; MASS. CONST. OF 1780, art. XXX, *reprinted in id.* at 1893; N.H. CONST. OF 1784, art. XXXVII, *reprinted in* 4 *id.* at 2457; N.C. CONST. OF 1776, art. IV, *reprinted in* 5 *id.* at 2787; VIRGINIA CONST. OF 1776, *reprinted in* 7 *id.* at 3813, 3815.

Nevertheless, the recitations of separation-of-powers principles in the state constitutions did not prove sufficient to secure the doctrine. In practice, the doctrine was universally ignored, with the legislature controlling the legislative, judicial, and executive functions. McDONALD, *supra* note 44, at 84; WOOD, *supra* note 22, at 156. See also Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514 (1924-25).

Madison explicitly invoked the image of the impotent state separation-of-powers clauses to press the need for checks and balances in the new Constitution:

If we look to the constitutions of the several states we find, that notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.

ran roughshod over governors and courts and were almost "omnipotent."¹¹⁷ Left unchecked, the assemblies passed many foolish and wicked bills,¹¹⁸ giving rise to talk of "democratic despotism."¹¹⁹

The Framers were well aware of the trouble caused by an "excess of democracy"¹²⁰ in the states. They sought to prevent such legislative tyranny from plaguing the national government by "giving every defensive authority to the other departments that was consistent with republican principles."¹²¹ Thus, they favored a strong executive¹²² with lone control over the military, substantial power over appointments, and a term longer than the governor of any state.¹²³ Yet, the writing of such powers on paper did not satisfy many Federalists, who

...

... [I]n no instance has a competent provision been made for maintaining in practice the separation delineated on paper.

THE FEDERALIST NO. 47, *supra* note 1, at 303, 308 (James Madison).

¹¹⁷ 2 RECORDS, *supra* note 9, at 35 (July 17, 1787) (statement of James Madison).

¹¹⁸ See STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW & JURISPRUDENCE IN AMERICAN HISTORY* 132 (2d ed. 1989); WOOD, *supra* note 22, at 405. Notorious examples of this legislation, which wreaked havoc on the infant state economies, included schemes allowing for the confiscation of private property, the overproduction of paper or "rag" money, and the altering or invalidating of contracts for the payment of debts. Presser and Zainaldin, however, note that not all the workproduct of the young assemblies was substantively offensive or unjust: "Virginia's revisal of her colonial laws, for example, was a model of circumspection." PRESSER & ZAINALDIN, *supra*, at 133.

Compounding the problem of the state assemblies was the fact that the law was in such constant flux that even those charged with its enforcement often found themselves at a loss to know what the law was. WOOD, *supra* note 22, at 405. Madison, writing in 1787, complained: "We daily see laws repealed or superceded [sic], before any trial can have been made of their merits, and even before a knowledge of them can have reached the remoter districts within which they were to operate." James Madison, *Vices of the Political System*, in WRITINGS, *supra* note 112, at 365-66; WOOD, *supra* note 22, at 406.

¹¹⁹ In 1774, John Adams had thought this idea was oxymoronic. See John Adams, *Novanglus*, in 4 THE WORKS OF JOHN ADAMS 11, 79-83 (Charles F. Adams ed., 1851); WOOD, *supra* note 22, at 63. However, as early as 1781, Jefferson recognized that the accumulation of power in the Virginia legislature had converted the representative body of the people into "precisely the definition of despotic government." His *Notes on The State of Virginia* went on to urge that "one hundred and seventy-three despots" were "as oppressive as one" and that "elective despotism was not the government we fought for." THE FEDERALIST NO. 48, *supra* note 1, at 310-11 (James Madison quoting Thomas Jefferson, NOTES ON VIRGINIA).

¹²⁰ See 1 RECORDS, *supra* note 9, at 48 (May 31, 1787) (statement of Elbridge Gerry) ("The evils we experience flow from the excess of democracy."). See also 2 RECORDS, *supra* note 9, at 35 (July 17, 1787) (statement of James Madison) (The "[e]xperience had proved a tendency in our governments to throw all power into the Legislative vortex."); 1 RECORDS, *supra* note 9, at 26 (May 29, 1787) (statement of Edmund Randolph) ("Our chief danger arises from the democratic parts of our constitutions.").

¹²¹ 2 RECORDS, *supra* note 9, at 74 (July 21, 1787) (statement of James Madison).

¹²² Madison identified the Framers' main goals in drafting the Federal Constitution as providing "proper energy" to the executive and "proper stability" to the legislature and "adjust[ing] the clashing pretensions of the large and small states." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 THE LETTERS AND OTHER WRITINGS OF JAMES MADISON 345 (1865).

¹²³ WOOD, *supra* note 22, at 521.

perhaps remembered that the state separation-of-powers clauses had done little to stop legislative usurpation.¹²⁴

The last powerful executives the Framers had known were the King and the Royal Governors. Moreover, it was common knowledge that after the death of Royal absolutism in 1688, the "dynamo" that fueled the English executive engine had been the system of influence. For all the "invidious appellations of corruption and dependence," wrote David Hume,¹²⁵ the Royal Patronage had made the King independent of Parliament while at the same time linking the executive and the legislature so that the government could function.¹²⁶ Many influential writers of the day, from Blackstone to Thomas Paine, observed that without the system of influence, the British government would have ground to a halt.¹²⁷

Thus, when the Federal Convention debated the Incompatibility Clause, the advocates of a strong executive questioned whether, for all his supposed power on parchment, the new President would in reality have any strength or independence, absent a British-style system of influence. As John Mercer said, "[Governments] can only be maintained by *force* or *influence*. The Executive has not *force*, deprive him of influence by rendering the members of the (Legislature) ineligible to Executive offices, and he becomes a mere phantom of authority."¹²⁸ Hamilton similarly observed, "We have been taught to reprobate the danger of influence in the British government, without duly reflecting how far it was necessary to support a good government."¹²⁹ Finally,

¹²⁴ As Madison noted, "[A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." THE FEDERALIST NO. 48, *supra* note 1, at 313. See also *supra* note 116 (discussing state constitutional separation-of-powers clauses).

¹²⁵ David Hume, *On the Independency of Parliament*, in *ESSAYS: MORAL, POLITICAL AND LITERARY* 117-22 (T.H. Green & T.H. Grose eds., 1912) (emphasis omitted).

¹²⁶ See W.S. Holdsworth, *The Conventions of the Eighteenth-Century Constitution*, 17 IOWA L. REV. 161 (1932) (discussing the system of influence as a vital link between the Crown and Parliament).

¹²⁷ See I BLACKSTONE, COMMENTARIES 334-36 (1765) (without the ability to confer honors, the "Crown would soon have been overborne by the power of the people."); Thomas Paine, *Common Sense*, in *COMMON SENSE AND OTHER POLITICAL WRITINGS* 3, 9 (Nelson F. Adkins ed., 1953) (The Crown "derives its whole consequence merely from being the giver of places and pensions.").

¹²⁸ 2 RECORDS, *supra* note 9, at 284 (Aug. 14, 1787).

¹²⁹ 1 RECORDS, *supra* note 9, at 381 (June 22, 1787). See also *id.* at 376 (June 22, 1787) (statement of Alexander Hamilton) ("It was impossible to say what wd. be the effect in G.B of such a reform as had been urged. It was known that (one) of the ablest politicians (Mr. Hume) had pronounced all that influence on the side of the crown, which went under the name of corruption, an essential part of the weight which maintained the equilibrium of the Constitution."). However, while Hamilton opposed all other proposed limitations on legislators' ability to obtain executive office, including the Virginia Plan's proposed post-service waiting period, he concluded that, on balance, the "danger[s] where men are capa-

Nathaniel Gorham cautioned against an overly hasty rejection of the British system:

The corruption of the English government cannot be applied to America. This evil exists there in the venality of their boroughs: but even this corruption has its advantage, as it gives stability to their government. We do not know what the effect would be if members of parliament were excluded from offices.¹³⁰

Thus, the Federalists worried that an American President without patronage would be an impotent figurehead. They feared that strict legislative-executive incompatibility would undercut one of the key goals of the new Constitution.

ii. *Strengthening the National Government*—Another Federalist goal that seemed threatened by the Incompatibility Clause was the augmentation of national government power.¹³¹ While most of the delegates to the Federal Convention acknowledged the need for such a clause to stop legislative corruption,¹³² by 1787 larger worries loomed. Countering the fear of corrupt M.C.s was the dread of having no national legislators at all, or at least of significantly reducing the quality of those willing to run for Congress.

In 1787, the state governments were still the only effective political forces the Framers had known since independence. They did not lightly assume, therefore, that the new national government would be able to hold its own against the states. Power and prestige in American politics were still to be found at the state level, and an ambitious office seeker would find far greater reward as the Governor of Virginia than as a delegate to the Continental Congress.¹³³ The Federalists,

ble of holding two offices" warranted a requirement that legislators vacate all other offices upon taking their seats in Congress. *Id.*

¹³⁰ 1 RECORDS, *supra* note 9, at 381 (June 22, 1787). *See also id.* at 375-76 (June 22, 1787) (statement of Nathaniel Gorham) ("It was true abuses had been displayed in G.B. but no one cd. say how far they might have contributed to preserve the due influence of the Gov't nor what might have ensued in case the contrary theory had been tried.").

¹³¹ McDONALD, *supra* note 44, at 185 n.1.

¹³² *See* 1 RECORDS, *supra* note 9, at 381 (June 22, 1787) (statement of Alexander Hamilton) ("I confess there is a danger where men are capable of holding two offices."); *id.* at 388, (June 23, 1787) (statement of James Madison) (Madison "admitted the probable abuses of an eligibility of members, to offices.").

¹³³ Allan Nevins cites several examples of prominent statesmen who felt a greater calling to serve in their respective state governments than in the weak Continental Congress. For example, as early as 1776, Jefferson resigned his seat in the Continental Congress, believing his duty was to the government of Virginia. ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1776-1789* 206 (1924). Madison likewise thought he could do more good in Virginia than in Congress and resigned his congressional seat in 1784 to serve in the Virginia House. *Id.* at 207. The pull of the governorship was also great, despite the limited constitutional powers afforded the states' chief executives. Nevins notes that "[t]he Governors or Presidents were treated with a popular deference which helped to weaken the constitutional restrictions on their authority." *Id.*

therefore, saw a need to make national office attractive.¹³⁴ As Gouverneur Morris put it, "[i]f the state governments have the division of many of the loaves and fishes, and the general government few, [the general government] cannot exist."¹³⁵

The concern was particularly great with respect to the Congress.¹³⁶ As James Wilson observed: "[t]he members of the Legislature ha[d] perhaps the hardest [and] least profitable task of any who engage in the service of the state,"¹³⁷ and it was common knowledge that the lure of profitable offices had drawn many to Parliament and the state legislatures. Thus, Wilson continued, "nothing seemed to be wanting to prostrate the [national] Legislature, but to render its members ineligible to [national] offices, [and] by that means take away its power of attracting those talents which were necessary to give weight to the [government] and to render it useful to the people."¹³⁸

James Madison added that it would likely be even harder to get good people to serve in Congress than it had been to get them to serve in the State Assemblies,¹³⁹ "as the sacrifices [required] from the distant members [would] be much greater, and the pecuniary provisions, probably, more disproporti[on]ate."¹⁴⁰ Therefore, Madison counseled, it would be "impolitic to add fresh objections to the (Legislative) service by an absolute disqualification of its members."¹⁴¹ Drawing on the experience of his own state, Madison concluded, "[t]he Legislature of [Virginia] would probably have been without

¹³⁴ Cf. 2 RECORDS, *supra* note 9, at 289 (Aug. 14, 1787) (statement of John Mercer) ("It is a great mistake to suppose that the paper we are to propose will govern the U. States. [It is t]he men whom it will bring into the Govern[ment] and interest in maintaining it that is to govern them. The paper will only mark out the mode & the form—Men are the substance and must do the business.")

¹³⁵ 1 *id.* at 518 (July 2, 1787).

¹³⁶ The opponents of incompatibility were also worried, though to a lesser extent, about the effect the Clause would have on the quality of office seekers in the executive department. For example, James Wilson's support for limiting the ban on executive office-holding reflected his concern with attracting the best people to executive service:

Strong reasons must induce me to disqualify a good man from office. If you do, you give an opportunity to the dependent or avaricious man to fill it up, for to them offices are objects of desire. If we admit there may be cabal and intrigue between the executive and legislative bodies, the exclusion of one year will not prevent the effects of it. But we ought to hold forth every honorable inducement for men of abilities to enter the service of the public.

Id. at 379-80 (June 22, 1787). Rufus King of Massachusetts, agreeing that this "restriction on the members would discourage merit," also argued that restricting the eligibility of legislators to executive office would "give a pretext to the Executive for bad appointments, as he might always plead this as a bar to the choice he wished to have made." *Id.* at 376.

¹³⁷ *Id.* at 387 (June 23, 1787).

¹³⁸ 2 *id.* at 288 (Aug. 14, 1787).

¹³⁹ 1 *id.* at 389 (June 23, 1787) ("[T]he impulse to the Legislative service, was evinced by experience to be in general too feeble with those best qualified for it.")

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

many of its best members, if in that situation, they had been ineligible to [Congress and . . .] other honorable offices of the State."¹⁴²

c. *Madison's Middle Ground and the Republican Rejoinder*

For these reasons, the ever-pragmatic Madison put forth a compromise on incompatibility. Madison's "middle ground"¹⁴³ would have excluded Members of Congress only from those offices that "should be established, or the emoluments thereof, augmented by the Legislature of the U[nited] States during the time of their being members."¹⁴⁴ Madison "supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced."¹⁴⁵ Thus, "if the door was shut [against] them, it might properly be left open for the [appointment] of members to other offices as an [encouragement] to the Legislative service."¹⁴⁶

Republicans balked at Madison's assumption that the lure of office was needed to get good citizens into public life. George Mason, for example, thought that Madison's suggestion that "virtue should be encouraged by such a species of venality, was an idea, that at least had

¹⁴² *Id.* It will be remembered that, along with most of the state constitutions, the Virginia Constitution of 1776 contained a clause barring members of the state assembly from simultaneous executive service. See *supra* note 73. Thus, it is puzzling that Madison would refer to the situation in Virginia as support for his hypothesis that any limitation on executive service would dampen people's desire to serve in the legislature. One possible explanation is that Madison was not cautioning against making legislative service incompatible with *concurrent* executive office; rather, he was arguing against any proposal that would forever bar a legislator from accepting an executive appointment, even if he were to resign his seat in the assembly. Yet, another equally plausible explanation for Madison's statement is that the incompatibility provision of the Virginia Constitution was simply not enforced. The limited historical evidence available on the point reveals that such was the unhappy condition of the government in several other states during the founding decade. In Pennsylvania, for example, state representatives commonly held simultaneous positions as county treasurers, in spite of the fact that the Pennsylvania Constitution contained one of the strongest prohibitions on dual office holding. NEVINS, *supra* note 133, at 190. See also *supra* text accompanying note 71 (citing text of the Pennsylvania incompatibility clause). In Massachusetts, as well, the practice of appointing legislators to multiple executive offices was carried out to such an extreme that one notorious "Pooh-Bah" reportedly held six executive posts at once. NEVINS, *supra* note 133, at 176.

The state legislatures' disregard for other structural provisions in the state constitutions provides further support for the proposition that their incompatibility clauses may also have gone unenforced. The separation-of-powers clauses found in many of these constitutions are a case in point, since it was the common practice of the legislature to ignore these clauses, with the result that the state legislatures exercised all three powers of government. See *supra* note 116 and accompanying text. Since it would have served the interests of the Virginia legislature to ignore the constitution's incompatibility provision, this clause may have similarly been disregarded.

¹⁴³ 1 RECORDS, *supra* note 9, at 388 (June 23, 1787).

¹⁴⁴ *Id.* at 386 (June 23, 1787). Madison's proposal would have retained the provision that ineligibility extend for one year past the time of legislative service. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

the merit of being new."¹⁴⁷ Elbridge Gerry was likewise sickened by this base appeal to self-interest:

If men will not serve in the Legislature without a prospect of such offices, our situation is deplorable indeed. If our best Citizens are actuated by such mercenary views, we had better chuse a single despot at once. It will be more easy to satisfy the rapacity of one than of many.¹⁴⁸

Moreover, both Republicans and Federalists thought that Madison's proposal would be easy to evade. Thus, Rufus King, a staunch Federalist, scolded the Republican delegates for clinging to the "chimerical" hope that any constitutional provision could prevent legislators from soliciting offices:¹⁴⁹

You say that no member shall himself be eligible to any office. Will this restrain him from availing himself of the same means which would gain appointments for himself, to gain them for his son, his brother, or any other object of his partiality. We were losing therefore the advantages on one side, without avoiding the evils on the other.¹⁵⁰

Republicans also objected that it would be easy for M.C.s to find ways around a clause that rendered them ineligible only for newly-created or newly-salaried offices. Roger Sherman observed that a cunning legislator could avoid the rule by creating a new office and arranging for the appointment of an existing officer to the new post, thus opening the vacated office for himself.¹⁵¹ Elbridge Gerry added that the Madison proposal would "produce intrigues of ambitious men for displacing proper officers, in order to create vacancies for themselves."¹⁵²

Ultimately, Madison's proposed "middle ground" fell victim to these attacks. Yet, the Constitutional Convention did not forget his fear of Congress "creating offices or augmenting the stipends of those already created, in order to gratify some of the members."¹⁵³ Rather,

¹⁴⁷ *Id.* at 387 (June 23, 1787). Mason "[could] not suppose that a sufficient number of Citizens could not be found who would be ready, without the inducement of eligibility to offices, to undertake the Legislative service." *Id.*

¹⁴⁸ 2 *id.* at 285 (Aug. 14, 1787).

¹⁴⁹ 1 *id.* at 387 (June 23, 1787).

¹⁵⁰ *Id.* In answer to this objection, Elbridge Gerry argued that "although members, if disqualified themselves might still intrigue [and] cabal for their sons, brothers . . . , yet as their own interest would be dearer to them, than those of their nearest connections, it might be e[x]pected they would go greater lengths to promote it." *Id.* at 388 (June 23, 1787).

¹⁵¹ *Id.* at 387-88 (June 23, 1787).

¹⁵² *Id.* at 388 (June 23, 1787).

¹⁵³ *Id.* at 380 (June 22, 1787).

this concern became the motivation for the Ineligibility Clause of Article 1, Section 6.¹⁵⁴

d. *Resolution: Compromise*

What came out of the debates and became the Incompatibility Clause was a compromise between Republicans, who wanted the strict incompatibility rule of the Virginia Plan, and Federalists, who hated legislative-executive incompatibility in any form. The Clause today thus allows M.C.s to become officers of the United States, since there is no absolute (post-employment) bar on their appointment to office. But, upon taking office, the Clause does make them resign their seats in Congress and it prevents them from seeking reelection to those seats, as British ministers could do.¹⁵⁵ Advocates of a strong executive thus secured for the President half of the perceived powers of the British King, while those who hated legislative corruption secured half the protection they sought from executive abuse: the President would not be able to influence Congress directly by the presence of his ministers in the Senate or the House, but he would retain the indirect power to influence M.C.s who might want to give up their seats in exchange for office.¹⁵⁶

The Convention debates thus confirm historically what a close reading of the constitutional text had already made clear. The Incompatibility Clause was motivated by worries about British-style corruption. The Framers did not perceive it as having much to do with the separation of powers or with Presidential independence. The farthest thought from their minds when they passed two constitutional ethics clauses was that they might be creating a whole new form of *non-parliamentary* government. The unintended consequences of the Incompatibility Clause have been profound indeed.

¹⁵⁴ U.S. CONST., art. 1, § 6, cl. 2. Again, the Ineligibility Clause prohibits Members of Congress from being “appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during” his service in the legislature. See Stephen Chapman, *A History of Bending the Constitution for Political Purposes*, CHI. TRIB., April 14, 1994, § 9, at 27 (discussing application of the Ineligibility Clause to a possible 1994 Supreme Court appointment for U.S. Senator George Mitchell).

¹⁵⁵ See *supra* note 38 and accompanying text.

¹⁵⁶ The Ineligibility Clause dealt with other worries. That Clause addressed the fear that Congress might be corrupted by abusing its own power to create lucrative, but unnecessary, offices to be filled by its members. Moreover, the Framers’ limitation of the ineligibility provision to “Civil offices” eased the fears of some of the delegates that, in war time, the greatest military men might also be M.C.s who would be prohibited from defending their country.

B. The Actual Effects of the Incompatibility Clause Over the Last Two Hundred Years

1. *The Scorecard on "Corruption": An Ethics Rule Success?*

The purpose of the Incompatibility Clause was to stop the President from using certain kinds of patronage appointments to build support for his programs in Congress. We now consider how well the Incompatibility Clause has actually worked as a constitutional ethics rule in fulfilling this "anticorruption" goal.

We give the Clause a grade of C+ in gauging whether it has succeeded on its own terms. It has undoubtedly played some role in changing the motives of those who seek to work in Congress. Unlike the eighteenth-century British Parliament, the U.S. Congress is *not* filled today with Members whose main goal in life is a desire for wealth to be sought through executive appointment to office.¹⁵⁷ And, while it is hard to isolate precisely how this cleansing of motives came about, the Incompatibility and Ineligibility Clauses must deserve some of the credit.¹⁵⁸ Simple logic makes clear that one would be much more likely to go into politics with the hope of getting an executive or judicial office if the supply of those offices were unlimited¹⁵⁹ and if acceptance of an office did not force the resignation of one's congressional seat.¹⁶⁰

This is not to suggest, however, that the ban on dual office holding has completely purged M.C.s of the desire for executive office. On the contrary, former M.C.s have played a big role in nearly every President's Administration. President Clinton's cabinet, for example, includes former Senators Al Gore and Lloyd Bentsen, and former Representatives Leon Panetta and Mike Espy. Former Representative Les Aspin served one year as Secretary of Defense. In addition, Sena-

¹⁵⁷ Studies of candidates' reasons for seeking congressional office reveal a multitude of motivations behind their decisions to run. See, e.g., Gordon S. Black, *A Theory of Political Ambition: Career Choices and the Role of Structural Incentives*, 66 AM. POL. SCI. REV. 144 (1972); Rufus P. Browning & Herbert Jacob, *Power Motivation and the Political Personality*, 28 PUB. OPINION Q. 75 (1964); Thomas A. Kazee, *The Decision to Run for the U.S. Congress*, 1 LEGIS. STUD. Q. 79 (1980). Prominent among the reasons candidates give for seeking congressional office is the personal satisfaction they achieve from running. See, e.g., Kazee, *supra*, at 82.

¹⁵⁸ Credit also goes to the Framers for giving Congress, and not the President, the power to create new offices and for dividing the appointment power between the President and the Senate. Their refusal to grant an executive power to confer titles of nobility is also relevant here.

¹⁵⁹ Of course, the supply of offices would be limited by the individual Member's ability to influence fellow legislators to create an office for her.

¹⁶⁰ The acceptance of *any* office under the United States by a Member of Congress has been held to operate as a forfeiture of his seat. Case XVIII—John P. Van Ness, of New York, CASES OF CONTESTED ELECTIONS IN CONGRESS 123 (1834).

tor Sam Nunn was a top contender for Secretary of State (or Defense), and Senator Patrick Leahy was considered for Attorney General.

This tendency of Presidents to draw their advisors from the ranks of Congress has been documented empirically. One study surveyed the political appointments of Presidents Roosevelt, Truman, Eisenhower, Kennedy, and Johnson and found that former congressmen¹⁶¹ filled six out of every one hundred executive posts studied.¹⁶² Moreover, this study found that the likelihood of finding former M.C.s in a particular post rises sharply with the prestige and power of the executive office. Thus, 16% of all Cabinet secretaries in these administrations came from the ranks of Congress,¹⁶³ while former M.C.s accounted for a mere 1% of agency deputy administrators.¹⁶⁴

But, these numbers, while noteworthy, are not so dramatic as to prove that realized desire for executive office powerfully corrupts Congress. Political science research predictably confirms that once a politician's ambitions are focused on a particular office, she will alter

¹⁶¹ These really were men. Only 12 of the 1,567 appointments made by these five presidents went to women. See DAVID T. STANLEY ET AL., *MEN WHO GOVERN: A BIOGRAPHICAL PROFILE OF FEDERAL POLITICAL EXECUTIVES 2* (1967).

¹⁶² *Id.* at 41-42. The researchers studied a total of 1,567 appointments to the following executive positions: secretary, under secretary, assistant secretary and general counsel of ten Cabinet and three military departments; administrator and deputy administrator of major administrative agencies; and members of seven regulatory boards and commissions. *Id.* at 3.

¹⁶³ *Id.* at 43. It should be noted, however, that these secretaries did not necessarily come directly from Congress.

¹⁶⁴ *Id.* at 41-42, 139 (table E.6). As for particular departments and agencies, former legislators most often served in the Federal Trade Commission, the Civil Aeronautics Board, the Department of Interior, the National Labor Relations Board, and the Department of Health, Education and Welfare. Not surprisingly, they were least prevalent in the Departments of the Army and the Navy. *Id.* at 43, 140-41 (table E.7).

A subsequent study found that Presidents Nixon, Ford, Carter, and Reagan drew an average of only 1.5% of their top appointees from Congress. See Linda L. Fisher, *Fifty Years of Presidential Appointments*, in *THE IN-AND-OUTERS* 1, 15 (G. Calvin Mackenzie ed., 1987); Janet M. Martin, *An Examination of Executive Branch Appointments in the Reagan Administration by Background and Gender*, 44 *W. POL. Q.* 173, 177 (1991). But, this study may greatly understate the presence of former members in the executive department. First, the study counted only those officials whose occupation "immediately prior to appointment" was as a member of Congress. Thus, this study leaves out many former M.C.s who would have been included in the Stanley survey. Second, the researchers collected data on a smaller cross-section of executive officials. See Martin, *supra*, at 174 n.1. Third, these last four Administrations more frequently confronted Congresses dominated by the opposite party than did the five Administrations between FDR and LBJ. This too may have reduced the desirability or likelihood that the President would offer Cabinet spots to former M.C.s. Accordingly, the results of these two studies are not directly comparable.

The trend toward appointing former members of Congress increased substantially under President Bush. Bush, a former member himself, appointed six former Members of Congress as Cabinet secretaries—Richard B. Cheney, Manuel Lujan, Jr., Jack F. Kemp, Edward J. Derwinski, Lynn Martin, and Edward Madigan. All had served as members of Congress immediately prior to their appointment. A seventh nomination, that of former Senator John Tower (R-Tex.) to be Secretary of Defense, was rejected by the Senate.

her behavior in her current job in order to get the job she has targeted.¹⁶⁵ Unhappily, there is no good way to measure the effect that congressional desire for executive office has on legislative behavior. But, several realities of modern government make clear that the President has few opportunities to affect legislation by rewarding friendly legislators with executive appointments.

First, the fact that the Incompatibility Clause forces a Member of Congress to give up her legislative seat to accept an appointment means that aspiring to executive office is not costless. Before an M.C. will betray the interests of her constituents in order to curry favor with the President, she must weigh the benefit of a possible executive appointment¹⁶⁶ against the cost of leaving Congress, which includes loss of congressional seniority and other non-transferable political resources.¹⁶⁷ Second, the very limited supply of desirable offices and the relatively remote chance of an actual appointment¹⁶⁸ might discourage an M.C. from running the risk that her friendliness to the Administration might go unrewarded by the President but be remembered by voters at the polls. Thus, to the extent that the Incompatibility Clause forces legislators to calculate the political costs of voting with the President out of a selfish desire for office, the Clause has been a success.

Nevertheless, the President's inability to confer executive office *directly* on individual M.C.s does not mean that the evil which the

¹⁶⁵ As Joseph Schlesinger has noted, "the constituency to which a legislator is responding is not always the one from which he has been elected, and . . . it is more important to know what he wants to be than how he got to be where he now is." JOSEPH A. SCHLESINGER, *AMBITION AND POLITICS* 5 (1966). Schlesinger was the first to study systematically the impact of political ambition on political behavior. Subsequent research has generally supported Schlesinger's conclusions. See, e.g., Stephen E. Frantzich, *De-Recruitment: The Other Side of the Congressional Equation*, 31 W. POL. Q. 105 (1978); Dennis O. Grady, *Gubernatorial Behavior in State-Federal Relations*, 40 W. POL. Q. 305 (1987); John R. Hibbing, *Ambition in the House: Behavioral Consequences of Higher Office Goals Among U.S. Representatives*, 30 AM. J. POL. SCI. 651 (1986); Keith Nicholls, *The Dynamics of National Executive Service: Ambition Theory and the Careers of Presidential Cabinet Members*, 44 W. POL. Q. 305 (1991); Jack R. Van Der Slik & Samuel J. Pernacciaro, *Office Ambitions and Voting Behavior in the U.S. Senate: A Longitudinal Study*, 7 AM. POL. Q. 198 (1979).

¹⁶⁶ The marked decline in the perceived desirability of executive offices since the late eighteenth century may also account for the relatively small number of former legislators who have occupied executive office. For political science literature discussing the disincentives to federal executive service, see RICHARD F. FENNO, JR., *THE PRESIDENT'S CABINET* 59-62 (1959); JOHN W. MACY ET AL., *AMERICA'S UNELECTED GOVERNMENT: APPOINTING THE PRESIDENT'S TEAM* 12-14 (1983); G. CALVIN MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 241-42 (1981); DEAN E. MANN & JAMESON W. DOIG, *THE ASSISTANT SECRETARIES: PROBLEMS AND PROCESSES OF APPOINTMENT* 278 (1965); Nicholls, *supra* note 165, at 154.

¹⁶⁷ Frantzich, *supra* note 165, at 106.

¹⁶⁸ For example, a study conducted by Stephen Frantzich revealed that of 357 Representatives leaving the House between 1966 and 1974, only four of them were appointed to federal executive office. Three additional members were appointed to the federal judiciary. *Id.* at 113.

Clause targeted has been stamped out. Although M.C.s cannot themselves hold office, there is no constitutional bar to prevent their spouses, aides, and friends from doing so.¹⁶⁹ Some evidence exists to suggest that the ground for playing the patronage game may have simply shifted to these constitutionally permissible playing fields.

Unhappily, there is no good way of measuring how often Presidents are able to build congressional support by making well-timed appointments. As G. Calvin Mackenzie notes, “[t]here are few incentives for partners in this kind of a bargain to admit its occurrence publicly or to divulge the terms of trade.”¹⁷⁰ Nonetheless, anecdotal information abounds and belies any claim that the inclusion of the Incompatibility Clause in our Constitution has eradicated the ancient governmental impulse whereby Kings and Presidents have used patronage to build legislative support.

One fact that may be of some relevance here is the frequent presence of congressional spouses in executive (and even judicial) offices during the last three Administrations. Among those spouses who have served, or are now serving, we can count: Elizabeth Dole,¹⁷¹ Dee Jepsen,¹⁷² Anne Bingaman,¹⁷³ Ruth Harkin,¹⁷⁴ Sharon Percy Rockefeller

¹⁶⁹ This was no oversight. The loophole left by the Incompatibility Clause’s failure to protect against the appointment of M.C.s’ friends and family members was one of the Federalist’s central arguments against the Clause. See *supra* note 150 and accompanying text.

¹⁷⁰ MACKENZIE, *supra* note 166, at 224.

¹⁷¹ Wife of U.S. Sen. Robert Dole (R-Kan.), she served under President Reagan: as Assistant to the President for Public Liaison; as a member of his Council to Coordinate Women’s Issues, Steven V. Roberts, *Surveys on Women’s Reaction Worry White House*, N.Y. TIMES, Sept. 1, 1982 at B6; as a Member of the Federal Trade Commission (FTC); and as Secretary of Transportation, *Congressional Wives Taking Own Place in Sun*, U.S. NEWS & WORLD REP., July 18, 1983, at 54 [hereinafter *Congressional Wives*]. She also served President Bush as his first Secretary of Labor. *Task at Labor*, N.Y. TIMES, Dec. 28, 1988, at A26. Conveniently, Senator Dole and his wife were able to share, or swap, a staff member. Rod DeArment left his post as Chief of Staff to the then-Senate Majority Leader to become Deputy Secretary of Labor. Frank Swoboda, *Outgoing at Labor: Daily Overseer*, WASH. POST, May 22, 1991, at A19.

¹⁷² Wife of then-U.S. Sen. Roger W. Jepsen (R-Iowa), she served on the White House Council to Coordinate Women’s Issues with Elizabeth Dole.

¹⁷³ Wife of U.S. Sen. Jeff Bingaman (D-N.M.), she presently serves President Clinton as his Assistant Attorney General for the Antitrust Division. Laurie McGinley, *A Growing Number of Well Connected Women Land Key Positions in Clinton Administration*, WALL ST. J., June 2, 1993, at A16.

Attorney General Janet Reno’s quoted reaction was: “When I first heard that the White House was pushing Anne Bingaman, I said, ‘Hmmm. Now the White House is pushing a senator’s wife on me.’” According to Reno, however, she has since learned how very able Ms. Bingaman really is. Stephen Labaton, *Rousing Antitrust Law From Its 12-Year Nap*, N.Y. TIMES, July 25, 1993, at 8.

¹⁷⁴ Wife of U.S. Sen. Tom Harkin (D-Iowa), she presently serves President Clinton as the President of the Overseas Private Investment Corporation (OPIC). *Ruth Harkin To Take Oath as OPIC President*, J. OF COMM., June 1, 1993, sec. A at 3. Ruth Harkin was a prime contender, along with former Rep. Matthew McHugh (D-N.Y.) for Administrator of the Agency for International Development (AID). A bitter fight ensued and both Harkin and

ler,¹⁷⁵ Wendy Lee Gramm,¹⁷⁶ Heather Gradison,¹⁷⁷ Jane Roth,¹⁷⁸ Jeanne Hyde,¹⁷⁹ Harry Leinenweber,¹⁸⁰ Kathryn Porter,¹⁸¹ Cheryl Weber,¹⁸² Maryanne Knause,¹⁸³ Rita Gail,¹⁸⁴ Susan Coughlin,¹⁸⁵ Loret Ruppe,¹⁸⁶ Doris Matsui,¹⁸⁷ Sheila Anthony,¹⁸⁸ Louise McClure,¹⁸⁹ Col-

McHugh lost out. Mary McGrory, *Clinton Foot-dragging Leaves 3,000 Federal Positions Unfilled*, BUFFALO NEWS, Apr. 16, 1993, at 3.

¹⁷⁵ Wife of U.S. Sen. John D. (Jay) Rockefeller IV (D-W.Va.) and daughter of former U.S. Sen. Charles H. Percy (R-Ill.), she served President Reagan as head of the Corporation for Public Broadcasting. She was quoted as telling *The National Journal*: "Between my father and my husband, I have known many members of Congress. I've never had difficulty getting an appointment." Carol Matlack, *Connected Couples*, 1991 NAT'L J. 1793, 1798.

¹⁷⁶ Wife of U.S. Sen. Phil Gramm (R-Tex.), she served as Chairman of the Commodity Futures Trading Commission (CFTC), and as Director of the Bureau of Economics at the FTC. *Congressional Wives*, *supra* note 171, at 59.

¹⁷⁷ Wife of then-U.S. Rep. Willis D. Gradison, Jr. (R-Ohio), she was appointed by President Reagan to the Interstate Commerce Commission (ICC), ultimately serving as ICC Chairman. Carole Shifrin, *Heather Gradison Wins Reagan ICC Nomination*, WASH. POST, March 19, 1982, at E8.

¹⁷⁸ Wife of U.S. Sen. William V. Roth (R-Del.), she was appointed a U.S. District Judge by President Reagan and a U.S. Court of Appeals Judge by President Bush. Howard Kurtz, *Sen. Roth's Wife Picked To Be A Federal Judge*, WASH. POST, May 24, 1985, at A8.

¹⁷⁹ Wife of U.S. Rep. Henry Hyde (R-Ill.), she was appointed by President Reagan to serve as Staff Assistant in the Office of Presidential Correspondence. *Congress: Spouse's Jobs*, U.S.A. TODAY, May 4, 1989, at 6A.

¹⁸⁰ Husband of then-U.S. Rep. Lynn Martin (R-Ill.), he was appointed by President Reagan to be a U.S. District Judge. *Id.* Former Rep. Martin herself served President Bush as Secretary of Labor.

¹⁸¹ Wife of U.S. Rep. John Porter (R-Ill.), she was appointed to serve as a Special Assistant in the U.S. Department of Energy. *Id.*

¹⁸² Wife of then-U.S. Rep. Vin Weber (R-Minn.), she was appointed by HUD Secretary (and former U.S. Rep.) Jack Kemp to serve in the Congressional Affairs Office, U.S. Department of Housing and Urban Development. *Id.*

¹⁸³ Wife of U.S. Rep. Hamilton Fish (R-N.Y.), she served President Bush as Acting Director, White House Liaison, U.S. Department Commerce. *Id.*

¹⁸⁴ Wife of U.S. Rep. Benjamin Gilman (R-N.Y.), she worked as a lawyer in the U.S. Department of Labor. *Id.*

¹⁸⁵ Wife of U.S. Rep. Lawrence Coughlin (R-P.A.), she served President Bush as Deputy Administrator of the Federal Railroad Administration. *Id.*

¹⁸⁶ Wife of former U.S. Rep. Philip E. Ruppe (R-Mich.), she served President Reagan as Director of the Peace Corps. Kathryn Tolbert, *Winner's Way: Potomac's Loret Ruppe Bones Up to Direct the Peace Corps*, WASH. POST, March 26, 1981, at MD1. Ruppe later went on to become President Bush's Ambassador to Norway. U.S. GOV'T MANUAL 1989-90 911 (1989).

¹⁸⁷ Wife of U.S. Rep. Robert Matsui (D-Calif.), she serves President Clinton as a Deputy Assistant in the White House. McGinley, *supra* note 173, at A16.

¹⁸⁸ Wife of former U.S. Rep. Beryl Anthony (D-Ark.), she presently serves President Clinton as Assistant Attorney General for Legislative Affairs. She is also the sister of recently deceased Deputy White House Counsel Vince Foster. *Id.*

¹⁸⁹ Wife of then-U.S. Sen. James McClure (R-Idaho), she was appointed by President Bush to the National Endowment for the Arts, Advisory Council. Allan Parachini, *Top NEA Lawyer Julianne Davis Quits*, L.A. TIMES, April 17, 1991, at F5.

leen Nunn,¹⁹⁰ and Lynn Cheney.¹⁹¹ Other congressional relatives have served in high executive offices as well. For example, President Clinton appointed Jean Kennedy Smith, "favorite sister" to U.S. Sen. Edward M. Kennedy (D-Mass.), to be Ambassador to Ireland,¹⁹² and Sally Metzenbaum, daughter of U.S. Sen. Howard Metzenbaum, was named to head regional operations for the Environmental Protection Agency (EPA).¹⁹³ Finally, Linda Daschle, wife of Senator Tom Daschle (D-S.D.), is the Deputy Administrator at the Federal Aviation Administration. Husband Tom provided a key vote last year for President Clinton's Budget package.¹⁹⁴

Moving beyond immediate family to friends, former staff, and former M.C.s, we find a host of names. Among the former M.C.s recently appointed to executive or judicial offices are: Al Gore, George Bush, Dan Quayle, Lloyd Bensten, Les Aspin, Leon Panetta, Mike Espy, Tim Wirth, Dick Cheney, Manuel Lujan, Jack Kemp, Bill Brock, Howard Baker, Lynn Martin, Richard Schweicker, Margaret Heckler, Chic Hecht, Walter Mondale, Nicholas Brady, James Buckley, Abner Mikva, and Charles Wiggins.¹⁹⁵ Among the former staff and friends are: cur-

¹⁹⁰ Wife of U.S. Senator Sam Nunn (D-Ga.), she once served in the Central Intelligence Agency (CIA) but resigned and has turned down other positions to avoid a "conflict of interest." Lloyd Grove, *The Limited Life of a Political Wife*, WASH. POST, March 19, 1992, at C1.

¹⁹¹ Wife of then-U.S. Rep. Richard B. (Dick) Cheney (R-Wyo.), she served Presidents Reagan and Bush as Chairman of the National Endowment for the Humanities. Leslie Maitland Werner, *Of Humilities and Humanities*, N.Y. TIMES, June 12, 1986, at B6.

¹⁹² Al Kamen, *Exchanging One Chair for Another*, WASH. POST, March 11, 1993, at A27. U.S. Sen. Clairborne Pell (D-R.I.), Chairman of the Committee on Foreign Relations, explained the appointment "indicates the respect and affection the Kennedy and Clinton wings of the party have for each other." Phil McCombs, *The Wearin' O' the Black Tie*, WASH. POST, March 17, 1993, at B1.

¹⁹³ *Clinton Fills Posts At EPA and Energy Department*, WALL ST. J., July 19, 1993, at A12.

¹⁹⁴ *Daschle Confirmed for FAA Post*, J. OF COMM., Nov. 23, 1993, sec. B at 3.

¹⁹⁵ Former Congressman George Bush (R-Tex.) served as President Reagan's Vice President; former Senator Timothy E. Wirth (D-Colo.) is a Special Ambassador at the Department of State; former Congressman Manuel Lujan, Jr. (R-N.M.) served as President Bush's Secretary of Interior; former Congressman Jack F. Kemp (R-N.Y.) served as President Bush's Secretary of Housing and Urban Development; former Congressman and Senator William E. Brock (R-Tenn.) served both as President Reagan's Secretary of Labor and as Trade Representative; former Senator Howard Baker (R-Tenn.) served as President Reagan's Chief of Staff; former Congresswoman Lynn Martin (R-Ill.) served as President Bush's Secretary of Labor; former Senator Richard Schweicker (R-Pa.) served as President Reagan's Secretary of Health and Human Services; former Congresswoman Margaret M. Heckler (R-Mass.) served as President Reagan's Secretary of Health and Human Services and Ambassador to Ireland; former Vice President and Senator Walter F. Mondale is the Ambassador to Japan; former Senator Nicholas F. Brady (R-N.J.) served Presidents Reagan and Bush as Secretary of Treasury; former Senator James L. Buckley (R-N.Y.) is a Circuit Court Judge for the U.S. Court of Appeals for the District of Columbia Circuit. Other perhaps less well-known figures, who after retirement or electoral defeat joined the executive include: former Senator James Abdnor (R-S.D.) who became President Reagan's Administrator of the Small Business Administration; former Congressman Henson Moore (R-La.) who became President Reagan's Deputy Secretary of Energy; former Congresswoman

rent EPA Administrator Carol Browner,¹⁹⁶ former Director of the Office of Personnel Management (OPM) and, later, Undersecretary of Health and Human Services (HHS) Constance Horner, former HHS Assistant Secretary Kay James, former HHS Deputy Assistant Secretary Nabers Cabaniss,¹⁹⁷ National Endowment for the Arts Chair Jane Alexander,¹⁹⁸ the twenty-one Reagan Administration ambassadors who publicly endorsed U.S. Sen. Jesse Helms' (R-N.C.) 1984 re-election bid,¹⁹⁹ U.S. Supreme Court Justices David Souter²⁰⁰ and Clarence Thomas,²⁰¹ Bob Lighthizer,²⁰² Securities and Exchange Commission (SEC) member Richard Roberts,²⁰³ George Stephanopoulos,²⁰⁴ Mark Gearan,²⁰⁵ and the one-hundred and eighteen former Democratic staff members from Capitol Hill who *The Washington Post* reports are now working loyally for President Clinton.²⁰⁶ Of these,

Patricia Saiki (R-Haw.) who became President Bush's Administrator of the Small Business Administration; former Senator Roger W. Jepsen (R-Iowa) who became Chairman of the National Credit Union Administration; and former Senator Chic Hecht (R-Nev.) who became Ambassador to the Bahamas under President Bush.

¹⁹⁶ Formerly a legislative aide to then-U.S. Sen. Al Gore (D-Tenn.) and before that to then-U.S. Sen. (now Gov.) Lawton Chiles (D-Fla.).

¹⁹⁷ In addition, Cabaniss had previously served on Capitol Hill as an aide to former U.S. Sen. Jeremiah Denton (R-Ala.) and U.S. Sen. Jesse Helms (R-N.C.). Ms. Cabaniss held key HHS positions under both Presidents Reagan and Bush.

¹⁹⁸ An actress, she was pushed for the National Endowment for the Arts by U.S. Senator Claiborne Pell (D-R.I.) and U.S. Rep. Sydney Yates (D-Ill.), "who both helped create the NEA in 1965 and now chair the subcommittees that oversee the agency." Jacqueline Trescott, *Actress To Be Nominated to Head NEA: Jane Alexander is Supported by Arts Community, Hill Leaders*, WASH. POST, July 30, 1993, at G1.

¹⁹⁹ Philip Geyelin, *Unseemly Ambassadors*, WASH. POST, Oct. 30, 1984, at A19.

²⁰⁰ Souter had served as an Assistant Attorney General under then New Hampshire Attorney General and later U.S. Sen. Warren B. Rudman (R-N.H.). Thereafter, Souter and Rudman remained close friends. Rudman was regarded as essential in securing Souter's nomination to the Court. See MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1992, at 761 (1991).

²⁰¹ Thomas is a former aide and close friend to U.S. Sen. Jack Danforth (R-Mo.). Throughout Thomas' career, Danforth played the same vital role for Thomas that Rudman had played for Souter. *Id.* at 729.

²⁰² Former Chief Counsel to the Senate Finance Committee and then President Reagan's Deputy Trade Representative under Bill Brock. David Shribman, *Rising With a Network of Contacts*, N.Y. TIMES, Apr. 27, 1983, at A22. Then-U.S. Sen. Russell B. Long (D-La.) emphasized his pleasure at the appointment by explaining at Lighthizer's confirmation hearing that Mr. Lighthizer would have an entertainment allowance in his new job and that Finance Committee members would be "sort of disappointed if you don't invite us out and pick up the tab on at least one occasion." *Id.*

²⁰³ A former Chief of Staff to U.S. Sen. Richard C. Shelby (D-Ala.), Roberts was appointed to the SEC by Republican President George Bush. Gregory A. Robb, *Democratic Nominee for S.E.C. Seat*, N.Y. TIMES, Aug. 4, 1990, at A31.

²⁰⁴ Stephanopolous served as a former staffer to House Majority Leader Richard A. Gephardt (D-Mo.). Ann Devroy, *Undergirding McLarty, A Second-Tier Contrast*, WASH. POST, Dec. 14, 1992, at A1, A6.

²⁰⁵ Top Clinton White House aide and a former Chief of Staff to a Democratic M.C. *Id.*

²⁰⁶ Al Kamen, *So Much for the New Guard*, WASH. POST, Apr. 23, 1993, at A21.

37 have landed jobs in the White House, and 38 have followed three Cabinet members who came from the Hill. [Former] Defense Secretary Les Aspin ha[d] 15 people (11 from the House Armed Services Committee he chaired); Treasury Secretary Lloyd Bentsen has 13 (including 11 from the Senate Finance Committee he led); and Agriculture Secretary Mike Espy has 10 (including six former aides either on his staff or from the House Agriculture Committee.)

In addition, six of Vice President Gore's key Senate people have moved to the White House and many former Gore people have been sprinkled throughout the Clinton administration in key positions.²⁰⁷

A recent Article in *The American Political Science Review* explains both the phenomenon and its likely implications for those Presidents who hire former Hill Staff:²⁰⁸

[A] sizable fraction of time . . . in the Washington world is devoted to career development and protection, by nearly everyone to be sure, but specifically by members of Congress on behalf of their staffs. Indeed, some legislators are known for their staff networks spread throughout the Washington community; while formal ties are severed, member and ex-staffer "keep in touch."²⁰⁹

In sum, there can be no doubt that Members of Congress to some degree circumvent the Incompatibility Clause by securing executive and judicial offices for their spouses, relatives, friends, staffers, and former colleagues in Congress. This is NOT to say that these individuals are necessarily unqualified for the posts they hold. Indeed, one of us worked with a few of the individuals listed above and found them to be quite a bit *more* able than many other Reagan or Bush Administration officials, who lacked their political savvy. Moreover, the explosion of two-career families has made it often desirable, and necessary, for congressional spouses to hold executive jobs. Our *only* claim here is the very limited point that determined executives and legislators may easily circumvent the Incompatibility Clause. We think the point is clearly buttressed by the admittedly anecdotal evidence presented above.

These examples suggest that Members of Congress and the President do, at times, get around the Incompatibility Clause by exploiting the fact that the Clause does not apply to the spouses, aides, and friends of M.C.s.²¹⁰ Mackenzie notes that "[w]hile the President cannot create legislative majorities simply by offering appointments in ex-

²⁰⁷ *Id.*

²⁰⁸ Robert H. Salisbury & Kenneth A. Shepsle, *Congressional Staff Turnover and the Ties That Bind*, 75 AM. POL. SCI. REV. 381 (1981).

²⁰⁹ *Id.* at 394.

²¹⁰ Perhaps now with the rise of more two career congressional families, this problem will become more acute.

change for congressional votes, his appointment powers do allow him occasional tactically significant opportunities to curry favor among key legislators or to change the outcome of a legislative vote that is likely to be extremely close."²¹¹ Thus, if the Framers' intent in making congressional service incompatible with executive office was to eliminate patronage and its influencing effects, the Clause has not fully achieved its goal. Although the Clause may have reduced the effects of presidential patronage, its biggest impact may have been merely to change the *beneficiaries* of such patronage as the President chooses to confer.²¹²

C. Unanticipated Consequences: Stronger President, Reinforced Separation of Powers

In many respects, the story of the Incompatibility Clause's actual impact over the last two hundred years is a study in unforeseen consequences. Although the Framers' primary goal for the Clause was to curtail legislative "corruption," Section B demonstrated that the Clause has had only a limited ethics rule impact.²¹³ Nonetheless, we think it self-evident that the Clause *has* played a dramatic role in shaping our governmental institutions, although in ways largely unforeseen by its drafters. Specifically, the Clause has: 1) contributed to the strengthening of the Presidency and 2) reinforced the constitutional separation of powers. We turn now to an examination of both of these momentous, albeit unanticipated, consequences of the Incompatibility Clause.

1. *A Stronger, More Independent President*

The Framers believed the Incompatibility Clause would *reduce* Presidential power as well as guard against "corruption." The debates at Philadelphia make plain the delegates' fear that allowing M.C.s to hold office would subject Congress to presidential control.²¹⁴ Although logic should have counselled concern for the equal and opposite possibility of congressional control of the executive, the Fram-

²¹¹ MACKENZIE, *supra* note 166, at 224.

²¹² It should be noted at this point that the Republicans at the Philadelphia Convention may have agreed to allow M.C.s to be appointed to executive offices, with the sole condition that they resign their legislative seats, because they may have believed that the executive would not have the power to remove officers at will. Thus, there would have been fewer open offices, and a weaker impulse among M.C.s to aspire to office. However, this changed with interpretation and the Republicans later proposed a constitutional amendment to deprive the executive of any removal power, although this proposal was never approved.

²¹³ See *supra* notes 157-212 and accompanying text.

²¹⁴ See *supra* notes 94-156 and accompanying text.

ers never expressed a fear of *Congress* forcing the President to grant *its* Members executive office to gain legislative support for his programs.

It may at first seem surprising that the Framers would so fear presidential abuse of patronage as a threat to congressional independence. After all, the Constitution was written largely to stop the abuses of the state legislatures, which had so grossly usurped even the limited executive power granted under the early state constitutions.²¹⁵ However, under the new Federal Constitution, the appointments power was not to rest in the legislature alone, as it had under most of the state constitutions,²¹⁶ but rather would be exercised by the President acting jointly with the Senate.²¹⁷ Thus, the danger of English-style executive abuse of the appointments power was thought to have reemerged.

The Framers offered two reasons why the President had to have a key role in the appointments process. First, there was an "unspoken consensus" that the President had to have the power to pick his subordinates so he could provide for the effective administration of the government.²¹⁸ Second, the Framers were wary of recreating a situation, such as existed under the state constitutions, where unaccountable, multi-member legislatures conferred offices on their "friends, favorites, and dependents."²¹⁹ A presidential appointments power would mean appointments by a "single, responsible person,"²²⁰ who would at least have the virtue of having "*fewer* personal attachments to gratify."²²¹

Although a presidential appointments power, shared with the Senate, carried the day,²²² many delegates feared abuse.²²³ They feared that control over patronage would make the President a *de facto* King even if he lacked power to create offices, confer Titles of Nobil-

²¹⁵ See *supra* notes 116-19 and accompanying text.

²¹⁶ See *supra* note 52.

²¹⁷ U.S. CONST. art. 2, § 2.

²¹⁸ Blumoff, *supra* note 35, at 1069 n.194. Madison's speech on the floor of the House on June 16, 1789 supports this point: "I conceive that if any power whatsoever is in its nature executive, it is the power of appointing . . . those who execute the laws." James Madison, *Speech on the Floor of the House*, in WRITINGS, *SUPRA* note 112, at 394.

²¹⁹ 1 WORKS OF JAMES WILSON 359-60 (J. Andrews ed., 1896). See also 1 RECORDS, *supra* note 9, at 119 (June 5, 1787) (statement of James Wilson) ("Intrigue, partiality, and concealment were the necessary consequences" of appointments by a multi-member body.).

²²⁰ 1 RECORDS, *supra* note 9, at 119 (June 5, 1787) (statement of James Wilson).

²²¹ THE FEDERALIST No. 76, *supra* note 1, at 456 (Alexander Hamilton).

²²² Blumoff argues that locating the appointments power in any department of government caused the Framers such distress that "but for the need to lodge an appointing power somewhere, one suspects that the delegates might never have agreed on article II, section 2, clause 2 of the Constitution." Blumoff, *supra* note 35, at 1061.

²²³ See *id.* at 1074-78 (discussing concerns that the Senate might be an ineffective check on the President's appointment power).

ity, or make appointments without senatorial consent.²²⁴ Hence, it was natural for the Framers to conclude that the Incompatibility Clause would *weaken* the President by offsetting somewhat the return to the Executive of a role in making appointments. Ironically, however, the Clause has almost certainly *increased* presidential power by securing presidential independence from Congress.²²⁵

To understand this paradox, one must imagine what our government would look like in the absence of an Incompatibility Clause. In doing this, we must remember that the American President has few powers that are expressly granted by the Constitution. In fact, the President is vested personally with only eight specifically enumerated powers,²²⁶ which, although not insignificant, pale in comparison to the list of eighteen powers the Constitution specifically gives to Congress.²²⁷ The real political power of the presidency, therefore, stems from the Chief Executive's ability to appoint, remove, and, to some degree, oversee the thousands of like-minded officials who, as his agents, actually run the federal government.²²⁸ Absent the Incompatibility Clause, however, the President would have totally lost this vital source of power. Without such a Clause, he would have been forced to fill many, if not most, of the highest executive posts with powerful Members of Congress.²²⁹

The proof of this is easy to make. The President has an obvious interest in passing legislation. He owes his office to the public's general agreement with his proposed plan for governing, and, thus, has a duty to the electorate to try to carry out his popular mandate. Success

²²⁴ See, e.g., Luther Martin, *Information to the General Assembly of the State of Maryland* (Nov. 29, 1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 91, at 68 (the power of appointment will make the President "King in name, as well as in substance"); Patrick Henry, *Speech Against Ratification*, in THE POWER OF THE PRESIDENCY 22 (R. Hirschfield ed., 1968) (arguing that the President could easily become a King).

²²⁵ Willi P. Adams notes that, in light of the common rhetoric regarding the colonists' visceral reaction to abuse of executive power, "the striking fact of historical dimension is that the reaction against the colonial governor was so weak that it did not lead to parliamentary government with an executive committee of members of the legislature, but rather that within a decade the American system of presidential government evolved with full clarity and permanence." ADAMS, *supra* note 33, at 271.

²²⁶ See U.S. CONST. art. II, § 2.

²²⁷ See U.S. CONST. art. I, § 8, cls. 1-18. Many of these 18 powers have been broadly construed. For example, many argue that the New Deal Supreme Court's remarkable expansion of the commerce power allows Congress to do virtually anything it wants. See, e.g., TRIBE, *supra* note 15, § 5-8, at 316.

²²⁸ See U.S. CONST. art. II, § 2, cl. 2.

²²⁹ Of course, the President's freedom to appoint whomever he wishes to executive office is already restricted by Congress. See Theodore B. Olson, *The Impetuous Vortex: Congressional Erosion of Presidential Authority*, in THE FETTERED PRESIDENCY 225, 233-35 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989). Nonetheless, the President traditionally has been allowed exclusive control over his "inner-circle" of appointees. MACKENZIE, *supra* note 166, at 228-29.

in the legislative arena, moreover, helps ensure his continuance in office and presumably sets the nation on a policy course he believes is good for the country.

Of course, the President cannot alone turn his programs into law. To accomplish this end, he needs the cooperation of Congress and, thus, needs the means to influence that body. Absent a constitutional prohibition, one source of influence would have been the President's ability to appoint M.C.s to high executive office.²³⁰ And once Members of Congress realized how dependent the President was upon them for his reelection success, the most influential among them would have routinely demanded appointment to prestigious executive posts.

This convergence of the Executive and Legislative Departments would have dramatically changed the character of the Presidency as we know it today. Perhaps the greatest curtailment of presidential power would have stemmed from the President's inability independently to develop and recommend legislation to Congress.²³¹ If M.C.s dominated the President's Cabinet, the government would effectively be run by congressional committee. The President would, thus, be unable independently to perform many of the responsibilities that he is now expected to undertake, such as developing a budget for the national government, or proposing innovative programs that implement his campaign promises and respond to the needs of the country.²³² Even the President's ability to exercise his enumerated power as Commander-in-Chief, already the source of great contention between the legislative and executive departments, would be effectively destroyed if the President's Secretary of Defense were *simultaneously* the Chairman of the Senate or House Armed Services Committee. Presidential inability to make independent policy proposals would be most evident during periods of divided party control of Congress and the Presidency.

²³⁰ This would have appealed to both of the passions that Benjamin Franklin perceived as having the greatest "influence on the affairs of men. These are ambition and avarice; the love of power, and the love of money." 1 RECORDS, *supra* note 9, at 82 (June 2, 1787).

²³¹ Textually, the President's role as "chief legislator" derives from the Constitution's command that the President shall "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. CONST., art. II, § 3. But it was not until the early twentieth century, under the administrations of Theodore Roosevelt, Woodrow Wilson, and Franklin Roosevelt, that the modern role of the President as policy initiator became a regular part of the American political system. The development of the President's role in policy formation is detailed in EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 303-17 (Randall W. Bland et al. eds., 5th ed. 1984).

²³² For example, whether or not one agrees with the undertaking, President Clinton would have been unable to develop and propose *his own* national health care plan if his Cabinet were dominated by current members of Congress.

The existence of our elaborate system of congressional committees and subcommittees further proves this point. Although the committee system is nowhere contemplated or described in the text of the Constitution, Congress has, for most of our history, maintained an extensive and costly extra-constitutional network of committees that watch over the work of the various Cabinet departments and agencies. Commentators have long recognized the power and significance of these unplanned appendages of the Legislative Department. But constitutional lawyers may not be fully aware that these appendages are, in fact, the stunted growths of parliamentary ministries within our constitutional system.²³³ Standing congressional committees, chaired by a Member of Congress, that conduct detailed *oversight* hearings are the beginnings of a compound legislature-executive of the kind that evolved in England over the last two hundred years. The constitutional bar of the Incompatibility Clause is, in our judgment, the main reason these stunted growths have not overrun the departments and agencies that they oversee.

The unplanned congressional committee system emerged in this country at least in part because hydraulic pressures in Congress caused it to grow. The ambition and love of power of our Senators and Representatives caused them to lust after the patronage and media glory that a committee post could bring. Who can doubt that if these hydraulic forces were great enough to raise up a committee system where none was contemplated, they would not also be great enough to raise up a full-fledged parliamentary government absent the bar of the Incompatibility Clause? This same evolution occurred in Britain between the end of the eighteenth and the middle of the nineteenth centuries, so why not also in the United States?

Well, one reason, it might be argued, is because, unlike the British, we have an independently elected executive, the President, instead of a hereditary executive Monarch who lacks democratic legitimacy. This is an important difference between our constitutional system and theirs but it by no means fully explains our presidential regime and rejection of parliamentarianism. Absent the Incompatibility Clause, we could easily have evolved into an intermediate semi-presidential regime like that of the French Fifth Republic. The President, with an independent electoral mandate, could quite well have found himself exercising a few enumerated powers, while a congressionally-chosen Prime Minister and Cabinet really ran the

²³³ Political scientists, however, are fully aware of this fact. Woodrow Wilson was certainly aware of the connection when he urged Americans to abandon government by legislative committees in favor of what he called British-style cabinet government. Woodrow Wilson, *Committee Government or Cabinet Government?* in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 72, 72-74 (Arend Lijphart ed., 1992) [hereinafter *PARLIAMENTARY*].

show. To illustrate this point further, consider how the French hybrid presidential-parliamentary system actually works.

The French Constitution of 1958 creates a divided dual executive,²³⁴ thus leaving open the possibility that the "government," as represented by the Prime Minister, will be independent of the President. The French President is chosen in elections separate from those for Parliament, and he thus receives an independent electoral mandate. Yet, the Constitution of the Fifth Republic still contemplates the existence of a separate Prime Minister whose government depends on parliamentary support. As a result, the French President is quite powerful when his party controls the National Assembly, in which case he can pick a Prime Minister he likes. The French President is very weak, however, when there is divided party control of the Presidency and the National Assembly, and in those circumstances the regime becomes essentially a parliamentary one.²³⁵

Divided party control of the Parliament and the Presidency, known as "*cohabitation*," has occurred twice in the lifetime of the Fifth Republic.²³⁶ The first instance happened in 1986, when President Francois Mitterrand, a Socialist, faced a National Assembly dominated by conservatives. Mitterrand picked the conservative leader, Jacques Chirac, to be Prime Minister. The resulting dual executive regime was an unhappy one. Mitterrand ceded control over all things domestic to Chirac and was able to keep only an advisory role on domestic policy. In addition, the existence of a dual executive power greatly hampered French foreign policy, since neither Mitterrand nor Chirac

²³⁴ The French Constitution divides the executive power between a Prime Minister, who is the head of government, and a President, who is the head of state. Although this mixed system is not uncommon to parliamentary democracies, France is unusual in that, since the presidency of Charles de Gaulle, the French President has wielded an enormous amount of actual power. The most dramatic change in the office of the presidency with the advent of the Fifth Republic has been the mode of selection. The President, once elected by the Parliament, is now chosen directly by the people, and thus receives an independent electoral mandate much the same as the President of the United States.

²³⁵ It has thus been said that "French semi-presidentialism does not mean either a synthesis of the parliamentary and presidential types or an intermediate category more or less halfway between them. Rather, it entails an *alternation* of parliamentary and presidential phases, depending on whether or not the President's party has a majority in the legislature." Arend Lijphart, *Introduction, in* PARLIAMENTARY, *supra* note 233, at 8. The potential for presidents and prime ministers of opposing parties has been called the "Achilles heel of the 1958 constitution." LESLIE DERFLER, *PRESIDENT AND PARLIAMENT: A SHORT HISTORY OF THE FRENCH PRESIDENCY* 213 (1983).

²³⁶ Arguably, the period immediately following the 1981 election of Socialist Francois Mitterrand could be counted as another period of divided party control of government, since the Parliament at the time was dominated by a center-right opposition. However, Mitterrand quickly dissolved the National Assembly and called for new elections which produced a Socialist majority.

could make binding international commitments.²³⁷ The Socialists won back the National Assembly after two years of *cohabitation*, only to lose it again to the conservatives in March 1993. Conservative Edouard Balladur is thus the head of the government for the last two years of Mitterrand's current term. Thus, France today exemplifies what the U.S. might be like if, in the absence of the Incompatibility Clause, an American President were forced to share the executive power with his congressional-cabinet members. A figurehead President presides over a parliamentary regime in which most real power is exercised by a Prime Minister and Parliament in the hands of the opposition party.²³⁸

Skeptics might say, of course, that our Constitution allows for divided party control of the Presidency and of Congress, and, indeed, this condition has existed more often than not since 1945.²³⁹ But, while divided government is not without its problems,²⁴⁰ it cannot be equated with the radical fusing of the legislative and executive power that would ensue in the absence of the Incompatibility Clause. In that situation, we would trade gridlock for congressional control of the Cabinet and the government itself.

²³⁷ This evaluation is borne out by the impressions of journalists at the time. See, e.g., David Housego, *Mitterrand to Stress French Independence on Soviet Trip*, FIN. TIMES, July 7, 1986, at 2 (Mitterrand's visit to the Soviet Union "has less weight than Mr. Mitterrand's earlier trip to Moscow in 1984 . . . because 'cohabitation' has limited the powers of the French President to negotiate . . . [H]e does not have the power to make trade commitments that would bind the administration of Mr. Jacques Chirac.").

²³⁸ This analogy to the French system is not perfect. The French Constitution does contain an incompatibility clause requiring that those who are appointed to ministerial office resign their seats in Parliament. Fr. Const. art. XXIII, reprinted in 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Constitution du 4 Octobre 1958) (Blaustein and Flanz, ed. 1971). Interestingly, this reform was instituted by De Gaulle in an effort to secure the loyalty of his ministers. MAURICE LARKIN, FRANCE SINCE THE POPULAR FRONT: GOVERNMENT AND PEOPLE, 1936-1986 284-85 (1988). Nonetheless, it is the potential for a divided executive, through the office of the Prime Minister, that makes the French situation analogous to the government we would have in the absence of the Incompatibility Clause. Although our Constitution vests the executive power in one individual, who is at the same time head of state and head of the government, the presence of M.C.s in the Cabinet would have effectively divided the executive powers of the Presidency. Perhaps, although not necessarily, this would have reduced the American President's powers, rendering the actual scope of such presidential powers much closer to those of the figure-head Presidents of other Western democracies.

²³⁹ Between 1946 and 1992, Congress and the Presidency have been controlled by different political parties 67% of the time, or 30 out of 45 years. James A. Thurber, *Representation, Accountability, and Efficiency in Divided Party Control of Government*, 24 PS: POL. SCI. & POL. 653, 653 (1991). In contrast, between 1897 and 1945 divided party control of government occurred only 12% of the time. *Id.* But see David Menefee-Libey, *Divided Government as Scapagoat*, 24 PS: POL. SCI. & POL. 643, 643 (1991) (arguing that the contrast between pre- and post-World War II statistics is less sharp if one defines "divided government" to include periods in which a liberal President faced a conservative bipartisan coalition).

²⁴⁰ See *infra* notes 268-87 and accompanying text.

There is a reason why the Framers provided for separate elections of the President and Congress. That reason was to prevent the fusion of the divided powers of government by ensuring "that the executive should be independent for his continuance in office on all but the people themselves."²⁴¹ The Framers' constitutional system as it works today creates three different and independent electoral constituencies: the President's (and Vice President's) national constituency, each Senator's constituency of one state, and each Representative's constituency of one of the 435 congressional districts. The net result of this system, taken together with staggered four-year, six-year, and two-year fixed terms, is to create a complex and highly sophisticated method for sampling the national will of the American People. This system would be substantially defeated if the President's Cabinet, and three thousand or so political appointees, reported to Congress rather than to the President. Under such a regime, the President's proactive *national* voice would be totally submerged, and we would have a government of congressional committee chairs. Such a government would be too localist in orientation, and far too much federal money and attention would be lavished on the states and districts of the lucky M.C.s who happened to be Cabinet secretaries at any given time.²⁴² We are spared all of this because the Incompatibility Clause vitally protects the presidential independence created by the electoral system. Thus, although the Framers may have envisioned that the Incompatibility Clause would serve as a means to restrain presidential power, ironically the Clause in practice has actually *strengthened* the President by making him independent of control by congressional and localist influences.

²⁴¹ THE FEDERALIST NO. 68, *supra* note 1, at 413 (Alexander Hamilton). Hamilton also noted that the mode of electing the President was the only part of the Constitution not condemned by its Anti-Federalist opponents. *Id.* at 411 ("The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure.").

²⁴² As Madison explained more generally:

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another.

THE FEDERALIST NO. 51, *supra* note 1, at 321 (James Madison).

2. Reinforcing the Separation of Powers

The most striking, and to some the most troubling,²⁴³ actual effect of the Incompatibility Clause on the American political system over the last two hundred years is that the Clause has become one of the major constitutional roadblocks to the emergence in this country of a British-style parliamentary regime. Because the Clause bars M.C.s from holding office, it stops the Department Secretaries from formulating government policy and later proposing and defending the government's programs in Congress, as do the British Ministers in the House of Commons. In short, the Incompatibility Clause has kept Cabinet government out of the United States.

Of course, the Clause is not the only constitutional impediment to the development of an American parliamentary regime. Indeed, it is the election of the President independently of Congress, and his ability to retain office even when he does not command the confidence of the legislature, that are commonly cited as defining characteristics of American Presidential government.²⁴⁴ Nonetheless, as argued above, were it not for the Incompatibility Clause, the majority party in Congress might very well pressure its way into the President's Cabinet, thereby controlling the "government," if not the presidency itself.²⁴⁵ It is this institutional convergence of the legislative and executive offices of government that is usually thought to be a key attribute of parliamentary government; and it is by preventing this "nearly complete fusion of the executive and legislative powers"²⁴⁶ that the Incompatibility Clause plays a vital role in securing our constitutional system of separated powers.

Yet, although separation of powers is an obvious and inevitable result of a constitutional command that bars M.C.s from the President's cabinet, the records of the Federal Convention do not show any awareness by the Framers that adoption of the Incompatibility Clause was going to have the effect of securing the separation of powers. The

²⁴³ For works criticizing the Incompatibility Clause for its relationship to the separation-of-powers, see works cited *infra* note 267.

²⁴⁴ See, e.g., Samuel Beer, *The British Experience*, in REFORMING AMERICAN GOVERNMENT: THE BICENTENNIAL PAPERS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM 215-16 (Donald L. Robinson ed., 1985) [hereinafter REFORMING]; William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government*, in SEPARATION OF POWERS—DOES IT STILL WORK? 65, 75 (Robert A. Goldwin & Art Kaufman eds., 1986) [hereinafter SEPARATION OF POWERS]; Lijphardt, *Introduction*, in PARLIAMENTARY, *supra* note 233, at 1, 2-5; Douglas Verney, *Parliamentary Government and Presidential Government*, in PARLIAMENTARY, *supra* note 233, at 31, 41, 43. In Luxembourg, the Netherlands, Norway and Sweden, ministers are prohibited from serving in Parliament. However, because ministers are able to participate in debate and are deemed ultimately accountable to the parliament, political scientists classify these governments as parliamentary. Verney, *supra*, at 35-36.

²⁴⁵ See *supra* notes 230-42 and accompanying text.

²⁴⁶ WALTER BAGEHOT, THE ENGLISH CONSTITUTION 201 (1928).

delegates repeatedly said that controlling corruption was the purpose of the Incompatibility Clause,²⁴⁷ and although a few delegates were aware that inclusion of such a clause would affect the balance of power between Congress and the executive,²⁴⁸ the debates on incompatibility do not reveal a self-conscious attempt on the part of the Framers to set in motion a radical departure from the British system of parliamentary government.

We cannot fault the Framers for their failure to recognize that their inclusion of the Incompatibility Clause in the Constitution would result in a dramatically different form of democracy in America than in Great Britain. Although their discussion of the Clause undoubtedly focused more on controlling "corruption and the low arts of intrigue"²⁴⁹ than on structural concerns, this was not due to a lack of insight into the workings of the English Constitution. Rather, the Framers were simply unaware of the shape that British government would later take. As Margaret Banks reminds us, "British government in the eighteenth century was not what it is today. Some of the main characteristics of British government in the twentieth century were not fully developed or had not become apparent at the time the American Constitution was drafted."²⁵⁰ Indeed, another of the many ironies surrounding the Incompatibility Clause is that if the Framers had given serious thought to the structural consequences of the Clause, the state of English government in the eighteenth century might well have cautioned them that to *include* an Incompatibility Clause in the Constitution would actually *undermine* the system of checks and balances and separated powers!

²⁴⁷ See *supra* section II.A.3.

²⁴⁸ Only one speaker alluded to the separation of powers during the debates over the Incompatibility Clause, and even then the reference was made secondary to the concerns over corruption. In response to Madison's suggestion to exclude legislators only from those offices that "should be established, or the emoluments thereof, augmented" during their service in Congress, see 1 RECORDS, *supra* note 9, at 386 (June 23, 1787), Elbridge Gerry remarked:

At the beginning of the war we possessed more than Roman virtue. . . . [Yet now w]e have more land and stock-jobbers than any place on earth. It appears to me, that we have constantly endeavored to keep distinct the three great branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators to share in the executive, or to be too much influenced by the executive, in looking up to him for offices.

Id. at 393.

Mr. Gerry's explanation of the separation-of-powers concerns apparently made little impression on his fellow delegates, for Madison continued to press for his proposal to decrease the restrictions on joint office holding, and none of the other delegates again referred to the separation-of-powers. Slonim, *supra* note 14, at 400.

²⁴⁹ CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 58 (1956) (internal quotation marks omitted).

²⁵⁰ Banks, *supra* note 23, at 15.

It is often not appreciated²⁵¹ that, at the time of the drafting of the American Constitution, Great Britain's system of cabinet government and collective ministerial responsibility was still in its embryonic stage and bore only a passing resemblance to the system that is in place today.²⁵² While it is true that toward the end of the eighteenth-century there were signs that true cabinet government was on the way,²⁵³ the British parliamentary system did not emerge in its full glory until after the Reform Act of 1832.²⁵⁴ Thus, the British government with which the Framers would have been familiar differed greatly from the parliamentary democracy we think of today.²⁵⁵ As we know from the writings of Blackstone, Hume, and Montesquieu,²⁵⁶ the eighteenth-century English government was divided between King, Lords, and Commons, and the powers of each institution were checked and balanced by the powers of the other two.²⁵⁷ Admiration both for the work of these political philosophers and, in varying degrees for the British Constitution,²⁵⁸ encouraged the Framers to incorporate both separated powers and checks and balances into the

²⁵¹ Holdsworth explains why the fact of the later development of the British cabinet system is often disregarded:

In the eighteenth century a cabinet existed; and because the nineteenth century constitutional lawyers and historians saw that it existed, they too readily assumed that it held a position somewhat like that held by the modern cabinet. . . . [But] the process by which the cabinet became the principal link between the executive and the legislature . . . was not completed until after the Reform Act of 1832.

Holdsworth, *supra* note 126, at 163-64.

²⁵² For most of the eighteenth century, the British Cabinet was, at best, a loose link between the Crown and Parliament. *Id.* at 170. Although no government policy could proceed without the support of Parliament, and Parliament could either force the resignation of a particular minister or demand the appointment of a favorite son, *id.* at 169, neither the resignation of a particular minister nor the defeat of an especially important government program could cause the resignation of the entire Cabinet, the way it would today, *id.* at 170. As King George told Lord North in 1799, the ministers must "not mind being now and then in a Minority." 4 JOHN FORTESCUE, *THE PAPERS OF GEORGE THE THIRD* 275, *quoted in id.* at 170.

²⁵³ *Id.* at 176.

²⁵⁴ *Id.* at 164.

²⁵⁵ *Cf.* SIR HENRY SUMNER MAINE, *POPULAR GOVERNMENT* 253, *quoted in id.* at 180 n.58 ("The Constitution of the United States is a modified version of the British Constitution; but the British Constitution which served as its original was that which was in existence between 1760 and 1787.").

²⁵⁶ *See, e.g.,* 1 BLACKSTONE, *supra* note 127, at 50; Hume, *supra* note 125, at 119-20; MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156-66 (Anne M. Cohler et al. trans. & eds., 1989).

²⁵⁷ Admittedly, this somewhat oversimplifies these writers' views of the English Constitution. Montesquieu, for example, exaggerated the degree to which the powers of the English government were separated. *See* McDONALD, *supra* note 44, at 82. For a summary of the differences between these three men's visions of the English Constitution, see *id.* at 210-12.

²⁵⁸ Alexander Hamilton, for example, thought the British Constitution "was the best in the world: and . . . he doubted much whether anything short of it would do in America." 1 RECORDS, *supra* note 9, at 288 (June 18, 1787).

American Constitution.²⁵⁹ Yet, in the eighteenth century, the Crown's patronage power was the vital counterbalance and "check" to parliamentary sovereignty that kept the "absolutely command[ing]"²⁶⁰ power of the Commons from "reduc[ing] both the king and the House of Lords to insignificance."²⁶¹ As Hume observed, "[w]e may . . . give to this influence what name we please; we may call it by the invidious appellations of *corruption* and *dependence*; but some degree and some kind of it are inseparable from the very nature of the constitution, and necessary to the preservation of our mixed government."²⁶²

Thus, in eighteenth-century England, the system of influence was seen as vital to preserving the checks and balances of the British Constitution. To eliminate the system would have meant removing the one force that prevented the accumulation of all governmental power in the hands of the legislature, which the Framers believed to be the greatest threat to liberty.²⁶³ Therefore, yet another irony surrounding the Incompatibility Clause is that by focusing on the problem of corruption without giving serious regard to the structural consequences of their actions, the Framers wound up securing the new American system of a separation of powers when all the contemporary signs would have told them that the opposite would ensue.

III

NORMATIVE DISCUSSION: ASSESSING THE COSTS AND BENEFITS OF THE INCOMPATIBILITY CLAUSE

In the midst of the debate over incompatibility, James Madison admonished his fellow delegates not to be too hasty in forming their judgments regarding the merits of the Clause. "The question," he counseled, "[i]s not to be viewed on one side only. The advantages [and] disadvantages on both ought to be fairly compared."²⁶⁴ Heeding Madison's advice, this Part assesses the costs and benefits we have incurred as a result of the Framers' decision to include the Incompatibility Clause in our Constitution. Section A sets forth the major criticisms of the Clause as advanced by the Committee on the Constitutional System (CCS), a reform group founded by former White House Counsel Lloyd Cutler that advocates the Clause's repeal.

²⁵⁹ McDONALD, *supra* note 44, at 276.

²⁶⁰ Hume, *supra* note 125, at 120.

²⁶¹ Holdsworth, *supra* note 126, at 166. *See also* McDONALD, *supra* note 44, at 83.

²⁶² Hume, *supra* note 125, at 120-21.

²⁶³ It was a recognition of the essential role that the system of influence played in maintaining the division among the three powers of the English government, and especially in preventing the legislative power from consuming the powers of the other two, that caused three Federalists to speak out against the inclusion of an Incompatibility Clause in the Constitution. *See supra* notes 128-30 and accompanying text.

²⁶⁴ 1 RECORDS, *supra* note 9, at 388 (June 23, 1787).

Section B then rebuts the CCS critique by showing that repeal of the Clause will not produce the benefits predicted by CCS. Finally, Section C points out several *additional* very serious costs that would be incurred if the Incompatibility Clause were repealed.

A. The Case Against the Incompatibility Clause

Virtually the only mention of the Incompatibility Clause in the modern legal academic literature has come from a reform group known as the Committee on the Constitutional System (CCS),²⁶⁵ which is headed jointly by: Senator Nancy Landon Kassebaum, (R-Kan.); C. Douglas Dillon, former Secretary of the Treasury; and, until recently, Lloyd Cutler, White House Counsel to Presidents Jimmy Carter and Bill Clinton.²⁶⁶ These noted lawyers, scholars, and public officials have proposed that the U.S. adopt a constitutional amendment repealing the Incompatibility Clause, thereby freeing Members of Congress to serve in the President's Cabinet and other high executive posts.²⁶⁷ They claim that the President's inability to have his Cabinet secretaries serve simultaneously as M.C.s leads to distrust between the executive and legislative departments and causes confrontation, stalemate, and gridlock. Our leaders are thus unable "to propose, legislate, and administer a balanced program for governing."²⁶⁸ When government is gridlocked, the parliamentary reformers assert,

²⁶⁵ . *But see* Sargentich, *supra* note 16, at 707-38 (providing a superb general defense of the American system against Cutler's critique).

²⁶⁶ This Article will refer jointly to this group, along with others who would advocate repeal of the Incompatibility Clause, as the "parliamentary reformers."

²⁶⁷ The parliamentary reformers' proposals take several different forms. For example, Donald Robinson advocates eliminating the Incompatibility Clause as part of a larger package for constitutional reform. *See* Donald L. Robinson, *The Renewal of American Constitutionalism*, in SEPARATION OF POWERS, *supra* note 244, at 38, 54. Lloyd Cutler has advanced, though not specifically endorsed, a constitutional amendment that would either permit or require the President to fill 50% of his Cabinet with members of his party in Congress. *See* Lloyd N. Cutler, *To Form a Government*, in SEPARATION OF POWERS, *supra* note 244, at 1, 13-14. Henry Reuss's proposal would grant Congress the power to designate not more than fifty offices in the executive department that could be filled by Members of Congress who would retain their seats in the legislature. The President would then submit a slate of candidates for these offices to the House of Representatives, which would have to approve this slate by a simple majority. After gaining House approval, the President would still require the advice and consent of the Senate to appoint his slate. *See* Henry Reuss, *Legislators in the Executive Branch [A Proposed Constitutional Amendment]* in REFORMING, *supra* note 244, at 182-83. Yet another CCS proposal would authorize Congress to designate not fewer than 25 and not more than 50 executive offices that could be filled by active members of Congress. This proposal would require that the President appoint not fewer than 4 and not more than 25 members of Congress to those offices. *See id.* at 183-84. For commentary on these last two proposals, see JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 168-77 (1986).

²⁶⁸ Cutler, *supra* note 267, at 1. Such criticisms are by no means new. For example, in 1896 James Bryce criticized the "defects in the structure and working of Congress, and in its relations to the executive branch" including "[t]he discontinuity of Congressional policy," "[t]he want of opportunities for the executive to influence the legislature," and "[t]he

“chronic budget deficits and growing national debt, an unfavorable balance of trade, conflicting diplomatic efforts, decaying urban areas, porous borders, and a host of other problems seem to mock the capacities of our political system.”²⁶⁹

Of course, not even the most ardent foe of the Incompatibility Clause claims that the Clause is solely to blame for this perceived predicament. Indeed, the parliamentary reform literature typically lists the proposal to gut the Clause as just one item on a whole menu of constitutional amendments aimed at narrowing the gulf between the legislative and executive departments.²⁷⁰ While the parliamentary reformers disagree as to whether these proposals should be adopted as a package,²⁷¹ they all make their case against the Incompatibility Clause as part of a general critique of the separation between Congress’s leg-

frequency of disputes between three coordinate powers.” JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 216 (6th prtg. 1956).

²⁶⁹ Donald L. Robinson, *Preface, in REFORMING, supra* note 244, at xiv.

²⁷⁰ For example, in addition to repealing the Incompatibility Clause, Donald Robinson advocates the following package of reforms: 1) Abolishing the separate House of Representatives and Senate; 2) Arranging representation in the unicameral legislature such that each state would be guaranteed two seats, with additional seats assigned in proportion to population; 3) Electing the President and all members of Congress at the same time, for a concurrent fixed term, with no barriers on their reelection; 4) Providing both the legislature and the executive with the ability to call new elections in the event of stalemate; 5) Establishing a National Council of “about one hundred notable persons, who would elect one of their number to serve as chief of state, to issue the call for elections, and to superintend their conduct.” This council might also be empowered to review certain legislation, to exercise a suspensive veto, and to provide leadership in times of national crises. Robinson, *supra* note 267, at 54.

Other CCS reformers offer variations on Robinson’s themes. For example, Cutler suggests giving the President the power to call new congressional elections, but requiring that he not exercise this power more than once during his term of office. Cutler, *supra* note 267, at 14. Other ideas include tying the electoral fortunes of the executive department and Congress by requiring the electorate to vote for the President, Vice President, and their representative in the House on a team ticket, *id.* at 13, and lengthening the Representatives’ term of office to four years to coincide with the President’s. *Id.* Another frequently discussed proposal is a single six-year presidential term. *Id.* at 14-15.

²⁷¹ Some, such as former Congressman Henry Reuss and, apparently, Lloyd Cutler, argue that because large scale constitutional reform is unlikely to occur, we should focus our energies on “modest” changes that would move us in the direction of parliamentary government. See, e.g., Cutler, *supra* note 267, at 13; Lloyd N. Cutler, *Party Government Under the Constitution, in REFORMING, supra* note 244, at 93, 100-07. Although these “incremental” reformers suggest a number of proposals, at least some would apparently be comfortable with the adoption of an isolated constitutional amendment repealing the Incompatibility Clause, which would “do what needs to be done, and no more.” Henry Reuss, *To Encourage Cooperation, in REFORMING, supra* note 244, at 155, 156. Others, such as Donald Robinson, reject the notion that it is possible to correct any perceived defect in the constitutional system by tinkering with a single clause. Robinson argues that because the Constitution is an “organic whole,” it is impossible to alter one clause or provision without affecting the entire system. Robinson, *supra* note 267, at 53. The reformers in this camp would, therefore, urge the repeal of the Incompatibility Clause only as part of a larger package of constitutional reforms. For Robinson’s proposed package of reforms, see *supra* note 270.

islative power and the President's executive power. The discussion that follows sets out their case.

As the parliamentary reformers see it, the fundamental problem with the U.S. government is that our two-hundred year old Constitution is a relic of a bygone era, incapable of keeping up with the demands of an increasingly complex society that needs more and bigger government.²⁷² The Framers designed our Constitution under the misimpression that the national government was to have a limited number of concerns—matters of foreign relations, national defense, and the regulation of commerce (narrowly defined).²⁷³ The relatively narrow scope of the national government's jurisdiction, combined with the more leisurely pace of the day, allowed the Framers the luxury of dividing and checking the powers of government in the hope of preventing tyranny and encouraging deliberation.²⁷⁴ However, the parliamentary reformers claim, in today's "welfare-garrison state," the separation of powers is a luxury we can no longer afford.²⁷⁵ "A government is an organism with work to do," and our system of separated powers renders the government unfit "to perform the tasks we assign it."²⁷⁶

The parliamentary reformers attribute our institutional paralysis and gridlock to two key flaws in the constitutional system. First, they argue that by allowing the executive department and Congress to be controlled by different political parties, the Constitution creates the possibility that partisan antagonism will forestall government action. This problem is then compounded, in their view, by the Constitution's failure to give the President any direct way to influence the legislature to pass his programs. Under this scenario, the American people elect Presidents because they like their policy proposals.²⁷⁷ But, because there is no overlap of personnel and only the weakest ties of party loyalty, it is very hard for the President to get Congress to pass his

²⁷² Donald Robinson likens the Constitution to "[a] horse . . . fit to pull a carriage, but [not to] take a man to the moon." Robinson, *supra* note 267, at 40.

²⁷³ *Id.*

²⁷⁴ *Id.* at 40-41; Cutler, *supra* note 267, at 5. Any argument that the Framers might have thought that separation of powers and checks and balances was a luxury unique to a national government of enumerated powers fails, however, when one considers that the state governments of general jurisdiction all emulate the Constitution's system of separated powers and checks and balances. See NEVINS, *supra* note 133, at 196-205. The parliamentary reformers do not address this point.

²⁷⁵ Robinson, *supra* note 267, at 40-41. As Lloyd Cutler asserts, "[t]he separation of powers between the legislative and executive branches, whatever its merits in 1793, has become a structure that almost guarantees stalemate today." Cutler, *supra* note 267, at 2.

²⁷⁶ Robinson, *supra* note 267, at 40. As Donald Robinson puts it, "[a] government that might have to decide in minutes whether to return nuclear fire must be structured differently from one that did not learn for several weeks whether its envoys have been able to buy the Louisiana territory." *Id.* at 41.

²⁷⁷ Cutler, *supra* note 267, at 12.

popular programs into law.²⁷⁸ Moreover, once the President turns over his proposals to Congress, he has no way of overseeing or controlling their often tortuous path through the legislative process. As a result "[a]ny part of the [P]resident's legislative record may be defeated or amended into [something] entirely different [and] the legislative record of any presidency may bear little resemblance to the overall program the President wanted to carry out."²⁷⁹ In sum, the Chief Executive, whom the public expects to govern, lacks the constitutional power to carry out his popular mandate.²⁸⁰

As one remedy for these alleged defects in our constitutional system, the parliamentary reformers suggest we eliminate the Incompatibility Clause, which they believe creates an unnecessary distance between Congress and the executive. Repeal of the Clause would "encourage[] comity between the branches by the carrot of permitting the [P]resident to appoint [M]embers of Congress to his [C]abinet."²⁸¹ According to the reformers, "[i]t would tend to increase the intimacy between the executive and the legislature and add to their sense of collective responsibility,"²⁸² thus promoting "cooperation rather than stalemate" in government.²⁸³ Giving the President "some of his own people in the Congress"²⁸⁴ should help him in his battle to overcome congressional opposition.

Furthermore, the parliamentary reformers believe that the costs to our system from such a change would be small. They acknowledge that the Framers' purpose in adopting the Clause was to prevent the President from corrupting the Congress with the lure of lucrative office.²⁸⁵ Yet, this constitutional bar has not been adequate to remedy the anticipated evil, since Presidents have been able to side-step the Incompatibility Clause by "offering administrative appointments to [the legislators'] cronies."²⁸⁶ Because the Clause has largely failed in its appointed constitutional task, the parliamentary reformers believe that we would be wise to eliminate it, thereby "open[ing] the way for able leaders in Congress to display and develop executive talents, and . . . encourag[ing] the integration of legislative and administrative approaches to policy."²⁸⁷

²⁷⁸ For a discussion of the role of political parties in this context, see Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. (forthcoming 1994).

²⁷⁹ Cutler, *supra* note 267, at 3.

²⁸⁰ *Id.* at 16.

²⁸¹ Robinson, *supra* note 267, at 55.

²⁸² Cutler, *supra* note 267, at 14.

²⁸³ Reuss, *supra* note 271, at 155.

²⁸⁴ Lloyd N. Cutler, *Some Reflections About Divided Government*, 18 PRESIDENTIAL STUD. Q. 485, 491 (1988).

²⁸⁵ Robinson, *supra* note 267, at 55.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

B. Rebutting the Attack: Why the Case Against the Clause Fails on its Own Terms

The CCS critique of our national institutions is not an isolated one, even though to date most Americans have shown no enthusiasm for a British-style parliamentary cure. Overcoming government gridlock was a big issue in the 1992 presidential and congressional elections and one which an overwhelming number of voters said they considered important.²⁸⁸ Certainly, no one wants to live under a Constitution that is truly dysfunctional and incapable of serving the ends for which it was designed.

Of course, the Framers did not want such a Constitution either. Although the Framers wanted to set up institutions of government that would protect the American people from arbitrary rule, they were also aware of the need to create a government that could legislate energetically for the common good.²⁸⁹ Thus, if, as the critics claim, the Incompatibility Clause stops the government from living up to the aspirations of the Constitution's Preamble, we should give serious, if skeptical, consideration to the arguments for its repeal.

Happily, the parliamentary reformers turn out on closer analysis to be dead wrong. Their proposals will not cure the ill complained of, and their remedy would produce results worse than the disease.²⁹⁰

1. *The Fallacy That Governmental Efficiency Will Be Increased if Divided Government is Eradicated*

The parliamentary reformers' main attack on the Incompatibility Clause is that it allows for "divided government,"²⁹¹ which in turn cre-

²⁸⁸ *Yearning for Change Leads Clinton to Victory*, Gannet News Service, Nov. 4, 1992, available in LEXIS, News Library, CURNEWS File.

²⁸⁹ Gwyn, *supra* note 244, at 66. Alexander Hamilton, in *The Federalist* 26, described the Constitution as the result of a search for "that happy mean which . . . combines the energy of government with the security of private rights." THE FEDERALIST NO. 26, *supra* note 1, at 168. James Madison likewise spoke of the Framers' desire to construct a government capable of acting in a "prompt and salutary" fashion. THE FEDERALIST NO. 37, *supra* note 1, at 226 ("Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government."). See also McDONALD, *supra* note 44, at 2-3 (Framers understood the need for energetic government).

²⁹⁰ See generally Mark P. Petracca, *Divided Government and the Risks of Constitutional Reform*, 24 PS: POL. SCI. & POL. 634, 634-35 (1981). Petracca warns against proposals for constitutional reform that are really "diagnostic mismatches," a term that he borrows from Justice Stephen Breyer's analysis of the frequent lack of harmony between market problems and regulatory solutions. See STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

²⁹¹ By "divided government," we do not only mean divided party control of Congress and the Presidency, which of course is made possible by the electoral system, not the Incompatibility Clause. Rather, we mean divided party control of Congress and the Cabinet, or the entity that, in fact, exercises the bulk of the "executive power." The Incompatibility Clause is responsible for divided government of this kind. For a more detailed explanation

ates partisan infighting, bickering, deadlock, and delay. The main benefit of gutting the Clause, they claim, would be to increase the efficiency of the national government.

Underlying this attack, of course, is a normative judgment that more government is necessarily better than less. While it is not our project in this Article to debate the merits of large versus small government, we would point out that the parliamentary reformers' judgment is not universally shared.²⁹² Furthermore, the parliamentary reformers' perspectives are understandably influenced by their positions as legislators and government insiders. From the vantage point of an insider, government "works" when it is taking care of the day-to-day business of governing—that is, when it is passing legislation and designing public policy.²⁹³ Yet, for the governed, government may "work" best when it works least.²⁹⁴ As Professor Petracca reminds us, "[w]here you sit as an analyst will influence what you see and how you interpret it."²⁹⁵

However, even accepting the parliamentary reformers' implicit assumption that producing more legislation is necessarily a good to be strived for, it is questionable whether repealing the Incompatibility Clause would even further their end of producing more laws. Recent empirical studies contradict the parliamentary reformers' intuitions about the actual consequences of such divided government.

For example, in a thought-provoking 1991 study of the effects of divided party control of the Presidency and Congress, Professor David Mayhew examined the validity of two assertions commonly held out as nearly axiomatic: 1) that "[m]ajor laws will pass more frequently under unified party control than under divided control," and 2) that "Congressional committees, acting as oversight bodies, will give more trouble to administrations run by the opposite party than to those of their own party," thus preventing the executive from going about the

of the Incompatibility Clause's role in producing divided government, see *supra* notes 226-42 and accompanying text.

²⁹² Professor Sundquist candidly acknowledges this difference of opinion: "The question is whether one fears government and expects it to make mistakes most of the time—as people thought in the 1780s—or whether one feels that, on the whole, the government ought to be able to act on the assumption that it will usually act wisely and well . . ." James L. Sundquist, *The Question is Clear, and Party Government is the Answer*, 30 WM. & MARY L. REV. 425, 428-29 (1989).

²⁹³ Petracca, *supra* note 290, at 636.

²⁹⁴ See Richard A. Epstein, *In Praise of Divided Government*, 68 WASH. U. L.Q. 567, 567 (1990) ("The correct way to look at things is with the strong presumption that the more legislation you have, the worse that government works."). Moreover, it is not necessarily the case that the increased complexity of modern life means that we need more and bigger government. To the contrary, it almost certainly means that we need less. See, e.g., FRIEDRICH A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* (3 vols. 1973-79); THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* (1980).

²⁹⁵ Petracca, *supra* note 290, at 636.

business of governing.²⁹⁶ Professor Mayhew's research found that *neither* of these assumptions held true.²⁹⁷

First, Professor Mayhew found that the incidence of high public-oversight investigations did not vary significantly with divided or unified party control of government.²⁹⁸ Although acknowledging the prominence of the Watergate investigations, which took place under divided party control, Professor Mayhew is quick to point out that the investigations launched by Democratic Congresses against the Truman administration were among the most politically damaging investigations in this half-century.²⁹⁹ Thus, Professor Mayhew rejects the parliamentary reformers' thesis that divided government promotes inefficiency by encouraging a "beat up on the other party's administration" mentality in the Congress.³⁰⁰

Perhaps more importantly, Professor Mayhew found a comparable paucity of evidence supporting the parliamentary reformers' claim that "divided [government] . . . causes deadlock" and, hence, legislative inactivity.³⁰¹ On the contrary, Professor Mayhew's survey of 267 major statutes enacted between 1947 and 1990 found a rough equivalence in the amount of major legislation passed under divided and unified party control of government.³⁰² Although the tremendous burst of lawmaking that occurred under President Johnson's Great Society Congress of 1965-66 and the dearth of activity under President Eisenhower's last Democratic Congress of 1959-60 conforms to the parliamentary reformers' productive one-party government thesis,³⁰³ one need only examine President Reagan's early legislative successes with a Democratic-controlled House of Representatives or President Carter's and President Clinton's failures despite comfortable Democratic majorities in both Houses³⁰⁴ to appreciate the limits of the cor-

²⁹⁶ David R. Mayhew, *Divided Party Control: Does It Make A Difference?*, 24 PS: POL. SCI. & POL. 637, 638 (1991) (emphasis omitted) [hereinafter *Divided Party*]. See generally DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990* (1991) (discussing the phenomenon of divided party control in America).

²⁹⁷ Professor Mayhew acknowledges, however, that his evidence depends on numerous individual judgments that could be disputed. He therefore tempers his conclusions, asserting that the reformers' assumptions about the effects of divided government are "false—or at least largely or probably false." Mayhew, *Divided Party*, *supra* note 296, at 638.

²⁹⁸ *Id.*

²⁹⁹ *Id.* (citing ANDREW J. DUNBAR, *THE TRUMAN SCANDALS AND THE POLITICS OF MORALITY* (1984)).

³⁰⁰ Mayhew, *Divided Party*, *supra* note 296, at 638.

³⁰¹ *Id.*

³⁰² *Id.* at 639.

³⁰³ The reformers often cite the ten years between the mid-1950s and the mid-1960s as illustrating the proposition that divided government cannot govern. See generally JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY AND JOHNSON YEARS* (1968).

³⁰⁴ Franklin Roosevelt, between 1938 and 1941, and Lyndon Johnson, between 1967 and 1968, also experienced serious difficulties with Democratic-controlled Congresses. And, despite Democratic majorities in both Houses, President Clinton was able to muster

relation between party control and legislative action.³⁰⁵ Hence, divided government does not appear to be the only culprit that is responsible for our government's failure to legislate as "energetically" as the parliamentary reformers would like.

In fairness, of course, most members of the CCS advocate far more fusion of the executive and legislative departments than would be accomplished just by gutting the Incompatibility Clause. What they fail to realize, however, is that such a reform would not cure divided government but would make it *worse*. The reason for this is that repeal of the Incompatibility Clause would weaken the President instead of strengthening him, as the reformers seem to expect. At the same time, the President would not be eliminated as a national official with an independent electoral mandate. As a result, the CCS proposal would give us a French-style constitutional regime under which we would have traded in the possibility of divided government for the likelihood of a divided executive. To prove that the CCS proposal would do to America what De Gaulle did to France, we turn now to explaining why elimination of the Incompatibility Clause would *weaken* the Presidency.

2. *Eliminating the Incompatibility Clause Will Weaken the Presidency, Not Strengthen It*

A key assumption underlying the CCS's case against the Incompatibility Clause is that the existence of the Clause weakens the Presidency.³⁰⁶ In this respect at least, the CCS reformers agree with the Framers of the Constitution. Presidents, after all, are presumably elected, at least in part, on the basis of the public's agreement with their platform—their proposals for government action. It is logical, therefore, to believe that gridlock³⁰⁷ would be eliminated and the

only razor-thin majorities for his major initiatives during the first year of his term in office and has encountered even more trouble during his second year in office.

³⁰⁵ Mayhew recounts a litany of Presidential successes and failures that bear no correlation to the divided or unified state of the government:

Johnson succeeded memorably in 1964 through 1966 with a Congress of his own party, but so did Reagan in 1981 despite having to deal with a House of the opposite party. Truman's Fair Deal and Kennedy's New Frontier largely failed as legislative enterprises, despite the availability of Congresses of the same party. Carter's years proved a washout for his party's lawmaking aspirations, despite sizable Democratic House and Senate majorities of 292-143 and 62-38 during 1977-78. On the only occasion since 1840 when a party took over the House, Senate, and presidency all at once—in 1952 when the Republicans did—that party turned out not to have much of a program to enact.

Mayhew, *Divided Party*, *supra* note 296, at 639.

³⁰⁶ See, e.g., Sundquist, *supra* note 292, at 428.

³⁰⁷ Sundquist describes the antagonism between the President and Congress: If the President sends a measure to Congress, the Congress *has* to reject it. It cannot follow the President's leadership because he is not *their* leader.

Presidency strengthened if only the President could be as powerful as a Prime Minister, with his Cabinet secretaries whipping the legislature into line.³⁰⁸

Even the opponents of constitutional change have tended to accept the parliamentary reformers' assumption that presidential power would necessarily increase if the Incompatibility Clause were eliminated and have devoted their efforts to attacking the desirability of greater presidential control under a constitutionally-unified government, rather than questioning whether that result would indeed follow.³⁰⁹ Thus, much of the literature tends to conflate the desirability of constitutional reform with one's inclination toward a comparatively strong or weak executive, with the executives disparaging and the congressionalists extolling the virtues of the Incompatibility Clause.³¹⁰

We think this is total nonsense. Everyone from the Framers to the parliamentary reformers to the reformers' scholarly opponents have misunderstood the effect that the Incompatibility Clause has on presidential power and on the separation of powers. For reasons we have explained above, the *actual* effect of the Incompatibility Clause is to strengthen the President. Its repeal would weaken him without actually killing him off. The likely result would be a French-style hybrid

He is the opposition leader, the enemy that they have to defeat in the next election. If they accept his leadership, they are building him up for reelection. . . . By the same token, the President must veto a congressional initiative—reject it and send it back and condemn the Congress.

Id. at 429.

³⁰⁸ See Cutler, *supra* note 284, at 491; Cutler, *supra* note 267, at 13-14; Robinson, *supra* note 267, at 54.

³⁰⁹ See, e.g., Erwin Chemerinsky, *The Question's Not Clear, But Party Government is Not the Answer*, 30 WM. & MARY L. REV. 411, 421 (1989) (argues Cutler's reforms would lead to greater legislative deference to the President); Mark P. Petracca et al., *Proposals for Constitutional Reform: An Evaluation of the Committee on the Constitutional System*, 20 PRESIDENTIAL STUD. Q. 503, 521 (1990).

Professor Petracca and his colleagues, for example, criticize the parliamentary reformers' proposals by warning of the "aggrandizement of executive power" that would occur as a result. Petracca et al., *supra*, at 521. In response, Professor Sundquist goes to painstaking lengths to diffuse this concern. He points out the numerous ways in which Congress could protect itself from an overbearing executive:

[W]ere the experiment to produce a tilt in favor of the executive . . . [Congress] would press prospective appointees not to serve, the Senate would refuse to confirm them or extract behavioral promises in the confirmation process and, if they were confirmed then legislators would penalize and ostracize them within the halls of Congress if they abused their [executive] posts.

James L. Sundquist, *Response to the Petracca-Bailey-Smith Evaluation of the Committee on the Constitutional System*, 20 PRESIDENTIAL STUD. Q. 533, 541 (1990). Yet, no one has raised the possibility that precisely because Congress could exercise all this informal control over its members, removing the Incompatibility Clause could make Congress too powerful!

³¹⁰ See JAMES A. THURBER, *Preface*, in *DIVIDED DEMOCRACY: COOPERATION AND CONFLICT BETWEEN THE PRESIDENT AND CONGRESS* at xi, xi-xii (James A. Thurber ed. 1991) [hereinafter *DIVIDED DEMOCRACY*].

regime that alternated between presidential and parliamentary phases, depending on electoral results. This does not seem to accomplish what the parliamentary reformers want: a U.S. President with the power of a British Prime Minister.

The reformers are fond of reminding us that the cry for some measure of parliamentary-type government, (to be produced by repeal of the Incompatibility Clause), has a long and distinguished pedigree in this country.³¹¹ In this they are right, for no less prominent figures than Justice Joseph Story³¹² and President Woodrow Wilson³¹³

³¹¹ See generally SUNDQUIST, *supra* note 267, at 40-74 (describing "[t]wo centuries of constitutional debate" over the continued validity of our system of separation of powers). It is interesting to note in this regard that legislative-executive separation became considerably less popular by the second half of the nineteenth century than it had been fifty years before. Perhaps this occurred because of a growing awareness of and admiration for the then-new system of full parliamentary government that had grown up in Britain. By the 1860s, parliamentarianism was so in vogue that the drafters of the Confederate Constitution chose *not* to include a legislative-executive incompatibility clause in their constitution. This is striking since the Confederate Constitution is in some other ways similar to the pre-Civil War U.S. Constitution of 1787.

³¹² Justice Story was one of the few constitutional commentators to take notice of the Incompatibility Clause, and he was by no means enamored of the fact that the Clause prohibits the President's Cabinet from sitting in Congress. "If corruption ever eats its way silently into the vitals of this republic," he wrote, "it will be, because the people are unable to bring responsibility home to the executive through his chosen ministers." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 334 (Da Capo Press 1970).

In Justice Story's opinion, the Clause destroyed any hope of accountable government in America. Because the Constitution bars Cabinet members from simultaneously serving in Congress, the government is compelled to entrust its legislative proposals to other men, "who are either imperfectly acquainted with the measures, or are indifferent to their success or failure." *Id.* at 333-34. This imposition of a disconnected congressional middleman, Story thought, permitted the executive to escape "that open and public responsibility for measures" which is the "greatest security and strength" of republican government. *Id.* at 334.

Moreover, Story believed the Incompatibility Clause encouraged the President to cut secret and dishonest deals with members of Congress. "[P]rivate intrigues, political combinations, irresponsible recommendations, and all the blandishments of office, and all the deadening weight of silent patronage" would become the President's tools for getting his programs through Congress. *Id.*

Finally, Story thought that eliminating the Clause would have a positive effect on the caliber of people the President would choose to fill executive offices. Because the Cabinet members would be forced to participate in the work of the Legislature and would be required to defend aggressively the government's position in Congress, the President would feel compelled to choose appointees "not from personal or party favourites, but from statesmen of high public character, talents, experience, and elevated services At present, gross incapacity may be concealed under official forms, and ignorance silently escape by shifting the labours upon more intelligent subordinates in office." *Id.* at 335.

³¹³ While still an undergraduate at Princeton University, Woodrow Wilson, borrowing from Justice Story's critique of the Incompatibility Clause, wrote a paper arguing that in order to have truly responsible government, not only should the President's Cabinet be *allowed* in Congress, but the President should be *required* to choose his Cabinet from the ranks of Congress, and to resign when the government lost the support of the legislature. See WOODROW WILSON, CABINET GOVERNMENT IN THE UNITED STATES, in 1 THE PAPERS OF WOODROW WILSON, 493, 497 (Arthur S. Link, ed., 1966) reprinted in 6 INT'L REV. 146

have argued that removing this constitutional barrier between Congress and the executive is essential to effective, accountable government. Yet, what both the modern-day parliamentary reformers and their critics have overlooked is that historically, support for parliamentary government has not been confined to those who favor Presidential power. On the contrary, the parliamentary banner was raised in the 1970s to counter the "imperial presidencies" of Lyndon Johnson and Richard Nixon,³¹⁴ just as Justice Story had raised it in the 1830's to counter the imperial presidency of "King" Andrew Jackson.

Overlooking this history, today's reformers maintain that repealing the Incompatibility Clause and allowing M.C.s to serve in the Cabinet would reduce the conflict that often exists between Congress and the White House.³¹⁵ The premise is that M.C.s would be less distrustful of executive officers who were also "one of them" and would thus be more likely to support the administration's program.³¹⁶ Moreover, the fact that these M.C.s would owe their executive offices to the President would increase his power *vis-a-vis* Congress, allowing him to fulfill his constitutional role as the initiator of legislation.³¹⁷

(1879). An excerpted version of this paper can be found in REFORMING, *supra* note 244, at 131-34. In short, Wilson was arguing for full-blown British-style parliamentary government, a preference he would continue to express with varying degrees of enthusiasm throughout his academic and political career. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 102, 284-85, 318 (15th ed. 1900); CORWIN, *supra* note 231, at 308-10.

³¹⁴ Petracca et al., *supra* note 309, at 520 (noting that commentators such as Charles Hardin and Richard Strout advocated the parliamentary model as a "perfect antidote" to imperial presidencies). See generally CHARLES HARDIN, PRESIDENTIAL POWER AND ACCOUNTABILITY: TOWARD A NEW CONSTITUTION (1974); Richard L. Strout, *Parliamentarianism*, THE NEW REPUBLIC, Sept. 28, 1974, at 4.

³¹⁵ See *supra* notes 266-87 and accompanying text.

³¹⁶ Petracca et al., *supra* note 309, at 520-21. See also REFORMING, *supra* note 244, at 184 (analyzing the benefits of M.C.s in the executive branch); Cutler, *supra* note 267, at 13-14 (suggesting that M.C.s serving in the executive branch will "tend to increase the intimacy between the executive and the legislature and add to their sense of collective responsibility").

³¹⁷ For a defense of the President's role as "Chief Legislator," see JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 127-54 (1981). See also Sundquist, *supra* note 292, at 427. An interesting attack on the conventional vision of the President's role as the initiator of legislation can be found in Philip C. Bobbitt, *The Committee on the Constitutional System Proposals: Coherence and Dominance*, 30 WM. & MARY L. REV. 403 (1989).

The reformers posit additional benefits of removing the Incompatibility Clause including the addition of a "home town touch" to federal agencies now too often isolated in Washington," an improvement in the quality of individuals attracted to the House of Representatives, and an expansion in the President's choice of executive officials, since qualified congressmen are now off limits for executive appointments. Reuss, *supra* note 271, at 155-56. We, however, disagree that these results would actually benefit government. First, as explained in greater detail *infra* part III.C.1., adding a "home town" touch to government agencies would greatly distort the equality of representation received by the American people, since not every citizen could be assured of having one of their congressional representatives in the executive department. Second, although in the eighteenth century the lure of executive appointments may have been necessary to attract the most qualified

We do not, of course, agree that repeal of the Incompatibility Clause would either add to the President's power or promote more effective government. First, striking the Clause from the Constitution would greatly limit the President's freedom to choose his own Cabinet. The parliamentary reformers' protestations to the contrary notwithstanding,³¹⁸ the truth is that permitting the President to nominate members of Congress to his Cabinet would be tantamount to *forcing* him to make that choice.³¹⁹ Recall that the parliamentary reformers' asserted purpose for allowing Cabinet secretaries to serve in Congress is to increase the President's ability to influence Congress in order to pass his legislative agenda. Obviously, the people who are the most influential with Congress are the congressional power-brokers themselves. Not only would the President feel compelled to choose his Cabinet from among these high ranking Members of Congress, but a cantankerous Congress could virtually force his hand either by threatening to withhold legislative support for his programs unless the requisite nominations were made, or by refusing to confirm his alternate appointments.

Not only would the repeal of the Incompatibility Clause strip the President of power over appointments, but it would also impinge upon another key executive prerogative—the removal power. The President's ability to dismiss subordinates at will has long been a subject of bitter contention between the executive and legislative departments.³²⁰ A similar divisiveness has plagued the Justices of the U.S. Supreme Court, whose opinions on this subject have been at best incoherent, and at worst inconsistent.³²¹ What appears certain, how-

individuals to the House of Representatives, today that is no longer the case. Finally, the President's choice of executive officials would expand only slightly if the Incompatibility Clause were removed, since he is currently barred from appointing only those Members who remain in Congress. This marginal gain in the President's ability to appoint congressional insiders to offices must be balanced against the concomitant loss in his ability to appoint individuals from the private sector that would likely ensue if M.C.s were allowed to serve in the executive. For a discussion of this possibility, see *infra* notes 343-50 and accompanying text.

³¹⁸ See Sundquist, *supra* note 309, at 540 ("The Committee on the Constitutional System did not advocate appointment of members of Congress to the presidential cabinet. It only suggested that the constitutional prohibition against such appointment be removed, to permit what it called 'an experiment that has considerable promise and little risk.'"). However, several CCS proposals do require the President to appoint a certain number of legislators to designated executive offices. See *supra* note 267 (describing these proposals).

³¹⁹ This prospect runs entirely counter to our long-standing tradition respecting the President's right to choose his own closest advisors. See *supra* note 229.

³²⁰ See Calabresi & Rhodes, *supra* note 2, at 1166 (describing the three forms of the theory of the unitary executive). See also Steven G. Calabresi, *The Vesting Clauses as Power Grants* 88 Nw. U. L. Rev. (forthcoming 1994); Steven G. Calabresi & Saikrishna Bangalore Prakash, *The President's Power to Execute the Laws*, 107 YALE L.J. (forthcoming 1994).

³²¹ Calabresi & Rhodes, *supra* note 2, at 1167. Supreme Court cases taking a formalist approach, and thus allowing the President great control over his subordinates include: *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) ("A direct congressional role in the removal of

ever, is that "the power to remove an executive official [may not be] completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws."³²² Rather, the President must retain a core of control over executive officers sufficient "to assure that [each officer] is competently performing . . . her statutory responsibilities."³²³ Without the protection of the Incompatibility Clause, however, the President's removal power would, at best, exist in theory only. In reality, the President would be *politically powerless* to dismiss a Cabinet officer whose executive loyalty and performance was substandard, but whose congressional influence was vital to the President's legislative agenda. The result would be that Congress, by threatening to withhold legislative support, would be able to accomplish indirectly, ends that the Constitution forbids it to pursue directly.

Finally, there is little reason to believe that the President would face less opposition to his programs, or would be able to form a more coherent national policy agenda, by the mere fact of having his Cabinet secretaries sit in Congress. True, the President might be relieved of his perennial grapple with Congress to obtain majority support for his programs because the congressional leaders in his Cabinet presumably would be able to deliver the requisite votes. But the conversion of pure congressional leaders into congressional Cabinet members would only change the locus of the President's battleground, it would not relieve him of the need to fight. The problem with Congress, as the parliamentary reformers see it, is that it has become an "amalgam of individual fiefdoms."³²⁴ Members view themselves as autonomous power centers, with their own legislative and career-building agendas, not as team players. That is at least part of the reason why Presidents often face heated opposition, even from members of their own party.³²⁵ Thus, it seems naive in the extreme to

officers charged with the execution of the laws . . . is inconsistent with separation of powers."); *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) ("Congress could not . . . divest the President of the power to remove an officer in the Executive Branch whom he was initially authorized to appoint."); *Myers v. United States*, 272 U.S. 52, 161 (1926) (The Constitution prevents Congress from "draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power.").

Cases taking a functionalist approach include: *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (limiting the President's removal of the Independent Counsel to good cause); *Humphrey's Executor v. United States*, 295 U.S. 602, 623-26 (1935) (limiting the President's power to remove Commissioners of the Federal Trade Commission).

³²² *Morrison*, 487 U.S. at 692.

³²³ *Id.*

³²⁴ Gloria Borger, *The Reform War*, U.S. NEWS & WORLD REP., Aug. 31, 1992, at 54.

³²⁵ For example, Republican Representative Tom Tauke of Iowa explained why even a Congressman of the President's own party may not believe it in his interest to ensure the President's legislative success. Speaking of George Bush's relationship with Congress, Tauke explained:

assume that putting M.C.s in the Cabinet would magically transform them into presidential loyalists.³²⁶ Instead, they would likely pursue their own agendas in *both* the Cabinet³²⁷ and the Congress, working both ends of Pennsylvania Avenue to advance their constituents' interests and their personal reputations as people who can get their way with the President. The President would be unable to make a single move without obtaining the requisite blessings from the high priests of his "congressional Cabinet," which would look a lot like a roomful of congressional committee chairs.³²⁸ The result would be a President dominated by his Cabinet, rather than the president-friendly Congress the parliamentary reformers claim they would like to see.³²⁹

If Bush is enormously successful, the power of Congress is diminished somewhat. If you work from the assumption that there has been some shift of power to Capitol Hill, Members and especially their staffs are not going to be inclined to let all that power back down Pennsylvania Avenue just because we have a new president.

Statement of Rep. Tom Tauke, *quoted in* James A. Thurber, *Introduction: The Roots of Divided Democracy*, in *DIVIDED DEMOCRACY*, *supra* note 310, at 1-2.

³²⁶ Of course, strong parties could cure this tendency among legislators to pursue their individual ends in Congress rather than acting as team players. The reformers also argue for a revitalization of the party system. *See e.g.*, James L. Sundquist, *Reversing the Decay of the Party*, in *REFORMING*, *supra* note 244, at 89, 89-92; Cutler, *supra* note 271, at 93-109.

However, most scholars are skeptical that strong parties will reappear on the American political landscape any time soon. For example, James Q. Wilson notes that the existence of strong parties depends on strong partisanship among the voters, which is absent in American political culture, *and* the ability of party leaders to control access to the party ballot, which would require the elimination of the primary system and a major overhaul of our electoral system. James Q. Wilson, *Political Parties and the Separation of Powers*, in *SEPARATION OF POWERS*, *supra* note 244, at 8, 35.

The heterogeneity of American interests may also be a major impediment to the emergence of strong parties in this country. The twentieth century has witnessed the crumbling of America's once-strong party system due, in large part, to its inability to respond to the needs of an increasingly diverse electorate. Redish & Cisar, *supra* note 2, at 470. Thus, even if it were possible to strengthen party government, the result of such reform would likely be either to leave many voters' interests effectively unrepresented, *id.*, or to multiply the number of parties. Wilson, *supra*, at 35. As James Sundquist, an advocate of stronger parties, concedes:

[T]here are no ready means to achieving stronger party organizations. If there were, they surely would have been adopted, for those who lead the Democratic and Republican parties assuredly desire to preside over more potent organizations. The barrier is that the American people have not wanted stronger parties.

SUNDQUIST, *supra* note 267, at 177-78.

³²⁷ Even under our present system it is obvious that many members of presidential administrations pursue a personal agenda, rather than the agenda of the President who appointed them.

³²⁸ *Cf.* Thomas K. Finletter, *Cabinet Members on the Floor of Congress*, in *REFORMING*, *supra* note 244, at 148 (noting the proposal would "subject the whole field of executive action to the deliberative power of Congress").

³²⁹ Similar, although less serious, concerns are raised by the CCS proposal to allow Cabinet members a non-voting voice in Congress. *See* *REFORMING*, *supra* note 244, at 185. *See also* Harold Laski, *In Defense of the Presidential System*, in *REFORMING*, *supra* note 244, at 135, 137-42 (arguing against this proposal).

The parliamentary reformers' tendency to overestimate the expansion of presidential power that would occur in the absence of the Incompatibility Clause probably results from too cursory a glance at the great power and control wielded by the Prime Minister of Great Britain, despite a system under which Parliament is nominally supreme.³³⁰ But, in Great Britain, the Prime Minister's constitutional power derives not only from the presence of her Ministers in Parliament, but also from her ability to threaten new elections, *and* to name candidates to stand for election under her party's banner. Thus, erecting a true British-style parliamentary system in this country would require a massive constitutional and political overhaul. In addition, Great Britain's relative cultural homogeneity, its strong tradition of party discipline, its stratified social and class hierarchies (which reinforce party discipline), and its unitary governmental structure are all markedly absent in America. Accordingly, any attempt to replicate British-style parliamentary government in this country would likely meet with disaster.³³¹ To say the least, it is uncertain whether and to

³³⁰ Images of the powerful British Prime Minister pervade the reform literature. This excerpt from a piece by Lloyd Cutler is illustrative:

In 1979 Margaret Thatcher won a majority of some thirty to forty in the British Parliament. She had a very radical program, one that could make fundamental changes in the economy, social fabric, and foreign policy of the United Kingdom. There was room for legitimate doubt whether her overall program would achieve its objectives and, even if it did, whether it would prove popular enough to reelect her government at the next election. There was not the slightest doubt, however, that she would be able to legislate her entire program

. . . .
 . . . The [American] president and the [congressional] leaders have a few sticks and carrots they can use to punish or reward, but nothing even approaching the power that a British government . . . can wield against any errant member of the majority.

Cutler, *supra* note 267, at 4-5.

Professor Petracca and his colleagues go so far as to call the British Prime Minister an "elective dictator." Petracca et al., *supra* note 309, at 521. Other scholars may not be as extreme in their characterization of the office, but the general consensus is that the British Prime Minister does exercise a great deal of power. See, e.g., DOUGLAS E. ASHFORD, *POLICY AND POLITICS IN BRITAIN* (1981); SAMUEL H. BEER, *BRITAIN AGAINST ITSELF* (1982); A.H. BIRCH, *REPRESENTATIVE AND RESPONSIBLE GOVERNMENT* (1964); RICHARD H.S. CROSSMAN, *THE MYTHS OF CABINET GOVERNMENT* (1972); ANDREW HILL & ANTHONY WHICHELOW, *WHAT'S WRONG WITH PARLIAMENT?* (1964); *IS BRITAIN DYING?* (Isaac Kramnick ed., 1979); ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* (1985); Geoffrey Smith, *Parliamentary Change in Britain, in THE ROLE OF LEGISLATURES IN WESTERN DEMOCRACIES* (Norman J. Ornstein ed. 1981); GEOFFREY SMITH & NELSON W. POLSBY, *BRITISH GOVERNMENT AND ITS DISCONTENTS* (1981); Rodney Brazier, *Reducing the Power of the Prime Minister*, 44 *PARLIAMENTARY AFF.* 453 (1991).

³³¹ The cultural and political heterogeneity of the American people and the independent and competitive spirit of our decisionmaking institutions suggest that the strict party discipline that is essential to British government would not be warmly embraced here. As Redish and Cisar rightly point out,

[w]e cannot transplant a governmental system designed to serve a small, homogeneous nation into our vast, heterogeneous one. It is both inevita-

what extent the Prime Minister's strength derives from any or all of these nonimportable attributes of British political culture.³³²

Moreover, Britain's parliamentary and executive institutions did not always historically take the form that they now take today. Since the drafting of our Constitution in 1787, the British government, which has never had an effective incompatibility provision,³³³ has undergone a series of transformations—evolving from a monarchy characterized by executive supremacy, to a classic parliamentary system with two effective houses exerting true legislative supremacy, to today's prime-ministerial government.³³⁴ Were we to repeal our incompatibility provision today, who is to say that American government would instantly adopt the type of prime-ministerial control that it took the British two-hundred years to develop?

Finally, the vision of late twentieth-century scholars is understandably colored by the brilliant, "iron-fisted" prime ministership of Margaret Thatcher, who vastly increased the strength of her office.³³⁵ But, Thatcher is one of the great figures of the twentieth century, and British Prime Ministers before and since have had grapples with their Cabinets every bit as fierce as those American Presidents often face with Congress.³³⁶ Winston Churchill, for example, is reported to have said to Franklin Roosevelt: "You, Mr. President, are concerned to what extent you can act without the approval of Congress. You don't worry about your Cabinet. On the other hand, I never worry about Parliament, but I continuously have to consult and have the support of my cabinet."³³⁷

In sum, if Congress is really as powerful as the parliamentary reformers contend that it is, it seems curious to assume it would suddenly relinquish its control over the government in the face of constitutional reform. The most likely consequence of repeal of the Incompatibility Clause would be a President imprisoned by his Cabi-

ble and desirable that the electorate in a system as large and diverse as ours will hesitate to embrace a tightly unified system. They will require more control over governmental power than a mere choice between two political parties.

Redish & Cisar, *supra* note 2, at 469-70.

³³² See Gwyn, *supra* note 244, at 84.

³³³ See *supra* note 39.

³³⁴ Robinson, *supra* note 269, at xiii.

³³⁵ See Brazier, *supra* note 330, at 455; F.F. Ridley, *Using Power to Keep Power: The Need for Constitutional Checks*, 44 *PARLIAMENTARY AFF.* 442 (1991). For an example of Thatcher's influence on the reformers, see *supra* note 330.

³³⁶ Brazier, *supra* note 330, at 455 (John Major acting much more like the traditional "chairman of colleagues").

³³⁷ Wartime conversation between Winston Churchill and Franklin Delano Roosevelt, quoted in Arthur M. Schlesinger, Jr., *Leave the Constitution Alone*, in *REFORMING*, *supra* note 244, at 50, 51 (internal quotation marks omitted).

net—a far cry from the outcome sought by the parliamentary reformers.

C. The Costs of Eliminating the Incompatibility Clause

We saw in Part III.B. above that repeal of the Incompatibility Clause will not have the beneficial effects that the parliamentary reformers claim it will. We turn now to a consideration of several additional, very serious costs that would result from the Clause's repeal. Specifically, elimination of the Clause would have profound adverse effects on our system of representation, on the efficiency of our government, on the ethics of its officers, and finally, on our distinctively American notion of the separation of powers.

1. *Disparate Representation*

One criticism that scholars repeatedly levy against proposals to move toward a parliamentary system is that we would sacrifice the representative nature of our government.³³⁸ Without accompanying electoral reforms, eliminating the Incompatibility Clause would not in itself undermine the representative style of government that is characteristic of American democracy. Repeal would, however, significantly alter the *equality* of the representation that is received by the American people.

Under our present Constitution, the people of the United States are guaranteed roughly equal representation in the House of Representatives, and the states are guaranteed equal representation in the Senate.³³⁹ Neither the people nor the states have any claim to representation in the Administration of the national government, save through their election of a President, who is accountable to the entire nation. Elimination of the Incompatibility Clause, however, would allow *some* of the People's representatives in Congress to fill high executive offices, thus greatly increasing these representatives' power to influence national policy and to bring home governmental "goodies" for their constituents. Because not every congressional district, or even every state, could be assured of a spot in the President's Cabinet, some people's representation would end up "counting" for much more than others. While the parliamentary reformers rail against the present inequities of pork-barrel politics, their proposal to eliminate the Incompatibility Clause would seem only to exacerbate this aspect of the problem.

³³⁸ Chemerinsky, *supra* note 309, at 416.

³³⁹ Of course, the Seventeenth Amendment greatly reduced the extent to which the Senate is comprised of true representatives of the states themselves. Nonetheless, Senate seats are still apportioned equally among the states.

To better appreciate the distributional consequences of gutting the Incompatibility Clause, we need only look at the shadow parliamentary government that has grown up in Congress—i.e., the committee system. As discussed above, the Incompatibility Clause has fenced this shadow government out of the executive Cabinet entirely. The distributional consequences of the Committee system are, of course, grotesque and well known. *Some* states and districts get enormous amounts of federal money and others very little. Such distributional inequities are precisely what we could expect, nationwide, if the Incompatibility Clause were repealed.

This illustrates yet another point about the costs of repeal, which is the unsuitability of British-style parliamentarianism for a huge, heterogeneous federation of 260 million people that stretches across a continent. It is not even clear that the British system deals adequately with regional problems in Britain, as the Scots might attest, but it is certainly unsuited for the United States. No Cabinet member in the U.S. could ethically juggle the competing interests of her regional congressional constituency with those of the President's national constituency. If she favored her local region, the nation would be mis-served and vice versa. Repeal of the Incompatibility Clause is thus an invitation to conflicts of interest and to regional strife.³⁴⁰

2. *Inefficient Administration*

Aside from its damage to our representational equality, gutting the Incompatibility Clause would also have adverse consequences for the administration of our government. Although not explicitly discussed during the incompatibility debates at the Federal Convention, it seems possible that an unstated motive for the Framers' decision to make congressional service incompatible with offices in the executive department was to promote the efficient operation of the national government. The Framers must have known that the ability of a single person to hold a multitude of lucrative offices, whose duties he could not possibly perform, had contributed to the disastrous inefficiencies of both the British and state colonial governments.³⁴¹ Thus, the Framers sought to create a government in which "one person, one office"

³⁴⁰ These points are greatly elaborated upon in Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 79 ARK. L. REV. (forthcoming 1994).

³⁴¹ Colonial complaints regarding the evils of plural office holding often stressed the office holders' obvious lack of intention to perform the duties of their offices. *See, e.g.*, Boston CONTINENTAL J., Aug. 15, 1775; BOSTON INDEPENDENT CHRONICLE, Mar. 6, 1777, *quoted in* WOOD, *supra* note 22, at 156 (Colonial Americans resented the "piling of 'a multiplicity of posts upon one man,' offices that were obviously only a source of wealth and could never be properly exercised" and "were eager to prevent 'any one man-family—or their connections, from engrossing many places of honor and profit.'"). *See also supra* note 142 (citing examples of plural office-holding under the early state constitutions in spite of express textual prohibitions on the practice).

would be the constitutionally prescribed norm. This norm eliminates severe ethical conflicts of interest that may exist when individuals hold two jobs simultaneously. For precisely this reason, many state governments expressly bar dual office holding in their state constitutions. Moreover, at the center of our ethics laws lies a prohibition against holding many public and private jobs simultaneously. This bar, too, has been with us for most of our history. Accordingly, it should come as no surprise today that, for the most part, our national government now conforms quite strictly to the one person, one office ideal.³⁴²

In addition, it should be noted that the Incompatibility Clause has influenced the effective administration of our government in ways the Framers probably could not have foreseen. Because the Clause eliminates, or at least greatly reduces, any pressure the President might feel to appoint Members of Congress to high executive office in order to win their support,³⁴³ the President is able to choose officers from those segments of society whose expertise is most needed by the nation. Accordingly, every four or eight years we wait two and one-half months to inaugurate a new President so he can build a whole new Executive Department and Cabinet from scratch that is, on balance, reflective of the new President's national constituency. For years, talented state officials, entrepreneurs, and academics have thus been vaulted from nowhere to high national office. This unique American phenomenon brings fresh blood into the halls of our government and prevents Italian or Japanese-style governance by worn-out, recycled officials.

This point is illustrated by Jeffrey Cohen's two-hundred year survey of the Cabinet, which demonstrates how the Presidents' freedom from congressional control has permitted the composition of the Cab-

At another point in the Convention, Benjamin Franklin had noted that it was "[t]he vast number of such places . . . that renders the British Government so tempestuous. The struggles for them are the true sources of all those factions which are perpetually dividing the Nation [and] distracting its councils . . ." 1 RECORDS, *supra* note 9, at 82 (June 2, 1787). Franklin offered his remarks in support of his proposal that executive officers receive no salary for their services, but only reimbursement for their "necessary expenses." *Id.* at 81. Thus, although not offered during the debates over the Incompatibility Clause, Franklin's remarks were aimed at controlling the same vice.

³⁴² See STANLEY ET AL., *supra* note 161, at 8. See also 5 U.S.C. § 5533 (1988 & Supp. IV 1992) (setting forth limitations and exceptions for "dual pay" to government employees who hold more than one position).

³⁴³ One could argue that President Clinton's selection of five members of Congress to serve in his Cabinet belies the assertion that the Incompatibility Clause decreases the pressure on the President to choose cabinet members from the ranks of Congress. It is certainly true that these appointments were widely perceived as being made with an eye toward improving presidential relations with the legislature. This may, however, be a phenomenon that is most likely to occur when there has been a change in party control of the White House, which has helped to bring a congressional "shadow government" into power.

inet to change through time.³⁴⁴ Professor Cohen's study divides the nation's history into five "party eras"³⁴⁵ and calculates the number of Cabinet secretaries drawn from the general occupational categories of government, law, business, and education during each of these eras.³⁴⁶ From these data he concludes that since the nation's founding, the Cabinet secretaries' occupational backgrounds have undergone a "fundamental transformation" tied to the nation's needs for leaders possessing particular skills and expertise.³⁴⁷

For example, Cohen hypothesizes that the disproportionate number of Cabinet secretaries drawn from other areas of government service during the years 1789-1860 is explainable in terms of the country's need for leaders with the political savvy and expertise necessary to found a new nation.³⁴⁸ Similarly, after the Civil War, with the "traumas of nation building . . . concluded," the country entered a new era based on economic expansion; and in order to secure leaders with the requisite scientific and business training to fuel the country's progressive engine, Presidents naturally began to recruit their secretaries from the private sector.³⁴⁹ Thus, it appears that, in ways probably unforeseen by the Framers, the Incompatibility Clause has contributed to the efficient operation of our government.³⁵⁰

3. *Paving Over the Separation of Powers*

Surely the most perilous consequence of eliminating the Incompatibility Clause from our Constitution would be the concomitant collapsing of our American system of checks and balances and of separation of powers. The separation of governmental powers in our Constitution was rooted in the Framers' "virtual obsession" with the concentration of political power.³⁵¹ Well-versed in the writings of political theorists such as Montesquieu and Locke,³⁵² the Framers ap-

³⁴⁴ JEFFREY E. COHEN, *THE POLITICS OF THE U.S. CABINET: REPRESENTATION IN THE EXECUTIVE BRANCH, 1789-1984* (1988).

³⁴⁵ Cohen's breakdown of the five party eras is as follows: 1) The founding era, 1789-1824; 2) The nation-building era, 1825-1860; 3) The transitional era, 1861-1896; 4) The progressive era, 1897-1932; and 5) The era of big government, 1933-1984. *Id.* at 56.

³⁴⁶ In Cohen's typology, "Government" includes any government post and many party positions. "Law" includes only membership in a private law firm. "Education" includes teachers, administrators, clergy, and foundation executives. "Business" includes all other jobs. *Id.* at 76.

³⁴⁷ *Id.* at 74.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 74, 77.

³⁵⁰ *But see supra* notes 268-87 (setting out the parliamentary reformers' efficiency critique of the Incompatibility Clause which argues that the Clause causes government conflict and gridlock).

³⁵¹ Redish & Cisar, *supra* note 2, at 463.

³⁵² For examples of the delegates explicitly invoking Montesquieu, see 1 RECORDS, *supra* note 9, at 580 (July 11, 1787) (Edmund Randolph); *id.* at 485 (June 30, 1787) (James

proached the crafting of a government with the assumption that the accumulation of too much power in any one political institution was a sure recipe for tyranny.³⁵³ Thus, they divided the powers of government horizontally among three coequal departments and vertically between the federal and state governments.

Given the Framers' painstaking efforts to divide the powers of government, the most profound and disturbing ramification of eliminating the Incompatibility Clause would be its effect in uniting the once-separated powers of the executive and legislative departments. Although the parliamentary reformers are adamant that their proposal would be only "experimental"³⁵⁴ and would not "alter [the separation of powers] in any fundamental way,"³⁵⁵ the foregoing discussion of the likely effects on presidential-Cabinet relations makes plain both the radical and lasting consequences that removing the Incompatibility Clause would have for our system of government.³⁵⁶ As we have explained, eliminating the Incompatibility Clause would likely result in a fusion of the executive and legislative powers, with the Congress-filled Cabinet controlling the President's exercise of his constitutionally granted powers.³⁵⁷

The parliamentary reformers nonetheless argue that their proposed reallocation of governmental powers is consistent with the purpose of the original constitutional design. For example, Lloyd Cutler correctly points out that although the Framers were "very, very careful about preventing what they thought of as the rise of tyranny on the part of any branch, they certainly were trying to design a system that was more efficient than the system that had gone before" under the Articles of Confederation.³⁵⁸ Cutler further reminds us, again cor-

Madison). See also THE FEDERALIST NO. 47, *supra* note 1, at 301 (James Madison) ("The oracle who is always consulted and cited on [the separation of powers] is the celebrated Montesquieu."). McDonald notes that the "contract and natural-rights theories of John Locke were repeatedly iterated without reference to their source." McDONALD, *supra* note 44, at 7.

³⁵³ Madison, for example, states in *Federalist 47*, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, *supra* note 1, at 301. An excellent discussion of both the pre-American intellectual thinking about separation of powers and the influence of this doctrine on our national Constitution can be found in Redish & Cisar, *supra* note 2, at 456-65.

³⁵⁴ Sundquist, *supra* note 309, at 540-41.

³⁵⁵ *Id.* at 534. "[T]he Committee on the Constitutional System does not 'challenge' the principle of the separation of powers. It accepts the principle as necessary and desirable for the United States. What minor modifications it was able to agree upon are designed only to make the Constitutional system work better, not to alter it in any fundamental way." *Id.* See also Cutler, *supra* note 267, at 13-14.

³⁵⁶ See *supra* notes 319-29 and accompanying text.

³⁵⁷ *Id.*

³⁵⁸ Cutler, *supra* note 284, at 486.

rectly, that the Constitution is not a pristine exemplar of the separation of powers,³⁵⁹ but is a system of "separate branches exercising shared powers."³⁶⁰ Therefore, Cutler asserts, "as is true of all shared powers, the sharers of power have to figure out a way to cooperate in exercising the shared powers or the result is deadlock."³⁶¹ And of course, one way in which the parliamentary reformers hope to encourage this cooperation is by repealing America's constitutional ethics rule, the Incompatibility Clause.³⁶²

Yet, this reasoning is flawed. The "power sharing" of which Cutler speaks arose from the Framers' recognition that the mere demarcation on paper of the boundaries of each department's power was insufficient to prevent interdepartment encroachments.³⁶³ Thus, they sought to enforce the primary allocation of governmental powers by allowing each department a narrow and textually explicit inroad or "check" on the powers granted primarily to the others.³⁶⁴ This type of "selfish sharing" was viewed as necessary to secure and enforce the separation of the departments. It was *not* intended to bridge the gap. Madison explicitly clarified the Framers' purpose in *Federalist 48*: "unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."³⁶⁵

Yet the parliamentary reformers would use the Constitution's narrowly defined instances of shared powers to argue for a far, far greater communion between the executive and Congress.³⁶⁶ Cutler's argument is based on an appeal to our ordinary sense of what it means to

³⁵⁹ See, e.g., Lloyd N. Cutler, *Now is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387, 387 (1989) (citing RICHARD NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 101 (1976)); Cutler, *supra* note 284, at 485.

³⁶⁰ Cutler, *supra* note 359, at 387.

³⁶¹ Cutler, *supra* note 284, at 486.

³⁶² *Id.* at 491.

³⁶³ The Framers had learned from their experiences under the state constitutions that some sort of enforcement mechanism was essential to preventing the accumulation of governmental power in the hands of any one department. See *supra* note 116 (discussing the states' common practice of ignoring the recitation of the separation of powers in their constitutions). As Madison counseled in *Federalist 48*, "experience assures us that the efficacy of [merely marking the boundaries of power] has been greatly overrated." THE FEDERALIST NO. 48, *supra* note 1, at 308-09 (James Madison).

³⁶⁴ As explained in *Federalist 51*, the Constitution's "great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." THE FEDERALIST NO. 51, *supra* note 1, at 321-22 (James Madison).

³⁶⁵ THE FEDERALIST NO. 48, *supra* note 1, at 308 (James Madison).

³⁶⁶ A rough analogy might be granting your neighbor an easement to use your driveway, and having her argue that this is evidence of your intent to give her your whole lot!

"share." Sharing, as we all learned on the playground, is about cooperation and mutual sacrifice. We do not deny that this give-and-take is essential to the passage of legislation, but this is not the sense in which the Framers intended the three departments of government to share power. Instead, the Constitution contemplates that the coequal departments would share power in much the same fashion that the United States and the former Soviet Union "shared" nuclear capabilities during the Cold War. The "balance of power" created by the knowledge of the other guy's strength was intended to keep each governmental actor from overreaching.³⁶⁷

Thus, it is apparent that the parliamentary reformers' proposal to repeal the Incompatibility Clause cannot in good faith be justified as an attempt to further the Framers' purposes in partially blending the separated powers of government. Furthermore, while the parliamentary reformers have attempted to make a case for the benefits of removing the Incompatibility Clause,³⁶⁸ they have almost completely ignored the very real costs, measured in terms of arbitrary government and loss of liberty, that might flow from such a reform.³⁶⁹ The parliamentary reformers themselves are continually raging about the undue accretion of power in the hands of Congress.³⁷⁰ If one accepts our prediction that a President dominated by the Congress and his Cabinet would be the likely result of repealing the Incompatibility Clause,³⁷¹ it might be but a short step for the exercise of congressional power to move from aggressive to arbitrary. And one need look no further than the scandals of the Nixon administration to appreciate the threat to basic freedoms that would likely ensue even if we are

³⁶⁷ We acknowledge that this analogy is far from perfect. The theory behind the nuclear balance of power was that the "shared" nuclear capabilities of the U.S. and the U.S.S.R. would keep both countries from ever exercising what would be an unspeakably destructive force. Clearly, the checks that are built into our Constitution are nowhere near as potent and are intended to be used, frequently if necessary. Still, the analogy is apt in that it conveys the protective purpose for which the separated powers of government were blended in our Constitution and the awful fear with which the Framers regarded the concentration of governmental power.

³⁶⁸ See *supra* notes 267-87 and accompanying text (discussing the reformers' thesis that repealing the Incompatibility Clause would provide for more efficient government and would strengthen the presidency).

³⁶⁹ Marty Redish and Elizabeth Cisar have noted that "[t]he most significant problem with the modern attacks on separation of powers is that they completely ignore the very real fears that led to the adoption of the system in the first place." Redish & Cisar, *supra* note 2, at 471.

³⁷⁰ See, e.g., Cutler, *supra* note 284, at 489 (complaining about Congress's tendency to micromanage foreign policy and the budget). The comments of former Attorney General Dick Thornburgh regarding the rapidly increasing power of Congress are also worth noting. Thornburgh is not in any way associated with the CCS. See Dick Thornburgh, *The Separation of Powers: An Exemplar of the Rule of Law*, 68 WASH. U. L.Q. 485, 487-93 (1990).

³⁷¹ See *supra* notes 318-37 and accompanying text.

wrong, and the President emerged supreme after the eradication of incompatibility.³⁷²

Thus, although it would be virtually impossible to construct an empirical proof demonstrating that the Incompatibility Clause has in fact played a critical role in preventing our decline into tyrannical government,³⁷³ the Framers' well-founded fear of centralized power, combined with the nation's (fortunately limited) examples of dangerously strong government,³⁷⁴ should lead us to appreciate the utility of the delicate and precarious balance the Framers created in distributing the powers of government. Before we embark on any mission to tinker with the constitutional separation of powers, we would do well to heed Edmund Burke's admonition to proceed with "infinite caution,"³⁷⁵ and insist at least that the parliamentary reformers meet the heavy burden of "demonstrat[ing] either that the fears of undue concentrations of political power that caused the Framers to impose separation of powers are unjustified, or that separation of powers is not an important means of deterring those concentrations."³⁷⁶

IV

THE UNWRITTEN INCOMPATIBILITY TRADITIONS: HISTORY, PRACTICE, AND A NORMATIVE DEFENSE

We turn now to the second project of this Article, which is to explore how the one person, one office principle embodied in the Incompatibility Clause gradually expanded over time until it came to include a number of unwritten incompatibility traditions. Section A considers the tradition that has grown up of substantial federal judicial-executive incompatibility. Section B then turns to the tradition, now largely codified in state constitutional law, of federal-state incompatibility. Both sections begin with a part describing the texts and relevant original debates. They then progress to a part describing our actual practice over the last two hundred years, during which time

³⁷² One might also point to the numerous threats to individual rights that occurred as a result of President Lincoln's exercise of virtually unrestrained executive power. See Redish & Cisar, *supra* note 2, at 473. Martin S. Sheffer has compiled a study of three of America's most "prerogative" presidents, Lincoln, F.D.R., and Nixon, that is interesting both for its discussion of the alarming accretion of presidential power under these administrations and its unique discussion of the presidents' use of attorney general opinions to justify their actions. See MARTIN S. SHEFFER, *PRESIDENTIAL POWER: CASE STUDIES IN THE USE OF THE OPINIONS OF THE ATTORNEY GENERAL* (1991).

³⁷³ See Redish & Cisar, *supra* note 2, at 473.

³⁷⁴ See *supra* note 372.

³⁷⁵ "It is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society." Edmund Burke, *quoted in* James W. Ceaser, *In Defense of Separation of Powers*, in *SEPARATION OF POWERS*, *supra* note 244, at 168.

³⁷⁶ Redish & Cisar, *supra* note 2, at 471.

powerful incompatibility traditions have grown up. And, they conclude with a part offering a normative defense of the one person, one office rule in each context.

A. The Tradition of Judicial-Executive Incompatibility

The Federal Constitution contains no provisions that bar federal judges and justices from simultaneous service in the executive department.³⁷⁷ This striking lacunae is so contrary to contemporary notions of the separation of powers that even constitutional scholars have been known to assume mistakenly that the Framers did bar such extra-judicial service.³⁷⁸ Our story begins with a consideration of the relevant constitutional text and the historical debates that surrounded its adoption into law.

1. *Text and Origins: No Federal Judicial-Executive Incompatibility*

a. *Text and Context*

As we have seen, the Constitution contains an express legislative Incompatibility Clause but no comparable provision exists to bar joint service in the judicial and executive departments. Nonetheless, this outcome sufficiently startles modern sensibilities that some have been tempted to advance constitutional arguments as to why the U.S. Constitution must create judicial-executive incompatibility. Alan Morrison in his Supreme Court brief for John M. Mistretta thus points out that when the Constitution makes exceptions from the general principle of the separation of powers it does so in the most explicit and

³⁷⁷ See *Mistretta v. United States*, 488 U.S. 361, 397 (1988) (“The text of the Constitution contains no prohibition against the service of active federal judges on independent commissions [Although] [t]he Constitution does include an Incompatibility Clause applicable to national legislators . . . [n]o comparable restriction applies to judges.”).

Although the Constitution is silent on the question of federal judges simultaneously holding executive office, the *Code of Conduct for United States Judges* seeks to regulate the extent to which joint executive-judicial service is acceptable. Canon 5, subsection G of the Code provides:

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if the judge’s governmental duties would interfere with the performance of judicial duties or tend to undermine the integrity, impartiality, or independence of the judiciary.

CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5, subsection G.

³⁷⁸ Perhaps because the Incompatibility Clause prohibits federal judges from holding seats in Congress, it is sometimes assumed that judges are likewise constitutionally barred from serving in executive posts. See, e.g., COHEN, *supra* note 344, at 16 (the Constitution “prohibit[s] anyone from serving simultaneously in more than one branch of government”).

express terms.³⁷⁹ Any sharing of the powers of government is precisely described and goes only so far as the text clearly provides.³⁸⁰ Accordingly, since the constitutional text does not expressly authorize the sharing of judicial and executive power by one individual, Morrison's *Mistretta* brief concludes that it must not be allowed.

One might counter, however, that since the Incompatibility Clause *is* express, and applies *only* to joint service in Congress, there can be no other "structural" incompatibilities in the Constitution. The canon relied upon would be *expressio unius, exclusio alterius*, and the *Mistretta* brief's conclusion would be said to be suspect because it renders the Incompatibility Clause redundant or meaningless.

But, an advocate of the *Mistretta* brief's position might respond by observing that the Constitution is full of redundancies of which the Incompatibility Clause's buttressing of the separation of powers could be just another example.³⁸¹ Sure the Clause is express, it might be argued, but it is just an express reinforcement of the general separation-of-powers principle that imbues the document. It is not an express *and exclusive* description of an exceptional sharing of otherwise separated powers.

To these arguments, we believe a definitive response can be made. First, the Constitution creates a regime of separated and shared governmental *powers*. It does *not* create a regime of separated (or shared) governmental *personnel*. Except for the Incompatibility Provisions of Article I, Section 6, Article I, Section 9 and Article II, Section 1,³⁸² the Constitution speaks only of a separation of functions among three institutions of government and not of a separation of powers among personnel. Unlike the Virginia Constitution of 1776, a document with which the Framers were deeply familiar, the U.S. Constitution does not prohibit "*any person*" from exercising the powers of more than one department of government at the same time.³⁸³ Accordingly, the *Mistretta* brief errs when it concludes that express authorization is required for a sharing of powers by the same personnel. Express authorization is only necessary for a sharing of powers in the same governmental institutions.³⁸⁴

³⁷⁹ Brief of Respondent-Petitioner John M. Mistretta at 44-46, *United States v. Mistretta*, 488 U.S. 361 (1989) (Nos. 87-1904 & 87-7028) [hereinafter "Brief for Mistretta"]. See also *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988) (invalidating the U.S. Sentencing Commission on separation-of-powers grounds).

³⁸⁰ Brief for Mistretta, *supra* note 379, at 44-46.

³⁸¹ For a brief discussion of redundancy and the Constitution, see Calabresi & Prakash, *supra* note 320.

³⁸² U.S. CONST. art. I, § 6, cl. 2; U.S. CONST. art. I, § 9, cl. 8; U.S. CONST. art. II, § 1, cl. 2.

³⁸³ See *supra* note 73.

³⁸⁴ There are only two instances in which the Constitution expressly addresses the issue of the separation (or sharing) of personnel among the three departments. First, the

Second, the fact that the Constitution contains three different Incompatibility Clauses in two different articles strongly suggests that the absence of such a clause in Article III was deliberate and was not an oversight. One superfluous Incompatibility Clause in Article I, Section 6 could arguably be a redundancy, but the presence of a Foreign Incompatibility Clause, an Electoral College Incompatibility Clause, and a Congressional Incompatibility Clause in three separate places could not be an accident. The Framers must have thought that their document created no structural incompatibilities and that, as a result, express provision for incompatibility was required.

Third, there is simply no general separation of powers "clause" in the Constitution to generate the principle asserted in the *Mistretta* brief. Unlike some state Constitutions in 1787, the U.S. Constitution has no separation of powers clause at all.³⁸⁵ It is thus legally meaningless to talk of the Constitution's "principle of separation of powers." All the Constitution contains is a series of explicit clauses that are worded at a low level of generality, and that expressly separate (or share) certain very specific powers.³⁸⁶

Finally, it must be remembered that the *Mistretta* brief argues for an implied ineligibility to government office. By claiming that there are certain implied inherent ineligibilities to the holding of executive or judicial office in our democracy, the *Mistretta* brief tries to close the door on a fundamental democratic freedom. The Supreme Court has made clear in *Powell v. McCormack*³⁸⁷ that no department of government can add to the explicit, textual prerequisites of the Constitution for holding a seat in Congress.³⁸⁸ Why then should any department of government be able to add a one person, one office prerequisite for service in the judicial or executive departments?

For all of these reasons, we believe the textual case against the *Mistretta* brief's position is ironclad. For better or worse, there is pres-

Vice President of the United States, presumably an executive officer, is made also the President of the Senate. U.S. CONST. art. I, § 3, cl. 4. Second, the Chief Justice, a judicial officer, is also the presiding officer of the Senate when the President is tried by that body on an impeachment. U.S. CONST. art. I, § 3, cl. 6. These two express authorizations for the sharing of personnel both allow for the joint exercise of very limited legislative power simultaneous with an exercise of one (or both) of the other two powers of government. These Clauses thus are necessary to waive the ban of the Incompatibility Clause since it seems highly likely that the presiding officer of the Senate must also necessarily be deemed a Member of that House. The fact that the Constitution explicitly authorizes *this* sharing of personnel does not help the *Mistretta* brief's argument because the explicit authorization is made necessary to get around the Incompatibility Clause's explicit bar on dual office-holding by Members of Congress.

³⁸⁵ See *supra* note 116.

³⁸⁶ Compare, for example, the three vesting clauses, which separate powers, *with* the Appointments or Treaty Clauses, which share them.

³⁸⁷ 395 U.S. 486 (1969).

³⁸⁸ *Id.* at 522.

ently no specific, textual constitutional bar to joint service in the judicial and executive departments. The members of the Virginia Ratifying Convention obviously read the Constitution the same way in 1788 that we read it today. They urged the First Congress to adopt an amendment drafted by George Mason providing that:

The Judges of the federal Court shall be incapable of holding any other Office, or of receiving the Profits of any other Office, or Emolument under the United States or any of them.³⁸⁹

The First Congress declined to adopt Virginia's proposal.

b. *Explaining the Gap*

The debates at Philadelphia and in the ratifying conventions confirm that the absence of a federal judicial-executive incompatibility clause was a knowing and deliberate act of the Framers. We turn now, therefore, to a consideration of two proposals offered at the Federal Convention that would have limited the judges' extrajudicial roles, and we offer some possible explanations for their rejection.

The Constitution's omission of a judicial-executive incompatibility clause cannot be explained by any unfamiliarity of the Framers with the problem of executive manipulation of the judiciary. The Framers vividly described the insidious abuses that stemmed from royal control over colonial judges who could be removed from their posts at the King's pleasure.³⁹⁰ Since the Glorious Revolution, judges in England had held their positions during good behavior, and the Crown's stubborn refusal to extend life tenure to colonial judges had been a much-discussed and divisive issue in colonial times.³⁹¹ So great was the colonists' hatred of King George's manipulation of their judges that the Declaration of Independence expressly cited the practice as one ground for the break with England. Charging that the

389 PAPERS OF GEORGE MASON, *supra* note 89, at 1057.

390 See *supra* notes 30-32 and accompanying text.

391 See PAMPHLETS OF THE AMERICAN REVOLUTION 249-51 (Bernard Bailyn ed., 1965) [hereinafter PAMPHLETS]; WOOD, *supra* note 22, at 160; Blumoff, *supra* note 35, at 1048-51. One author described the situation as follows:

The failure of the English government to establish a court system for South Carolina's rapidly developing western counties led to the violence in 1767. In North Carolina, abuses by corrupt court officials in the western counties led to an open rebellion that lasted for three years, between 1768 and 1771. Throughout the 1760's English attempts to alter judicial commissions from "during good behavior" to "at the King's pleasure," met with stiff resistance from colonial legislatures and pamphleteers. The Ministry's decision in 1772 to remove control of the judge's salaries from the Massachusetts legislature . . . led to the establishment of local Committees of Correspondence; and the widespread bitterness of the American reaction to the Intolerable Acts was due in no small part to British tampering with the Bay Colony's judicial system.

RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 6 (1971).

King had "made Judges dependent on his Will alone, for the Tenure of their Offices and the Amount and Payment of their Salaries" and thereby "obstructed the Administration of Justice,"³⁹² the colonists declared themselves forever free of his corrupting influence.

King George's power over the colonial judiciary led the drafters of many of the constitutions of the newly-independent states to strip executive authorities of any role even in the making of judicial appointments.³⁹³ When this power was largely returned to the President under the Federal Constitution, the Framers sought to buttress judicial independence by safeguarding both judicial salaries and tenure from Presidential tampering.³⁹⁴ Yet, although most of the original state constitutions in the 1770s and 1780s had *also* protected judicial independence by barring judges from joint judicial-executive service,³⁹⁵ the drafters of the Federal Constitution chose not to provide for this protection.

The delegates did not lack opportunities to vote for judicial-executive incompatibility had they wished to constitutionalize it. In fact, two separate proposals for such incompatibility were put before the Federal Convention, but neither led to any discussion, debate, or voting.³⁹⁶ The first proposal appeared as part of the famous New Jersey Plan, which William Patterson introduced on June 15 as the small states' alternative to the Virginia Plan.³⁹⁷ The New Jersey Plan's fifth

³⁹² THE DECLARATION OF INDEPENDENCE paras. 10 & 11 (U.S. 1776).

³⁹³ WOOD, *supra* note 22, at 160. In most of the state constitutions, the appointments power was entrusted to the legislature. Only Maryland and Pennsylvania excluded the state legislatures from the appointments process. However, even in these states, no single person held sole power to appoint the judges. In Maryland, the governor's appointments required confirmation by an Executive Council comprised of five persons elected annually by the legislature. MD. CONST. OF 1776, art. XLVIII, *reprinted in* 3 CONSTITUTIONS, *supra* note 53, at 1699. In Pennsylvania, the power to appoint judges was vested solely in the executive, but the executive power in that state was lodged in a twelve-person Executive Council. PA. CONST. OF 1776, sect. 20, *reprinted in* 5 *id.* at 3087.

³⁹⁴ U.S. CONST., art. III, § 1.

The early state constitutions did not uniformly provide for judicial salary and tenure protection. In New Jersey, Pennsylvania, and Connecticut, for example, the judges held their offices for a term of years. See N.J. CONST. OF 1776, art. XII, *reprinted in* 5 CONSTITUTIONS, *supra* note 53, at 2596 (seven year appointed terms); PA. CONST. OF 1776, § 23, *reprinted in id.* at 3088 (seven year appointed terms); CT. CONST. OF 1818, art. 5, § 3, *reprinted in* 1 *id.* at 543 (one year elected term). In the states that did protect judicial tenure during good behavior, the legislature controlled the judges' salaries and had lax procedures for judicial removal. WOOD, *supra* note 22, at 161.

³⁹⁵ See *supra* note 67 (listing state constitutional prohibitions on simultaneous service in judicial and executive office).

³⁹⁶ Despite the fact that the secret Philadelphia debates are not of legal relevance and despite the fact that neither of these proposals were discussed on the floor of the Convention, Justice Harry Blackmun writing for the Supreme Court in *Mistretta* said that it was "at least inferentially meaningful" that the delegates did not act on either proposal to limit the extrajudicial activities of the judges. *Mistretta v. United States*, 488 U.S. 361, 398 (1989).

³⁹⁷ 1 RECORDS, *supra* note 9, at 242 (June 15, 1787). On June 19, 1787, the delegates rejected the New Jersey Plan by a vote of seven states to three, with one state divided. *Id.* at

resolution provided "that none of the Judiciary shall during the time they remain in Office be capable of receiving or holding any other office or appointment during their time of service, or for — thereafter."³⁹⁸ Yet, although the delegates spent nearly three days debating the merits of this proposed substitute system of government, the records of the Convention fail to reveal a single mention of the New Jersey Plan's judicial incompatibility clause.³⁹⁹ Even James Wilson, who carefully laid out thirteen points of difference between the New Jersey and Virginia Plans for his colleagues' consideration, did not cite the inclusion of a judicial incompatibility clause in the former as one of the provisions that distinguished the two.⁴⁰⁰

A second proposal that included a partial judicial-executive incompatibility clause came on August 20, 1787 when Charles Pinckney put forward a number of amendments to the Virginia Plan, including a resolution which stated that no "Judge of the[] supreme Court . . . shall be capable of holding at the same time any other office of trust or emolument under the United States, or an individual State."⁴⁰¹ Yet, Pinckney's suggestions were immediately referred to the Committee of Detail and never emerged from that body. Thus, like the New Jersey Plan, the Pinckney proposal did not generate debate.

Although this lack of debate certainly makes it harder for us to understand the Framers' reasons for not adopting a judicial-executive incompatibility clause, we can nonetheless identify several plausible explanations for their decision. One possibility is that the absence of such a clause was simply an oversight. It will be remembered that the Virginia Plan, while prohibiting Members of Congress from serving in the executive or judiciary departments, was silent on the issue of simultaneous service in judicial and executive offices. And, although the delegates at Philadelphia were twice presented with proposals to prohibit simultaneous judicial-executive service, both proposals were submitted as part of much larger packages for constitutional reform. Thus, the delegates may have failed to notice either the presence of

312-13 (June 19, 1787). A concise description of the Plan's major provisions and the delegates' discussion of the Plan can be found in FARRAND, *supra* note 86, at 84-90.

³⁹⁸ 1 RECORDS, *supra* note 9, at 244 (June 15, 1787).

³⁹⁹ The delegates' discussions of the New Jersey plan are recorded at 1 RECORDS, *supra* note 9, at 249-333 (June 16-19, 1787).

⁴⁰⁰ See 1 RECORDS, *supra* note 9, at 252 (June 16, 1787) (statement of James Wilson). It should be noted that Wilson was not remiss in pointing out other discrepancies between the Virginia and New Jersey plans with respect to the judiciary. On the contrary, three of the 13 differences Wilson cited dealt specifically with the judicial power as defined in the New Jersey plan's fifth resolution. *Id.* (describing the provision for inferior courts in the Virginia plan but not in the New Jersey plan and the greater scope of federal trial and appellate jurisdiction in the Virginia plan).

⁴⁰¹ 2 RECORDS, *supra* note 9, at 335 (August 20, 1787).

judicial incompatibility clauses in the Patterson and Pinckney proposals or the absence of such a clause in the Virginia Plan.⁴⁰²

A second and, in our view, more likely explanation for the absence of a judicial incompatibility clause is that the status of the judiciary and the distinction between judicial and executive power itself were both uncertain in 1787.⁴⁰³ Although Articles I, II, and III of the Federal Constitution faithfully replicated Montesquieu's classic three-power conception of government, the idea that the judiciary was a wholly independent and coequal department with the other two did not have deep roots in America at the time of its drafting.⁴⁰⁴ Only eleven years before, in 1776, John Adams wrote that the judiciary was a mere branch of the executive department. "[T]he first grand division of constitutional powers," he wrote, consisted of "those of legislation and those of execution" with "the administration of justice" being entrusted to "the executive part of the constitution."⁴⁰⁵ Between the Revolution and the drafting of the Federal Constitution, a few state courts had made tentative moves toward the assertion of a power of judicial review over legislation,⁴⁰⁶ but the distinctiveness of the relationship between the executive and judicial departments remained unclear, even to many of the finest constitutionalists of the times.⁴⁰⁷ Thus, the Framers might have knowingly and deliberately chosen not to provide for judicial-executive incompatibility because they thought it natural that judicial talents ought sometimes to be put to use in simultaneous executive roles.

In his extensive and superb study of the extrajudicial activities of the pre-Marshall Supreme Court, Professor Russell Wheeler makes several persuasive arguments that suggest the Framers may well have

⁴⁰² Wilson's failure to highlight the discrepancy between the New Jersey and Virginia plans in terms of judicial incompatibility supports this hypothesis. See *supra* text accompanying note 400.

⁴⁰³ This could also explain, of course, why the Framers overlooked the absence of a judicial-executive incompatibility clause in the Virginia Plan.

⁴⁰⁴ Even Montesquieu did not think of the judiciary as being independent to the degree that contemporary federal judges are. Rather, Montesquieu envisioned that the judges should be temporary office holders, drawn intermittently from the public at large. See MONTESQUIEU, *supra* note 256, at 156-57; McDONALD, *supra* note 44, at 85.

⁴⁰⁵ John Adams, *The Earl of Clarendon to William Pym*, BOSTON GAZETTE JAN. 27, 1766, reprinted in 3 THE WORKS OF JOHN ADAMS, *supra* note 119, at 477, 480-82. See also BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON 103 (1974) (quoting Governor Hutchinson's opinion that "[c]ourts are part of the law enforcement procedure, not a check upon it").

⁴⁰⁶ "[I]n isolated but important cases" in the 1780s, judges began to impose some restraints on legislative power. WOOD, *supra* note 22, at 454-55. The practice in England (and in Connecticut for that matter) of having the upper house of the legislature also serve as the jurisdiction's highest court of appeal must have augmented the indistinctiveness of the concepts of judicial and legislative power.

⁴⁰⁷ This uncertain relationship led such reasonable minds as James Madison's to urge the uniting of judges and the President in a Council of Revision. 1 RECORDS, *supra* note 9, at 109-10; 2 RECORDS, *supra* note 9, at 74, 77-78.

wanted federal judges to be able to perform at least some extrajudicial activities, including those that involved the holding of executive offices.⁴⁰⁸ Wheeler notes that the Framers' concept of the judicial role was necessarily informed by the English constitutional tradition. Under that tradition, "judges were obligated to serve the nation extrajudicially in various ex officio capacities in which their judicial skills would be of use."⁴⁰⁹ Interestingly, the records of the Federal Convention do indicate that several of the most prominent delegates did at least contemplate such extrajudicial service for the federal judges.

For example, Gouverneur Morris submitted to the Committee of Detail a proposal for a Council of State that would have the Chief Justice as its second ranking member.⁴¹⁰ Morris envisioned the Chief Justice's role as recommending legislation that would "promote useful learning and inculcate sound morality throughout the Union."⁴¹¹ In addition, Professor Wheeler points to the well-known arguments advanced in support of James Madison's proposed Council of Revision as indicating the Framers' general support of an extensive nonjudicial role for the judges.⁴¹² Madison himself argued that principled extrajudicial use of "the Judiciary talents" would lend "perspicuity . . . conciseness, and . . . systematic character . . . [to] the Code of laws."⁴¹³ Mason later added that judges could improve legislation by virtue of their "habit and practice of considering laws in their true principles, and in all their consequences."⁴¹⁴ From these examples,⁴¹⁵ Wheeler

⁴⁰⁸ Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123 [hereinafter Wheeler, *Extrajudicial*]. See also Russell Wheeler, *Extrajudicial Activities of United States Supreme Court Justices: The Constitutional Period, 1790-1809* chs. 7-8 (unpublished Ph.D dissertation, University of Chicago, Department of Political Science, 1970).

⁴⁰⁹ Wheeler, *Extrajudicial*, *supra* note 408, at 123-24.

⁴¹⁰ *Id.* at 127.

⁴¹¹ 2 RECORDS, *supra* note 9, at 342 (Aug. 20, 1787); Wheeler, *Extrajudicial*, *supra* note 408, at 127.

⁴¹² Wheeler, *Extrajudicial*, *supra* note 408, at 128. Wheeler notes, however, that "[m]ajority sentiment in the 1787 Constitutional Convention toward extrajudicial activity is hard to discern." *Id.* at 127.

⁴¹³ 1 RECORDS, *supra* note 9, at 139 (June 6, 1787); Wheeler, *Extrajudicial*, *supra* note 408, at 128.

⁴¹⁴ 2 RECORDS, *supra* note 9, at 78 (July 21, 1787); Wheeler, *Extrajudicial*, *supra* note 408, at 128.

⁴¹⁵ Wheeler also finds support for his thesis in Charles Pinckney's proposal that the President and Congress have the authority "to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions." Wheeler, *Extrajudicial*, *supra* note 408, at 129 (quoting 2 RECORDS, *supra* note 9, at 341 (Aug. 20, 1787)). He notes that, contrary to the common assumption, the delegates at Philadelphia did not reject Pinckney's suggestion that the Supreme Court be authorized to issue advisory opinions. Rather, "[t]he motion simply did not emerge from the Committee of Detail, to which he submitted it. This could well mean that the committee assumed that the President and Congress could and would seek the judges' opinions in accord with the Anglo-American practice, which indeed they did." *Extrajudicial*, *supra*, at 129. For a discussion of the early use of Supreme Court Justices as advisors, see *id.* at 144-48.

concludes that the delegates generally did not believe that the judges' role should be confined to deciding cases and controversies. Rather, he posits, "[m]any delegates shared Mason's conviction that it was proper that 'further use be made of the judges.'"⁴¹⁶

Of course, the obvious objection to Professor Wheeler's conclusion is that the Convention as a whole decisively rejected the proposals for a Council of State and a Council of Revision.⁴¹⁷ Nonetheless, a surprising colloquy from the Pennsylvania Ratifying Convention, although unmentioned by Professor Wheeler, does provide some support for his thesis.

In defending the Constitution's judicial article in the Pennsylvania Convention, James Wilson was confronted with an objection which, he "confess[ed], [he] had not expected."⁴¹⁸ One of the convention's attendees had noticed the Constitution's lack of a judicial-executive incompatibility clause and protested that "the judges under this Constitution, are not rendered sufficiently independent, because they may hold other offices."⁴¹⁹ Wilson, thinking this objection "a little wire-drawn,"⁴²⁰ responded to the gentleman's concern in a speech that strongly suggests his belief that federal judges should not have been barred from extrajudicial service:

It is true that there is a provision made in the Constitution of Pennsylvania, that the judges shall not be allowed to hold any other office whatsoever . . . but this, sir, is not introduced as a principle into this Constitution. There are many states in the Union, whose constitutions do not limit the usefulness of their best men, or exclude them from rendering those services to their country for which they are found eminently qualified. . . . Now it is not to be expected that eleven or twelve states are to change their sentiments and practice, on this subject, to accommodate themselves to Pennsylvania.⁴²¹

⁴¹⁶ Wheeler, *Extrajudicial*, *supra* note 408, at 130 (quoting 2 RECORDS, *supra* note 9, at 78 (July 21, 1787)).

⁴¹⁷ 2 RECORDS, *supra* note 9, at 542 (Sept. 7, 1787) (rejecting Council of State); 1 *id.* at 140 (June 6, 1787) (rejecting Council of Revision); 2 *id.* at 80 (July 21, 1787) (same); *id.* at 298 (Aug. 15, 1787) (same).

⁴¹⁸ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 514 (Jonathan Elliot ed., 1881).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* See also 2 THE WORKS OF JAMES WILSON 794-802 (Robert G. McCloskey ed., 1967) (Wilson's speech at the Pennsylvania convention to review its state constitution). It should be noted that Wilson's allusion to the practices of other states is not entirely apt. For example, Wilson's reference to the constitution of New York spoke of that state's practice of allowing judges to sit in Congress. Apparently, the gentleman to whom Wilson was responding objected to the Federal Constitution's allowing federal judges to hold executive office, since the Constitution's Incompatibility Clause does preclude federal judges from sitting in Congress. Likewise, Wilson counted "eleven or twelve states" that permitted their judges to hold contemporaneous executive office. However, this figure is inaccurate unless it purported to include only those states that *enforced* their constitutional prohibi-

Thus, although the historical record is far from clear, there is at least some support for the proposition that the Framers did see some merit in allowing the judges to serve the nation in extrajudicial capacities and that they did not envision a sharp separation of the judicial and the executive powers.

2. *Development Over Two Hundred Years of the Partial Judicial-Executive Incompatibility Tradition*

Whatever the reason for the silence of the constitutional text on this subject, Americans have, from the beginning, debated the wisdom of the simultaneous holding of judicial and executive offices. In the nation's early years, it was not uncommon for some federal judges also to hold executive office.⁴²² Among the most notorious examples of this early practice are: John Marshall's simultaneous service as Secretary of State and Chief Justice,⁴²³ John Jay's simultaneous service as Special Ambassador to England and Chief Justice, and Oliver Ellsworth's simultaneous service as Special Ambassador to France and Chief Justice.⁴²⁴ Although these appointments were "not received fa-

tions on dual office holding. See *supra* note 67 (listing the state constitutions that prohibited dual office holding by state judges). See also *supra* note 142 (discussing the possibility that states simply ignored their constitutional prohibitions on joint office holding).

⁴²² It has been said that "[d]uring the Federalist era, 'the politicians—or statesmen—of that day bivouacked in the chief justiceship on their march from one political position to another.'" Alpheus T. Mason, *Extra Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193, 193 (1953) (quoting SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES). Indeed, two Supreme Court Justices even went so far as to run for elective office without leaving the bench: Jay, who sought the Governorship of New York, and Cushing who sought the same office in Massachusetts. *Id.*

⁴²³ In 1800, Marshall became President Adams' Secretary of State. Later that year, Adams nominated him for the office of Chief Justice after John Jay declined reappointment to that position. The Senate confirmed Marshall's appointment as Chief Justice on January 27, 1801, yet he did not resign his position as Secretary of State until March 4 of that year. See ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 558-59 (1919); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 178, 184-85, 200-01 (1922); Slonim, *supra* note 14, at 392 n.3.

Marshall was not the first person in the young republic to hold the offices of Secretary of State and Chief Justice simultaneously. For six months in 1789-90, Chief Justice Jay filled Thomas Jefferson's position as Secretary of State while Jefferson was away in France. BEVERIDGE, *supra*, at 11; Slonim, *supra* note 14, at 392 n.3. Of course, Marshall's dual role is the most famous since, during his tenure as Secretary of State, he himself signed and sealed, but failed to deliver, the commission appointing William Marbury as Justice of the Peace for the District of Columbia. This infamous commission would later become the subject of his landmark opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). 1 WARREN, *supra*, at 200-03.

⁴²⁴ In the Spring of 1795, President Washington appointed Chief Justice John Jay as Special Ambassador to England for the purpose of negotiating a treaty with the mother country. The so-called "Jay Treaty" that resulted was the occasion of bitter partisan controversy. Indeed, the controversy was so heated that it sank the nomination of recess appointee John Rutledge to be Chief Justice in replacement of Jay. Oliver Ellsworth, the third Chief Justice of the United States, served from 1799-1800 as President John Adams' special envoy to France to negotiate restrictions put on American ships in the wake of the

vorably by the Senate,"⁴²⁵ the fact is that they could not have been made at all⁴²⁶ unless all three Departments of the government, filled at that time with men who had helped to write and ratify the Constitution, believed that it was constitutional for Supreme Court Justices to hold simultaneously these executive posts.⁴²⁷

As further indication of this early belief that federal judges could constitutionally hold executive posts, the original legislative and executive departments adopted statutes giving inferior judges a role in overseeing the salvaging of French ships, in assessing the evidence in electoral disputes, in naturalization proceedings, and in evaluating the pensions of Revolutionary War Veterans.⁴²⁸ This latter scheme led to the famous opinions in *Hayburn's Case*,⁴²⁹ wherein the then-Justices of the Supreme Court indicated that no court could undertake an executive task that was subject to review by the Secretary of War, but several justices indicated that *individual judges* might be able to undertake executive tasks concurrent with their judicial service as Article II "commissioners."⁴³⁰ Thus began a distinction, now well-established, between what Article III courts can be asked to do and what particular judges can be asked to do *individually* if they hold a simultaneous executive office.⁴³¹

XYZ affair. Ellsworth continued to serve as Chief Justice, even though his peace mission was politically controversial. 1 WARREN, *supra* note 423, at 119.

⁴²⁵ 1 WARREN, *supra* note 423, at 119. For example, during the debate over the Jay nomination, Aaron Burr protested:

That to permit Judges of the Supreme Court to hold at the same time any other office or employment emanating from and holden at the pleasure of the Executive is contrary to the spirit of the Constitution and, as tending to expose them to the influence of the Executive, is mischievous and impolitic.

1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 152 (1828) (motion of Sen. Burr (Apr. 19, 1794)), *quoted in* Maeva Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269, 273-74 n.16 (1989).

⁴²⁶ After three days' debate on Jay's appointment, the Senate ultimately confirmed his nomination on April 19, 1794 by a vote of 18 to eight. 1 WARREN, *supra* note 423, at 119. Ellsworth's nomination as ambassador to France was similarly approved on February 27, 1799. *Id.* at 156.

⁴²⁷ *Mistretta v. United States*, 488 U.S. 361, 399 (1989) ("This contemporaneous practice by the Founders themselves is significant evidence that the constitutional principle of separation of powers does not absolutely prohibit extrajudicial service.").

⁴²⁸ Wheeler, *Extrajudicial*, *supra* note 408, at 132-36.

⁴²⁹ 2 U.S. (2 Dall.) 409 (1792).

⁴³⁰ *Id.* at 410 n.† (Jay, C.J., Cushing, J., Duane, Dist. Ct. J.) (individual judges could perform that function); *id.* at 411-12 n.† (Wilson & Blair, JJ., and Peters, Dist. Ct. J.) (not expressing an opinion on that question); *id.* at 413-414 n.† (Iredell, J., & Sitgreaves, Dist. Ct. J.) (leaving question open).

⁴³¹ This distinction was confirmed by the decision in *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851). In that case, the Supreme Court held that it lacked jurisdiction to review an executive act taken by a Florida district judge pursuant to statute. The act itself was subject to revision by the Secretary of the Treasury. Essentially, the Supreme Court concluded that it was constitutional for the district judge to serve simultaneously as an

The early Congresses and Administrations also indicated their approval of simultaneous executive posts for judges by statutorily assigning potentially controversial executive functions to the Chief Justice. As Professor Wheeler describes, the Chief Justice was assigned to the Sinking Fund Commission, which had the task of reducing and refunding the Revolutionary War debt.⁴³² The Chief Justice was also assigned to a Commission to inspect the operation and output quality of the United States Mint.⁴³³ The quality of currency and debt repayment were both hot political issues in the founding period. These statutory assignments therefore drew the Chief Justice directly into potentially controverted areas.⁴³⁴ Finally, Professor Wheeler notes that President Washington repeatedly sought all kinds of advice from Chief Justice Jay, whom he seems almost to have regarded as a member of his Cabinet.⁴³⁵ As indicated by *The Correspondence of the Justices*, Jay resisted the most extreme requests, but acceded to many others.⁴³⁶

However, to assert that many or all of these extrajudicial activities and escapades were accepted as constitutionally tolerable is not to say

executive officer for purposes of the statute even though it would not be constitutional for Congress to make the final actions of any Article III Court, supreme or inferior, subject to revision by an official in the executive department. See Brief for the United States at 49-51, *Mistretta v. United States*, 488 U.S. 361 (1989) (Nos. 87-1904 & 87-7028); Brief for the United States Sentencing Commission at 42, *Mistretta*. See also Marcus, *supra* note 425, at 269-71 (noting that Congress and the President were able to deal with the earliest Justices of the Supreme Court in their individual rather than institutional capacity).

⁴³² Wheeler, *Extrajudicial*, *supra* note 408, at 140-44. See Act of Aug. 12, 1790, ch. 47, 1 Stat. 186 (Chief Justice to serve ex officio as a member of the Sinking Fund Commission).

⁴³³ Wheeler, *Extrajudicial*, *supra* note 408, at 140. See Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 250 (Chief Justice to serve ex officio as a member of the U.S. Mint Commission). Wheeler reports that:

sample coins [were to] . . . be "assayed under the inspection of" a group including the Chief Justice, the Secretary and Comptroller of the Treasury, the Secretary of State, and the Attorney General. The Chief Justice's association with such activity had clear English precedents, namely the "Trial of the Pix," before, among others, the Lord Chancellor.

Wheeler, *Extrajudicial*, *supra* note 408, at 140. The Lord Chancellor of England, of course, is an officer of all three departments of government, presiding over the House of Lords, serving in the Cabinet, and being the highest judge in the English court system.

⁴³⁴ Wheeler, *Extrajudicial*, *supra* note 408, at 140. Wheeler suggests that Chief Justice Jay, perhaps cognizant of these difficulties, tried to keep his involvement in the Sinking Fund Commission to a minimum. *Id.* at 142-44.

⁴³⁵ *Id.* at 145-48.

⁴³⁶ *Id.* *The Correspondence of the Justices* is reprinted in PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-67 (3d ed. 1988) [hereinafter HART & WECHSLER]. Wheeler concludes that:

[this] incident was more than a refusal to give advice. It was part of a broader attempt by the early Supreme Court to deemphasize the obligatory extrajudicial service concept, so widely held in the early period. It was—along with *Hayburn's Case* and Jay's bout with the Sinking Fund Commission—an attempt to point out to non-judges and future judges that the duties of the American judge were best limited to judging cases and controversies.

Wheeler, *Extrajudicial*, *supra* note 408, at 158.

that they were looked upon with universal approval. In fact, quite the reverse is true.⁴³⁷ Opposition to many of the judges' executive activities was intense, and the objections raised echoed the cries of executive interference with a coequal department that had produced the constitutional ban on coterminous legislative-executive service just a few years earlier.

Thomas Jefferson, for example, complained that the executive had

been able to draw into this vortex the Judiciary branch of the Government, and by their expectancy of sharing the other offices in the Executive gift to make them auxiliary to the Executive in all its views, instead of forming a balance between that and the Legislature, as was originally intended. . . .⁴³⁸

Jefferson's conviction that the judiciary's acceptance of executive offices had unjustly slanted their opinions in favor of the executive is evident in many of his writings. For example, in a letter to James Madison railing against the "infernal" excise laws, Jefferson wrote: "We shall see what the Court lawyers and Courtly Judges and would-be Ambassadors will make out of it."⁴³⁹ Rufus King similarly warned that "although the prospect of an honorary appointment within the gift of the President was remote," the practice was dangerous since it "put the Judges under the influence of the Executive . . . [and] might influence and lessen their independence."⁴⁴⁰ To many, especially those who had been Antifederalists,⁴⁴¹ it seemed that the President's power to reward federal judges with offices and promotions had made the judiciary "simply an annex" to the President and the Federalist party.⁴⁴²

Undoubtedly, the prestige of the Supreme Court was badly hurt by the political controversies swirling around Chief Justice Jay's highly controversial treaty with England and Chief Justice Ellsworth's peace mission to France in the wake of the XYZ affair. Confidence in the judiciary cannot have been helped either by Chief Justice John Marshall's amazing involvement in the signing of William Marbury's Commission and his subsequent adjudication of the lawsuit arising out of

⁴³⁷ Even Chief Justice Jay had his doubts about some of the extrajudicial requests. See *supra* note 434.

⁴³⁸ WARREN, *supra* note 423, at 167.

⁴³⁹ *Id.* at 156.

⁴⁴⁰ I THE LIFE AND CORRESPONDENCE OF RUFUS KING 1894-1900, at 521-22 (Charles R. King ed., 1894); 1 WARREN, *supra* note 423, at 120.

⁴⁴¹ The opposition to dual judicial-executive office holding was not exclusive to Antifederalists, however. Federalists opposed the practice as well. See 1 WARREN, *supra* note 423, at 120-21.

⁴⁴² *Id.* at 167. For further discussion of the opposition to judicial office holding, see *id.* at 158-68, 189-99.

his own actions when he served simultaneously as Chief Justice and as Secretary of State.

It should come as no surprise therefore that Senator Charles Pinckney, believing that the failure of the Constitution to prohibit federal judges from holding other offices had created "an unwise and degrading situation for a National Judiciary,"⁴⁴³ proposed in 1800 a constitutional amendment that would have provided for judicial-executive incompatibility.⁴⁴⁴ When nothing came of his amendment proposal, Pinckney sought to bar joint judicial-executive office holding through legislation, but again to no avail.⁴⁴⁵

Of course, the failure of Senator Pinckney's proposals did not lead to a situation where federal judges holding simultaneous executive office was viewed as commonplace and unproblematic. In fact, in the years after the Jay and Ellsworth controversies, the Jeffersonians came to power, and the early practice of frequent and prominent instances of joint judicial-executive office holding largely died out. Perhaps the Jeffersonians were sincere in the constitutional arguments they had made against the practices of Presidents Washington and Adams. As likely, however, they found, initially, few Supreme Court Justices whose political offices they wished to engage. In any event, a practice did begin to grow up of *not* commissioning federal judges to hold politically sensitive executive posts. This practice became sufficiently solidified so that its general acceptance became most evident when we observe the negative reaction engendered by its breach.

In the nineteenth century, instances of extrajudicial service in executive office continued, but, with one notorious exception, the service was in significantly less controversial and important posts.⁴⁴⁶ The exception, of course, was the disastrous participation of five Supreme Court Justices in the infamous 1876 Hayes-Tilden Commission.⁴⁴⁷

⁴⁴³ *Id.* at 167.

⁴⁴⁴ The text of the proposed amendment can be found in ANNALS OF THE CONGRESS OF THE UNITED STATES, 6th Cong., 1st Sess. 1-42 (1800). Congressman Livingston of New York proposed a similar constitutional amendment in the House of Representatives on February 13, 1800. Professor Wheeler relates an 1806 attempt by John Randolph to ban plural office holding by judges. The Randolph proposal would not have affected *ex officio* service without salary such as on the Sinking Fund Commission. Wheeler, *Extrajudicial*, *supra* note 408, at 142.

⁴⁴⁵ Similar legislation was proposed in the House in 1804. See 1 WARREN, *supra* note 423, at 162.

⁴⁴⁶ For example, President Grant appointed Justice Nelson to represent the U.S. in arbitrating claims against Great Britain in 1871. Chief Justice Fuller and Justice Brewer accepted appointments as boundary arbitrators in a dispute between Venezuela and British Guiana. The Governor of California appointed Justice Stephen Field to serve on a commission for the revision of state laws. Mason, *supra* note 422, at 194 n.3.

⁴⁴⁷ The Hayes-Tilden Commission is discussed further in C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 161-62 (2d ed. 1956).

This Commission ratified a deal whereby Democrat Samuel Tilden's presidential victory was "stolen" from him in exchange for the Republicans in Congress agreeing to end Reconstruction. The unfortunate involvement of Supreme Court Justices in this partisan fiasco marked an isolated return to the judicial politicization of the 1790s.⁴⁴⁸

Most twentieth-century instances of extrajudicial service have also involved uncontroversial posts.⁴⁴⁹ But, beginning with the very politicized New Deal period and continuing to the present, a few exceptional instances of extrajudicial service have stirred bitter controversy. This controversy, like the controversy engendered in 1940 by F.D.R.'s bid for a third term, itself indicates how unacceptable simultaneous dual office holding has become. Presidents Roosevelt and Truman triggered the crisis by a series of actions. Initially, F.D.R., to the annoyance of the Chief Justice, appointed Justice Roberts to the politically sensitive commission investigating Pearl Harbor.⁴⁵⁰ The problem escalated to involve an undue presidential reliance on various justices for "advice,"⁴⁵¹ and culminated with President Truman's appointment of Justice Jackson as Chief Prosecutor for the United States in the Nuremberg Trials of 1945-46.⁴⁵²

Chief Justice Harlan Fiske Stone, himself a Roosevelt appointee, turned down an F.D.R. commission appointment with a stern letter observing that "[w]e must not forget that it is the judgment of history that two of my predecessors, Jay and Ellsworth, failed in the obligations of their office and impaired their legitimate influence by participation in executive action in the negotiation of treaties."⁴⁵³ He continued that: "it is not by mere chance that every Chief Justice since has confined his activities strictly to the performance of his judi-

⁴⁴⁸ It should be mentioned, however, that the Court was also badly hurt at this time by Justice Davis' and Justice McLean's openly entertained presidential ambitions. Davis ultimately resigned from the Court to become a Senator. Mason, *supra* note 422, at 194 n.3.

⁴⁴⁹ Thus, Justice Hughes served on a Commission to determine postal rates in 1911, and in 1930 settled a boundary dispute between Guatemala and Honduras. The first Justice Harlan sat as an arbitrator in the Fur Seal arbitration. Justice Day was named to the American-German Claims Commission, and Justice Roberts served on the Mexican Claims Commission. Justice Van Deranter arbitrated the controversy with Great Britain over the seizure of the ship, *I'm Alone*. See Mason, *supra* note 422, at 194 n.3. An extensive listing of federal judges who have served the executive while retaining their positions on the bench can be found in the REPORT OF SENATE JUDICIARY COMMITTEE ON ABE FORTAS, 90th Cong., 2d Sess. 6-8 (1968).

⁴⁵⁰ Mason, *supra* note 422, at 199. Later, Chief Justice Stone was also offered a series of commission appointments, including a commission to investigate the nation's rubber supply, a politically contentious issue at the time. *Id.* at 199-216. Before that Justice Roberts served on the Commission investigating the Pearl Harbor disaster.

⁴⁵¹ *Id.* at 198-99. Professor Mason recounts that F.D.R. frequently sought advice from Justices Douglas, Frankfurter and Byrnes.

⁴⁵² *Id.* at 209-16.

⁴⁵³ *Id.* at 203-04 (text of letter from Stone to Roosevelt).

cial duties."⁴⁵⁴ Stone was furious about Justice Jackson's extrajudicial service at Nuremberg,⁴⁵⁵ which embroiled the Court in current events, exacerbated problems of workload, and occasioned jealousy on the part of the other justices. Professor Mason makes clear that Stone arranged for the posthumous publication of his letter to F.D.R. turning down the proposed Rubber Commission appointment precisely to insure that a widely-known precedent of judicial refusal of such posts be set.⁴⁵⁶

Notwithstanding these events, only a few years passed before President Lyndon B. Johnson embroiled the Justices in two even more bitter controversies stemming from dual office holding. The first resulted from Johnson's appointment of a very reluctant Chief Justice Earl Warren to head the President's Commission on the Assassination of President Kennedy.⁴⁵⁷ Warren initially refused Johnson's request, noting that the Jackson appointment to the Nuremberg post had produced "divisiveness and internal bitterness on the Court."⁴⁵⁸ But Johnson insisted and Warren relented, thus embroiling his name, and the Supreme Court's prestige, in one of the most controverted and bizarre episodes in American history.

But, the Warren Commission fiasco was nothing compared to the controversy that came to swirl around Associate Justice Abe Fortas' nomination to be Chief Justice. Complaints about Fortas' extrajudicial advice to Johnson⁴⁵⁹ led, in 1969, to a full-scale investigation by

⁴⁵⁴ *Id.* at 204.

⁴⁵⁵ *Id.* at 209-16.

⁴⁵⁶ *Id.* at 205-06.

⁴⁵⁷ President Lyndon Johnson created this commission, commonly known as the Warren Commission, by Executive Order No. 1130, dated November 29, 1963. Later, Congress designated the Chief Justice as a Regent of the semi-public Smithsonian Institution, 20 U.S.C. §§ 41-42 (1990).

⁴⁵⁸ EARL WARREN, *THE MEMOIRS OF EARL WARREN*, 356 (1977). In his memoirs, Chief Justice Warren acknowledged the harmful effects that extrajudicial service can have on the federal judiciary. Recounting his reasons for initially refusing Johnson's request that he head the investigation into President Kennedy's death, Warren wrote:

[H]istorically, the acceptance of diplomatic posts by Chief Justices Jay and Ellsworth had not contributed to the welfare of the Court, . . . the service of five Justices on the Hayes-Tilden Commission had demeaned it, . . . the appointment of Justice Roberts as chairman to investigate the Pearl Harbor disaster had served no good purpose, and . . . the action of Justice Robert Jackson in leaving Court for a year to become chief prosecutor at [Nuremberg] after World War II had resulted in divisiveness and internal bitterness on the Court.

Id.

⁴⁵⁹ The nomination of Associate Justice Fortas for the office of Chief Justice provoked considerable discussion of the judiciary and the separation of powers when the Senate committee considering the Justice's promotion discovered that Justice Fortas had aided the President in drafting several pieces of legislation, had helped to craft the 1966 State of the Union address, and had participated in White House policy sessions regarding the Vietnam War and the Detroit riots. Slonim, *supra* note 14, at 393. These events should not

the Senate Subcommittee on the Separation of Powers into the nonjudicial activities of federal judges.⁴⁶⁰ As a result of these hearings, Subcommittee Chairman Sam Ervin introduced a bill that, much like the legislation proposed by Senator Pinckney nearly two hundred years earlier, purported "to enforce the principle of separation of powers" by "prohibit[ing] the exercise or discharge by justices and judges of the United States of nonjudicial governmental powers and duties."⁴⁶¹ Nothing came of Senator Ervin's proposed legislation,⁴⁶² and the problem of extrajudicial service has continued to generate controversy.

In 1983, President Reagan established the President's Commission on Organized Crime,⁴⁶³ chaired by then-active Circuit Judge Irving R. Kaufman, himself no stranger to controversy. The Kaufman Commission, which played an advisory role only, and on which membership was voluntary, generated two circuit court opinions that enforced Commission subpoenas, but caustically criticized the inclusion of judges on the Commission itself.⁴⁶⁴

More dramatically, in *Mistretta v. United States*,⁴⁶⁵ the issue arose as to whether three inferior federal judges could sit on the U.S. Sentencing Commission if the Commission was, as the Department of Justice argued, an agency of the executive department.⁴⁶⁶ The majority of the Court, idiotically concluding that the Commission was an Article III entity, allowed dual service in this instance.⁴⁶⁷ Justice Scalia wrote an impassioned dissent that correctly and elegantly explained the Court's separation-of-powers errors in upholding the constitutionality of the U.S. Sentencing Commission.⁴⁶⁸

We thus arrive at the present day to find circuit courts in some degree of doubt about the legality of Judge Kaufman's extrajudicial service and the Supreme Court straining to describe the Sentencing

be confused with later allegations that Justice Fortas had accepted an improper gratuity from a foundation, which ultimately led to his resignation from the Court.

⁴⁶⁰ See NONJUDICIAL ACTIVITIES OF SUPREME COURT JUSTICES AND OTHER FEDERAL JUDGES, HEARINGS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE COMMITTEE ON THE JUDICIARY, 91st Cong., 1st Sess. (1969).

⁴⁶¹ Slonim, *supra* note 14, at 395 n.15 (quoting S. 1097, 91st Cong., 1st Sess. (1969)).

⁴⁶² The proposal was never reported out of the Senate Judiciary Committee. *Id.* at 395 n.15.

⁴⁶³ Exec. Order No. 12, 435, 3 C.F.R. 202 (1983).

⁴⁶⁴ See *In re* President's Comm. on Organized Crime (Scarfo), 783 F.2d 370, 377 (3d Cir. 1986) ("[T]here has been a rising tide of criticism of judicial participation in such extrajudicial bodies. Responsible commentators have suggested that such conduct by judges violates the separation of powers."); *In re* President's Comm. on Organized Crime (Scaduto), 763 F.2d 1191 (11th Cir. 1985) (Roney, J., specially concurring).

⁴⁶⁵ 488 U.S. 361 (1989).

⁴⁶⁶ See Brief for the United States, *supra* note 431.

⁴⁶⁷ 488 U.S. at 398.

⁴⁶⁸ 488 U.S. at 422-26 (Scalia, J., dissenting).

Commission as being within Article III, perhaps in part to avoid this issue.⁴⁶⁹ We have a sustained and serious scholarly literature on the propriety of federal judges participating in extrajudicial activities, which literature has itself been spawned by some of the controversies extrajudicial activity has led to.⁴⁷⁰ For similar reasons, we have comment G to Canon 5 of the Code of Judicial Conduct purporting to advise federal judges on what very limited extrajudicial appointments they may accept.⁴⁷¹ Finally, we have a by now 190-year-old practice and tradition of not allowing joint judicial-executive service in Cabinet, subcabinet, or ambassadorial positions. In fact, the great dual service controversies of this century have all involved only the use of judges in executive posts that involved such court-related functions as: prosecution in a foreign jurisdiction (Nuremberg), law enforcement investigations (the Warren and Kaufman Commissions), and the issuance of Sentencing Guidelines (*Mistretta*).⁴⁷²

Given all of this, perhaps it is fair to say that a tradition has evolved that very nearly replicates the situation that would exist if we had a judicial-executive incompatibility clause. Thus, if we look at state constitutional law, we see that forty-six out of fifty states now provide for a substantial measure of judicial-executive incompatibility in their state constitutions.⁴⁷³ Twenty-eight states go even further with

⁴⁶⁹ In a pre-*Mistretta* case, the Ninth Circuit found the Sentencing Commission to be unconstitutional on separation of powers grounds. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988) ("We can prevent undue entanglement by the judiciary in the operation of the political branches only by adopting a clear cut prophylactic rule: Congress may not, under our system of separated powers, require judges to serve on bodies that make political decisions.")

⁴⁷⁰ For scholarly treatment of the propriety of federal judges' participation in extrajudicial activities, see Redish, *supra* note 17, at 300-03; Talbot D'Alemberte, *Searching for the limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 620-25 (1987); Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983 (1985); Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9 (1970); Nathaniel L. Nathanson, *The Extrajudicial Activities of Supreme Court Justices: Where Should the Line Be Drawn?*, 78 NW. U. L. REV. 494, 494-525 (1983) (book review); Slonim, *supra* note 14; Wheeler, *Extrajudicial*, *supra* note 408. See also James T. Barry, III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 261 (1989) (discussing Framers' debate over role of federal judges in creating laws).

⁴⁷¹ See *supra* note 377.

⁴⁷² Of course, in some ways the use of judges for executive posts of this kind raises the most serious separation-of-powers problems because litigation often results from law enforcement and sentencing activities, thus necessitating recusal of any judge who has already expounded on a litigated issue while serving in an executive post.

⁴⁷³ ALA. CONST. art. 5, § 130; ALA. CONST. art. 17, § 280; ALA. CONST. amend. 328, § 6.08(b); ALASKA CONST. art. 3, § 6; ALASKA CONST. art. 4, § 14; ARIZ. CONST. art. 6, § 28; ARK. CONST. art. 6, § 22; ARK. CONST. art. 7, § 10; ARK. CONST. art. 7, § 18; CAL. CONST. art. 5, § 2; CAL. CONST. art. 6, § 18; COLO. CONST. art. 6, § 18; DEL. CONST. art. 4, § 4; FLA. CONST. art. 2, § 5(a); FLA. CONST. art. 5, § 13; HAW. CONST. art. 5, § 1; HAW. CONST. art. 6, § 3; IDAHO CONST. art. 5, § 7; ILL. CONST. art. 6, § 13(b); IND. CONST. art. 2, § 9; IND. CONST. art. 5, § 8; IND. CONST. art. 5, § 24; IOWA CONST. art. 4, § 14; IOWA CONST. art. 5, § 18; KAN. CONST. art. 3, § 13; KY. CONST. § 123; LA. CONST. art. 4, § 2; ME. CONST. art. 6, § 5; ME.

the one person, one office principle and extend it to private sector "offices" by explicitly forbidding judges from practicing law.⁴⁷⁴ Accordingly, there is an important sense in which one person, one office judicial-executive incompatibility is now firmly a part of America's unwritten constitutional tradition.

But, there are vital limits to this point as well, which bear noting. First, there are many arguably executive functions and posts which we continue to assign to Article III judges, by statute or otherwise, that no one finds controversial. Thus, Congress has created numerous entities that obviously do not function exclusively as "courts" such as the Judicial Conference, the Judicial Councils, and the Special Division of the D.C. Circuit for Independent Counsels.⁴⁷⁵ With the exception of the Special Division, these entities do not decide cases or controversies and, in our judgment at least, should not as an original matter have been understood as exercising exclusively judicial power.⁴⁷⁶ Indeed, to some extent it seems to us that they might have been better understood, originally, as entities composed of judges who were temporarily exercising executive power. Even though these entities are composed of Article III judges, we believe they are probably constitutional under the rule of *United States v. Ferreira*⁴⁷⁷ because there is no

CONST. art. 9, § 2; MASS. CONST. pt. 2, ch. 6, art. 2; MASS. CONST. amend., art. 8; MICH. CONST. art. 6, § 21; MINN. CONST. art. 6, § 6; MO. CONST. art. 5, § 24; MONT. CONST. art. 6, § 5(2); MONT. CONST. art. 7, § 9(3); NEB. CONST. art. 4, § 2; NEV. CONST. art. 6, § 11; N.H. CONST. pt. 2, art. 93; N.H. CONST. pt. 2, art. 95; N.J. CONST. art. 6, § 6, para. 7; N.M. CONST. art. 6, § 19; N.Y. CONST. art. 6, § 20, para. b(1); N.C. CONST. art. 6, § 9(1); N.D. CONST. art. 6, § 10; OHIO CONST. art. 4, § 6(B); OKLA. CONST. art. 7, § 11(b); OR. CONST. art. 2, § 10; OR. CONST. art. 5, § 3; PA. CONST. art. 4, § 6; PA. CONST. art. 5, § 17(a); S.C. CONST. art. 4, § 2; S.C. CONST. art. 5, § 16; S.C. CONST. art. 6, § 3; S.D. CONST. art. 5, § 10; TENN. CONST. art. 2, § 26; TENN. CONST. art. 3, § 13; TEX. CONST. art. 4, § 6; TEX. CONST. art. 4, § 18; TEX. CONST. art. 16, § 40; TEX. CONST. art. 16, § 33; UTAH CONST. art. 8, § 10; VT. CONST. ch. 2, § 54; VA. CONST. art. 6, § 11; WASH. CONST. art. 4, § 15; W. VA. CONST. art. 7, § 4; W. VA. CONST. art. 8, § 7; WIS. CONST. art. 7, § 10(1); WYO. CONST. art. 5, § 27.

⁴⁷⁴ ALA. CONST. amend. 328, § 6.08(a); ALASKA CONST. art. 4, § 14; ARIZ. CONST. art. 6, § 28; CAL. CONST. art. 6, § 18; COLO. CONST. art. 6, § 18; DEL. CONST. art. 4, § 4; FLA. CONST. art. 5, § 13; HAW. CONST. art. 6, § 3; ILL. CONST. art. 6, § 13(b); KAN. CONST. art. 3, § 13; KY. CONST. § 123; LA. CONST. art. 5, § 24; MD. CONST. art. 4, § 41C; MO. CONST. art. 5, § 20; MONT. CONST. art. 7, § 9(3); NEB. CONST. art. 5, § 14; N.J. CONST. art. 6, § 6, para. 6; N.Y. CONST. art. 6, § 20, para. b(4); N.D. CONST. art. 6, § 10; OKLA. CONST. art. 7, § 11(b); PA. CONST. art. 5, § 17(a); S.C. CONST. art. 5, § 16; S.D. CONST. art. 5, § 10; UTAH CONST. art. 8, § 10; VA. CONST. art. 6, § 11; WASH. CONST. art. 4, § 19; W. VA. CONST. art. 8, § 7; WYO. CONST. art. 5, § 25.

⁴⁷⁵ For a thoughtful discussion, see Redish, *supra* note 17, at 311-19.

⁴⁷⁶ For an explanation of how judges might validly undertake some administrative functions, see *id.* at 315-18 (discussing authority to hire law clerks). This power may also come from the inferior officers appointment clause, which recognizes that judges will hire at least some officers inferior to themselves who need not necessarily decide cases or controversies. Conversation with Akhil Amar, July 29, 1994.

⁴⁷⁷ 54 U.S. (13 How.) 40 (1851). See discussion *supra* note 431. We have not considered whether such entities raise separation-of-powers problems under the Appointments Clause. We also assume here that the federal courts may only decide cases or controversies

judicial-executive incompatibility clause to prevent Article III judges from holding simultaneous executive posts.

Similarly, the various statutes which uncontroversially give all individual Article III judges the equal power to naturalize citizens⁴⁷⁸ or to conduct marriages⁴⁷⁹ are unquestionably constitutional because, in the absence of a judicial-executive incompatibility clause, there is no bar to giving such judges civil executive offices that entail tasks (arguably) beyond the adjudication of cases or controversies.⁴⁸⁰ Accordingly, even a truly wooden "originalist" need not entertain any fear that his or her civil marriage is invalid simply because it was performed without controversy by a Federal judge.

In sum, our modern practice after two hundred years is to avoid simultaneous dual service when it would in *any* way whatsoever impair the "checking" power of the judiciary relative to the other departments of government, while allowing dual service in other minor instances.⁴⁸¹ The minor instances are almost all tied closely to problems of judicial administration or to other issues of a court-related nature.⁴⁸²

3. *A Normative Defense of Judicial-Executive Incompatibility*

The delegates to the Federal Convention never discussed, debated, or voted on the concept of federal judicial-executive incompatibility.⁴⁸³ The reasons for this silence are not clear. But what is clear is that the problem of excessive judicial power was not a burning issue at Philadelphia in 1787. As Forrest McDonald reminds us, "[t]he delegates devoted less time to forming the judiciary—and less attention to careful craftsmanship—than they had expended on the legislative and executive branches."⁴⁸⁴ This may well have been because the Framers had no recent practical experience with abusive judicial power.⁴⁸⁵

and that they lack a judicial prerogative. *See generally* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327 (1992).

⁴⁷⁸ 8 U.S.C. § 142(a) (1988).

⁴⁷⁹ *See, e.g.*, D.C. CODE ANN. § 30-106 (1981); ILL. ANN. STAT. ch. 750, para. 5/209 (Smith-Hurd 1993); N.Y. DOM. REL. LAW § 11 (McKinney 1988).

⁴⁸⁰ The received wisdom is that these tasks *do* fall within the case or controversy description, since there is no inherent reason why a "case" cannot include an application by a private person for a government grant of property or status. *See* HART & WECHSLER, *supra* note 436, at 93; *Tuten v. United States*, 270 U.S. 568 (1926) (Brandeis, J.).

⁴⁸¹ Wheeler, *Extrajudicial*, *supra* note 408, at 130-31, 152.

⁴⁸² *See supra* notes 469-72 and accompanying text.

⁴⁸³ *See supra* notes 396-401 and accompanying text.

⁴⁸⁴ McDONALD, *supra* note 44, at 253.

⁴⁸⁵ Indeed, John Dickenson warned his fellow delegates to the federal convention to let "[e]xperience . . . be our only guide" since "[r]eason may mislead us." 2 RECORDS, *supra* note 9, at 278 (Aug. 13, 1787). *See also* William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 263 (1989) (quoting LOUIS FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 4-5 (1972)) (The Framers' argu-

Royal despotism in the 1770s and majority tyranny in the 1780s had made the Framers acutely aware of the threat posed by concentrations of power in the executive and legislative departments. The judiciary, however, had never been an oppressive power *of its own right*, but rather had been dominated and controlled by one of the two other departments.⁴⁸⁶ Thus, the Framers' main goal in drafting Article III was to protect the federal courts from presidential or congressional interference.⁴⁸⁷ In 1787, the specter of judicial imperialism was impossible to conceive.⁴⁸⁸ Today, however, the "least dangerous branch"⁴⁸⁹ looks a bit more menacing, and a great many thinkers on both the right and the left have directed a lot of energy toward finding principled ways to cabin its power.⁴⁹⁰ While most of these efforts have sought to restrain the judiciary within the bounds of theories that control constitutional and statutory interpretation, recent years have also seen an increased interest in structural reforms as an answer to our judicial woes.⁴⁹¹ An expansion of the incompatibility principle to prevent any commingling in the same hands of judicial and executive powers might be a structural reform worthy of consideration.

As explained above, a tradition of very substantial judicial-executive incompatibility has already grown up.⁴⁹² The soundness of this tradition requires little defense, for the hazards associated with judicial service in the executive department are readily apparent. Aside from the fact that extrajudicial service distracts judges from court

ments were always "grounded on what had been learned at home. Theory played a role, but it was always circumscribed and tested by experience."

⁴⁸⁶ See *supra* notes 30-32, 116 and accompanying text (royal governors and crown manipulated colonial judges; state legislatures usurped most judicial power granted under the state constitutions).

⁴⁸⁷ See THE FEDERALIST NO. 78, *supra* note 1, at 466 (Alexander Hamilton) ("[T]he general liberty of the people can never be endangered . . . so long as the judiciary remains truly distinct from both the legislature and the executive.").

⁴⁸⁸ The early American complacency toward the judicial power stands in sharp contrast to the fear and contempt with which the judiciary was regarded in civil law countries. This fear of the judiciary was markedly strong in France, where the judges had misused their power in ways designed to sustain the *ancien regime*. Accordingly, after the Revolution, the French severely constrained the power of their judges. See, e.g., MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 72-73 (1985).

⁴⁸⁹ Hamilton predicted in *Federalist* 78 that, as between the three great departments of government, the "judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." THE FEDERALIST NO. 78, *supra* note 1, at 465.

⁴⁹⁰ See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (1994).

⁴⁹¹ See, e.g., Stephen L. Carter, *Time's Up, Mr. Rehnquist: Term Limits for Justices and Other UnCourtly Ideas*, WASH. POST, May 8, 1994, at C1 (discussing proposal to limit judicial tenure to nonrenewable eight- or twelve-year terms).

⁴⁹² See *supra* notes 422-82 and accompanying text.

work, which should be "exacting enough to demand the undivided attention of all its members,"⁴⁹³ when judges serve in executive posts they may end up passing on issues that will later come before them for adjudication. If the judges hear those issues, the impartiality of the courts is lost. If they recuse themselves, workload burdens may be distributed unfairly. Moreover, on courts with fixed memberships like the U.S. Supreme Court, recusals can affect the outcome of a closely divided case. When judges hold executive office, there is an obvious danger that judicial affinity for the executive department will come to bias the judges in their adjudication of cases involving the United States. Finally, as Alexander Hamilton explained in *The Federalist*,

[b]y being often associated with the executive, [judges] might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws. It is peculiarly dangerous to place them in a situation to be either corrupted or influenced by the executive.⁴⁹⁴

Somewhat less apparently, the employment of judges in nonjudicial roles, where they are subject to executive department hierarchy, discipline, and promotion can only have the effect of undermining the federal courts' "reputation for impartiality and nonpartisanship,"⁴⁹⁵ which is the vital source of their authority and legitimacy. Where promotion within the executive department is possible, the reality, as well as the appearance, of judicial independence might well be threatened. The President's power to promote federal judges already curtails the independence afforded by Article III's tenure and salary guarantees. If an additional lode of promotions is suddenly also available, the reality and appearance of lost independence will be that much greater.

⁴⁹³ Letter from Chief Justice Stone to Senator Styles Bridges (August 1, 1941) *quoted in* Mason, *supra* note 422, at 200.

Chief Justice Stone firmly believed that it was improper for federal judges to engage in public acts that required them to perform nonjudicial functions. Writing to Senator Bridges to decline an invitation to attend a testimonial dinner in his honor, Chief Justice Stone expressed his concern that his colleagues' involving themselves in outside activities was damaging to the Court's influence and prestige. He wrote:

The Court, as you know, has of late suffered from overmuch publicity. After all, its only claim to public confidence is the thoroughness and fidelity with which it does its daily task . . . I am anxious to see the Court removed more from the public eye except on decision day, as soon as possible—to imbue its members by example and by precept with the idea that the big job placed on us by the Constitution is our single intent in life and that, for the present, public appearances and addresses by the judges and the attendant publicity ought to be avoided.

Id.

⁴⁹⁴ THE FEDERALIST NO. 73, *supra* note 1, at 446-47.

⁴⁹⁵ *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

Moreover, while Chief Justice Warren's limited service in the executive "unquestionably lent authority, dignity and stature to the Commission that bears his name,"⁴⁹⁶ one can only speculate as to the amount of authority, dignity, and stature he would have stripped from the Court had he demonstrated incompetence in his executive role.⁴⁹⁷ Furthermore, regardless of how well the Chief Justice performed his duties as head of the Warren Commission, the mere fact that a Chief Justice of the Supreme Court was so intimately associated with an investigation that has engendered such lingering controversy and speculation⁴⁹⁸ can only have had the collateral effect of diminishing the public's confidence in the Court. Much the same could be said of Justice Jackson's involvement in the prosecution of the Nuremberg Trials, which Chief Justice Warren ironically admitted had the additional effect of producing "divisiveness and internal bitterness on the Court."⁴⁹⁹

While one can understand and sympathize with a President's yearning to draw on the prestige of the federal courts to solve tough crises, the entanglement of judges in controversial undertakings, no matter how important, must, in the end, cause harm to the federal judiciary by stripping it of that appearance of impartial detachment that sustains judicial legitimacy and effectiveness.⁵⁰⁰ For all these reasons, a case can be made for constitutionalizing a strict rule of federal judicial-executive incompatibility. Such a rule would, at least, protect federal judges from being placed in the awkward position of having to refuse presidential requests that they further serve their country.⁵⁰¹

⁴⁹⁶ Robert F. Cushman, *Why the Warren Commission?*, 40 N.Y.U. L. Rev. 477, 502 (1965).

⁴⁹⁷ Cf. *id.* at 502 ("[T]he presence of the Chief Justice would aggravate the already embarrassing position of the Commission were it to turn up a new suspect or an accomplice. Had there been the least suspicion that this could occur it seems inconceivable that Chief Justice Warren would have accepted appointment to the Commission.").

⁴⁹⁸ To this day, charges of conspiracy and cover-up surround the findings of the Warren Commission, and the memory of the Chief Justice's association with this investigation has not left the public mind. A recent notable example is Oliver Stone's film, *JFK*.

⁴⁹⁹ WARREN, *supra* note 458, at 356.

⁵⁰⁰ As the Justices themselves recognized as early as 1792, in asking Congress to relieve them of their nonjudicial duties while riding circuit: "The distinction made between the Supreme Court and its Judges . . . is a distinction unfriendly to impartial justice, and to that confidence in the Supreme Court, which it is so essential to the public Interest should be reposed in it." Marcus, *supra* note 425, at 277 (quoting Letter from Justices of the Supreme Court to Congress (Aug. 9, 1792) (Record Group 46, National Archives)).

⁵⁰¹ Chief Justice Stone was constantly being put in the position of refusing requests to serve in executive capacities. See Mason, *supra* note 422, at 199-216. While Stone was firm in his resolve not to accept any such appointments, Chief Justice Warren found himself more susceptible to executive pressure. As discussed earlier, Warren initially refused to accept President Johnson's request that he head the investigation into President Kennedy's death. His reasoning was threefold:

First, it is not in the spirit of constitutional separation of powers to have a member of the Supreme Court serve on a presidential commission; second, it would distract a Justice from the work of the Court, which had a heavy

Of course, the practical effects of constitutionalizing the rule would most likely be small. The electoral system already provides a mechanism for enforcing violations, even of unwritten constitutional traditions. Moreover, the political costs to any President who would nominate a Judge to anything more than a temporary executive post, or to the Senate that would confirm such a nomination, are probably sufficient to enforce the essential separation of the personnel of these two great Departments.⁵⁰² In addition, the Code of Judicial Ethics purports to limit the ability of judges to accept nonjudicial posts.⁵⁰³ Thus, despite occasional breaches, the convention prohibiting federal judges from holding executive office does not appear to be in any great danger of demise. Yet, while we acknowledge that any constitutional reform is unlikely to occur in the absence of crisis, we would follow the lead of forty-seven of the fifty states and include a judicial-executive incompatibility clause in any constitution that was being written from scratch.

Some explicit exceptions could be made to allow for Judicial Conferences,⁵⁰⁴ Councils, and law reform commissions, or for a power on the part of judges to conduct naturalizations and weddings, assuming one even thinks that the received wisdom that conducting such functions falls within the judicial power is somehow wrong. We think the key factor is this: Judges should, *at a minimum*, not be allowed to take on any executive function, office, or power that is not equally available to all other Article III judges on the same terms. So long as there is a rule that no executive office or power can be given to one judge without it also being made available to all other judges at the same time,

docket; and, third, it was impossible to foresee what litigation such a commission might spawn, with resulting disqualification of the Justice from sitting in such cases.

WARREN, *supra* note 458, at 356. Yet, under pressure from Johnson, he eventually agreed to heed the President's request. *See id.* at 356-58.

The example of Chief Justice Warren's succumbing to executive pressure may suggest a need for an incompatibility provision between judicial and executive offices. If executive pressure is strong enough to persuade the Chief Justice of the United States to accede to the President's request for extrajudicial service, despite his better judgment, the effects of this pressure must be greatly multiplied for all lower federal judges and Associate Justices, whose chances for promotion rest with the President.

⁵⁰² Given the holding in *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 225 (1974), that claims arising under the present Incompatibility Clause are non-justiciable "generalized grievances," it appears that the political process would likely provide the sole avenue for redress even if we were to constitutionalize the tradition of judicial-executive incompatibility. On the other hand, perhaps *Schlesinger* will some day be limited to its facts. *See supra* note 12.

⁵⁰³ *See supra* note 377.

⁵⁰⁴ The role of the Judicial Conference in promulgating the Federal Rules is *not*, in our view, desirable. *See, e.g.*, the famous dissents of Justice Black and Douglas from the order of January 21, 1963 altering the Federal Rules of Civil Procedure. *See also* Redish, *supra* note 17, at 315-17.

there is no danger, real or in appearance, of presidential or congressional corruption of the courts.⁵⁰⁵

The Constitution has very explicit rules that govern the precise degree to which the three *powers* of government are separated and shared.⁵⁰⁶ It would be a better document if it had equally explicit rules to govern the precise degree to which judicial and executive *personnel* must be separated and shared between these two great departments of government.

B. The Tradition of Federal-State Incompatibility

We turn, finally, to our last topic: The unwritten tradition that has grown up proscribing the dual holding of federal and state offices. Section 1 sets forth the original understanding as to this issue; Section 2 describes our actual historical practice over the last two hundred years; and Section 3 normatively defends the practice that has developed of a strict bar on dual federal-state office holding.

1. *The Original Understanding*

a. *Text and Context*

The constitutional text is totally silent on the subject of the dual holding of federal and state offices. It is helpful, therefore, to consider initially the Framers' actual practice on this matter under the Articles of Confederation. This practice helps us to understand the presuppositions of the Framers and ratifiers of the Constitution as to the dual holding of federal and state offices.⁵⁰⁷ It provides the backdrop against which the silent constitutional text must be read.

The Articles of Confederation plainly contemplated the dual holding of federal and state offices. Indeed, dual office holding was almost the rule, rather than the exception. Most federal executive⁵⁰⁸ and judicial⁵⁰⁹ functions were performed by state officials, who were simultaneously federal officials, during the period of the Articles. For example, all federal adjudications were rendered by special federal courts appointed from the state bench, for this purpose.⁵¹⁰ The

⁵⁰⁵ We are confident that no President or Congress would surrender any real significant executive power to the *whole* of the federal judiciary. Pending constitutionalization of our rule, we would propose it for inclusion in the Code of Conduct for United States Judges.

⁵⁰⁶ Compare the vesting clauses *with*, for example, the Presentment Clause.

⁵⁰⁷ For a nice discussion of the value of the Articles of Confederation in understanding constitutional federalism, see Saikrishna Prakash, *Field Office Federalism*, 79 U. VA. L. REV. 1957, 1962-71 (1993).

⁵⁰⁸ There were a few wholly federal executive offices set up under the Articles' government but their existence does not affect our analysis here. *See id.*

⁵⁰⁹ *Id.* at 1967-71.

⁵¹⁰ *Id.* at 1969 n.67.

judges on those courts were for all practical purposes both federal and state officials. Similarly, the Members of the Continental Congress during this period were also often state officials. Even when they did not actually hold simultaneous state offices, the fact that they were paid for their federal service out of state coffers must have blurred the line between federal and state loyalties.⁵¹¹

Against the backdrop of this experience and practice, the silence of the Constitution must be assumed not to have disturbed the dual office holding custom. We can be even more confident of this fact when we consider that various counter-customary federalism provisions were made quite textually explicit lest confusion occur. For example, the Constitution specifically provides for national salaries for Members of Congress, for the President, and implicitly for the Article III judiciary.⁵¹² In addition, the Constitution guarantees the term of office of all of those national figures, thus protecting them from being recalled by the states.⁵¹³ Recall was allowed under the Articles government and diminished the independence at that time of federal officials.

In addition, we can be confident that the original Constitution contemplated dual federal-state office holding because of the provision made for the election of U.S. Senators by state legislatures.⁵¹⁴ This rule of election made U.S. Senators, in effect, "ambassadors" from the state legislatures to the national government. As a result, national senatorial office was, to a degree, a state legislative office. In effect, the Speakers and Presidents Pro Tempore of the state legislatures automatically became national officers and went to Washington. Once there, they had to remain very active in state legislative matters if they were to be re-elected. Thus, the original Senate was set up almost to guarantee a form of dual federal-state office holding.⁵¹⁵

Finally, we can be certain that the Constitution permits dual federal-state office holding because of the explicitness with which it forbids the dual holding of any foreign office and a U.S. national or state office.⁵¹⁶ The existence of this Article I, Section 9 ban on dual foreign-U.S. office holding, and the absence of any comparable Article I,

⁵¹¹ We are indebted to Akhil Amar for bringing this point forcefully to our attention and for stressing to us on many occasions the continued relevance of the Articles of Confederation, America's first constitution.

⁵¹² U.S. CONST. art. I, § 6, cl. 1; U.S. CONST. art. II, § 1 cl. 7; U.S. CONST. art. III, § 1, cl. 2.

⁵¹³ U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 3, cl. 1; U.S. CONST. art. II, § 1 cl. 1; U.S. CONST. art. III, § 1, cl. 2.

⁵¹⁴ U.S. CONST. art I, § 3, cl. 1 (emphasis added) ("The Senate of the United States shall be composed of two Senators from each State, *chosen by the legislature thereof*, for six Years . . .").

⁵¹⁵ We again thank Akhil Amar for calling this vital point to our attention.

⁵¹⁶ U.S. CONST. art I, § 9, cl. 8.

Section 10 ban on joint federal-state office holding, strongly suggests that joint federal-state office holding is definitely allowed.⁵¹⁷

Luther Martin so informed the general public when the Constitution was ratified. In his widely read statement of his reasons for not signing the Constitution,⁵¹⁸ Martin explained that the Constitutional Convention had considered a proposal to create federal-state incompatibility but had decided against it. He noted that:

[i]t was said, and in my opinion justly, that no good reason could be assigned why a senator or representative should be incapacitated to hold an office in *his own* government, since it can only bind him more closely to his State, and attach him the more to its interests, which, as its representative, he is bound to consult and sacredly guard, as far as is consistent with the welfare of the union; and therefore, at most, would only add the additional motive of gratitude for discharging his duty; and according to this idea, the clause which prevented senators or delegates from holding offices in their own States, was rejected by a considerable majority.⁵¹⁹

Accordingly, public utterances contemporary with ratification support the view that the Constitution was originally understood to create no incompatibility that would forbid the joint holding of federal and state office.

b. *Private Statements and the Debate at the Convention*

As Luther Martin's comments imply, the famous Virginia Plan had contained a clause that would have barred state office holders from Congress (although not from the national executive or judiciary).⁵²⁰ Nevertheless, the delegates decided to get rid of this provision with surprisingly little debate.

Charles Cotesworth Pinckney argued against federal-state incompatibility by pointing to "the inconveniency to which such a restriction would expose both the members . . . and the States wishing for their services."⁵²¹ Roger Sherman added that by adopting an intergovernmental incompatibility provision "[i]t [would] seem that we are erecting a Kingdom at war with itself."⁵²² The only vocal opposition to the deletion of the federal-state incompatibility rule came from James Wilson, who feared that letting M.C.s hold state office would make them

⁵¹⁷ Article I, Section 9, of course imposes a series of Bill of Rights-type disabilities on the national government. Article I, Section 10, incorporates similar, but not identical, disabilities against the states.

⁵¹⁸ See 2 COMPLETE ANTI-FEDERALIST, *supra* note 91, at 52.

⁵¹⁹ *Id.*

⁵²⁰ See 1 RECORDS, *supra* note 9, at 20-21. See also *supra* note 101 and accompanying text (quoting the text of Randolph's fourth and fifth resolutions).

⁵²¹ 1 RECORDS, *supra* note 9, at 386 (June 23, 1787).

⁵²² *Id.*

too dependent on the states. "The longer the time," he said, "allotted to the officer, the more complete will be the dependance."⁵²³ With this scant debate the delegates cut federal-state incompatibility out of the Randolph Resolutions.

Given the ease with which this was done in the midst of great controversy over the problem of legislative-executive incompatibility, we must wonder what the Framers hoped to gain by allowing simultaneous federal-state service. As we should by now expect, Republicans and Federalists probably had divergent motives that in this instance led them to favor the same outcome. Charles Cotesworth Pinckney and Pierce Butler, both "traditional Republicans,"⁵²⁴ were staunch defenders of the state governments. Pinckney and Butler were responsible for the motions to delete federal-state incompatibility from the original Randolph Resolutions.⁵²⁵ They must have believed that Congress would necessarily respond better to the interests of the states as states if, for example, various officers of the several states also sat in the Houses of Congress.

On the other hand, Republican support for eliminating federal-state incompatibility cannot alone explain matters because the motions to delete the clause carried by a vote of eight states to three⁵²⁶ and were vocally opposed by only one Federalist speaker.⁵²⁷ The absence of serious Federalist resistance to a proposal that so obviously benefitted the Republican cause suggests that many Federalists also wanted to allow simultaneous service in federal and state offices.

Although we cannot document this, one plausible explanation for the lack of Federalist opposition is that many Federalists may have believed that national power would be augmented if capable men cho-

⁵²³ *Id.* at 428-29 (June 26, 1787).

⁵²⁴ Historians have used various labels to refer to the group of delegates to the Federal Convention who, although generally agreeing that the national government needed to be strengthened, nonetheless advocated a strong role for the state governments in the new constitutional scheme. Calvin Jillson, for example, refers to these delegates as "traditional republicans." See CALVIN C. JILLSON, *CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787*, at 49-50 (1988). Forrest McDonald resurrects the archaic spelling of the term "foederalists" to distinguish those delegates who supported a federal system of government that would respect state sovereignty from the "Federalists" who later advocated ratification of the Constitution and became members of the Federalist party. See McDONALD, *supra* note 44, at 201 n.20. Gordon Wood simply uses the term "Antifederalists," although that label is more commonly applied to those who opposed ratification of the Constitution after the completion of the Federal Convention. See WOOD, *supra* note 22, at 499.

⁵²⁵ General Pinckney and Pierce Butler, both of South Carolina, actually made separate motions to strike the provisions that would have rendered members of each House of Congress ineligible for appointment to state offices. 1 RECORDS, *supra* note 9, at 386 (June 23, 1787); *id.* at 428 (June 26, 1787).

⁵²⁶ RECORDS, *supra* note 9, at 386 (June 23, 1787) (Pinckney's motion); *id.* at 429 (June 26, 1787) (Butler's motion).

⁵²⁷ See remarks of James Wilson, quoted *supra* text accompanying note 523.

sen to hold state office were also allowed to serve in national office.⁵²⁸ Similar concerns about the need to attract the best politicians for national service had led prominent Federalists to oppose even federal legislative-executive incompatibility.⁵²⁹ The nation-building concerns that caused many Federalists to accept dual legislative-executive office holding as a way to attract the brightest and best⁵³⁰ may have also convinced them to forgo a major attack on dual federal-state office holding. Thus, federal-state incompatibility may have been so easily defeated because its demise furthered both Federalist and Republican ends.

2. *Our Actual Practice, Historically and Today*

From the beginning of our constitutional history down to the present time, it is widely known that state officials have been relied upon to carry out many national functions. Thus, state judges have been asked to adjudicate cases involving federal questions, and state executives to a much lesser degree have been asked to execute and implement federal law. Saikrishna Prakash, in his thoughtful article entitled *Field Office Federalism*, persuasively explains how state officials can constitutionally be asked or even forced to carry out these federal tasks.⁵³¹ He also explains persuasively why State Legislatures cannot be conscripted by Congress even though state executives and courts can be.⁵³²

The issue to which we now turn, however, is not whether state officials have historically carried out federal functions, but rather whether they have also chosen jointly to hold federal and state offices. The answer of course is generally no. There have been a few examples of state officers simultaneously holding seats in Congress. Senator Robert LaFollete of Wisconsin, for example, retained his position as Governor of that State until January, 1906, even though he participated as a U.S. Senator in a special session of the Senate that had met in March, 1905.⁵³³ But, these exceptions are real rarities, and they tend to prove rather than disprove the rule we suggest. Likewise, the Seventeenth Amendment's abolition of state legislative election of U.S. Senators⁵³⁴ reveals a powerful trend away from dually held fed-

⁵²⁸ General Pinckney, the Republican proponent of the motion to strike out the state office incompatibility clause, actually argued this point. 1 RECORDS, *supra* note 9, at 429 (June 26, 1787) ("Such a restriction would also discourage the ablest men from going into the Senate.")

⁵²⁹ See *supra* notes 131-42 and accompanying text.

⁵³⁰ *Id.*

⁵³¹ Prakash, *supra* note 507, at 1990-2032.

⁵³² *Id.* at 1971-89.

⁵³³ See I WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES 606 (2d ed. 1929).

⁵³⁴ U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .").

eral-state governmental offices. Today, it seems almost unimaginable for one individual simultaneously to hold salaried, full-time federal and state offices.⁵³⁵ We just assume that if a state Governor, legislator, or judge attains national office, she will naturally (and ought to) resign her state office.

Why is it that we make this assumption? The answer is because a rule of one person, one office federal-state incompatibility is virtually mandated in most instances by *state constitutional law*. Thus, forty-seven out of fifty states have clauses in their state constitutions rendering individuals holding federal office ineligible to serve in their state legislatures.⁵³⁶ At least twenty-six states forbid persons to serve in the executive department of the federal government while serving in some offices of the executive department of their state government.⁵³⁷ At least twenty states specifically preclude their Governor from simultaneously serving in the federal executive department.⁵³⁸ And, forty-

⁵³⁵ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting) ("The adoption of the Seventeenth amendment (providing for direct election of senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies.").

⁵³⁶ ALA. CONST. art. 17, § 280; ALASKA CONST. art. 2, § 5; ARIZ. CONST. art. 4, pt. 2, § 4; ARK. CONST. art. 5, § 7; CAL. CONST. art. 7, § 7; COLO. CONST. art. 5, § 8; CONN. CONST. art. 3, § 11; DEL. CONST. art. 2, § 14; FLA. CONST. art. 2, § 5(a); GA. CONST. art. 3, § 2, para. 4(b); ILL. CONST. art. 4 § 2(e); IND. CONST. art. 2, § 9; IOWA CONST. art. 3, § 22; KAN. CONST. art. 2, § 5; KY. CONST. § 237; LA. CONST. art. 10, § 22; LA. REV. STAT. ANN. § 42:63(A) (West 1991); ME. CONST. art. 4, pt. 3, § 11; MD. CONST. art. 3, § 10; MASS. CONST. amend., art. 8; MICH. CONST. art. 4, § 8; MINN. CONST. art. 4, § 5; MISS. CONST. art. 14, § 266; MO. CONST. art. 3, § 12; MO. CONST. art. 7, § 9; MONT. CONST. art. 5, § 9; NEB. CONST. art. 3, § 9; NEV. CONST. art. 4, § 9; N.H. CONST. pt. 2, art. 95; N.J. CONST. art. 4, § 5, para. 3; N.J. CONST. art. 4, § 5, para. 4; N.M. CONST. art. 4, § 3(A); N.Y. CONST. art. 3, § 7; N. C. CONST. art. 6, § 9(1); OHIO CONST. art. 2, § 4; OKLA. CONST. art. 2, § 12; OKLA. art. 5, § 18; OR. CONST. art. 2, § 10; PA. CONST. art. 2, § 6; PA. CONST. art. 6, § 2; R.I. CONST. art. 3, § 6; S.C. CONST. art. 3, § 24; S.C. CONST. art. 6, § 3; S.D. CONST. art. 3, § 3; TENN. CONST. art. 2, § 26; TEX. CONST. art. 3, § 19; TEX. CONST. art. 16, § 12; TEX. CONST. art. 16, § 40; UTAH CONST. art. 6, § 6; UTAH CONST. art. 7, § 21; VT. CONST. ch. 2, § 54; VA. CONST. art. 4, § 4; WASH. CONST. art. 2, § 14; W. VA. CONST. art. 6, § 13; WIS. CONST. art. 4, § 13; WYO. CONST. art. 3, § 8; WYO. CONST. art. 6, § 19.

⁵³⁷ ALA. CONST. art. 17, § 280; ARK. CONST. art. 6, § 22; CAL. CONST. art. 7, § 7; DEL. CONST. art. 3, § 11; FLA. CONST. art. 2, § 5(a); IND. CONST. art. 2, § 9; KY. CONST. § 237; LA. CONST. art. 4, § 2; LA. CONST. art. 10, § 22; LA. REV. STAT. ANN. § 42:63(A) (West 1991); MASS. CONST. amend., art. 8; MISS. CONST. art. 14, § 266; MO. CONST. art. 7, § 9; MONT. CONST. art. 6, § 5(2); NEV. CONST. art. 4, § 9; N.C. CONST. art. 6, § 9(1); OKLA. CONST. art. 2, § 12; OR. CONST. art. 2, § 10; PA. CONST. art. 6, § 2; R.I. CONST. art. 3, § 6; S.C. CONST. art. 6, § 3; TENN. CONST. art. 2, § 26; TEX. CONST. art. 16, § 12; TEX. CONST. art. 16, § 40; UTAH CONST. art. 7, § 21; VT. CONST. ch. 2, § 54; W. VA. CONST. art. 7, § 4; WIS. CONST. art. 13, § 3; WYO. CONST. art. 6, § 19.

⁵³⁸ ALA. CONST. art. 5, § 130; ALASKA CONST. art. 3, § 6; ARK. CONST. art. 6, § 11; CAL. CONST. art. 5, § 2; CAL. CONST. art. 5, § 12; HAW. CONST. art. 5, § 1; IND. CONST. art. 5, § 8; IND. CONST. art. 5, § 24; IOWA CONST. art. 4, § 14; ME. CONST. art. 5, pt. 1, § 5; MASS. CONST. pt. 2, ch. 6, art. 2; NEV. CONST. art. 5, § 12; N.H. CONST. pt. 2, art. 93; N.H. CONST. pt. 2, art. 95; N.J. CONST. art. 5, § 1, para. 3; N.D. CONST. art. 5, § 3; OHIO CONST. art. 3, § 14; OR.

one states forbid members of their state judiciaries from holding office in the federal government.⁵³⁹

Thus, we can see that the original position of the Randolph Resolutions that there ought to be a constitutional ban on simultaneous federal-state office holding, has won out in America. Ironically, however, the ban exists as a matter of state rather than federal constitutional law. Why would so many states, acting individually, choose to enact such a ban? Maybe in part to secure the full-time service and attention of their office holders from excessive national loyalties. The fact is that at the point when the national government's power finally outstripped the power of the states, simultaneous dual office holding must have become more threatening to the states than it was to the national government. The states protected themselves with the only tool at their disposal. They enacted into state constitutional law a federal-state incompatibility rule virtually identical to the one that advocates of state power had defeated in 1787.

3. *A Normative Defense of Federal-State Incompatibility*

We believe there are a number of reasons to think strict federal-state incompatibility is generally a good idea. First, the enormous growth in the power of the federal government does make it dangerous for the states to allow simultaneous federal-state service. The federal office in any dual office holding arrangement is likely to seem disproportionately important to the office holder. As a result, it is likely to command more of the office holder's time, energies, and attention. This may be especially likely if a prospect exists of promotion to a higher federal office (or of removal from the present one). A

CONST. art. 5, § 3; PA. CONST. art. 4, § 6; S.C. CONST. art. 4, § 2; TENN. CONST. art. 3, § 13; TEX. CONST. art. 4, § 6; VA. CONST. art. 5, § 1.

⁵³⁹ ALA. CONST. amend. 328, § 6.08(b); ALA. CONST. art. 17, § 280; ALASKA CONST. art. 4, § 14; ARIZ. CONST. art. 6, § 28; ARK. CONST. art. 7, § 10; ARK. CONST. art. 7, § 18; CAL. CONST. art. 6, § 18; COLO. CONST. art. 6, § 18; DEL. CONST. art. 4, § 4; FLA. CONST. art. 2, § 5; FLA. CONST. art. 5, § 13; HAW. CONST. art. 6, § 3; ILL. CONST. art. 6, § 13(b); IND. CONST. art. 2, § 9; KAN. CONST. art. 3, § 13; KY. CONST. § 237; LA. CONST. art. 10, § 22; LA. REV. STAT. ANN. § 42:63(A) (West 1991); ME. CONST. art. 6, § 5; ME. CONST. art. 9, § 2; MD. CONST. art. 4, § 41C; MD. CONST. DEC. OF RIGHTS, art. 33; MASS. CONST. pt. 2, ch. 6, art. 2; MASS. CONST. amend., art. 8; MINN. CONST. art. 6, § 6; MISS. CONST. art. 14, § 266; MO. CONST. art. 7, § 9; MONT. CONST. art. 7, § 9(3); N.J. CONST. art. 6, § 6, para. 7; N.Y. CONST. art. 6, § 20, para. b(1); N.C. CONST. art. 6, § 9(1); N.D. CONST. art. 6, § 10; OHIO CONST. art. 4, § 6(B); OKLA. CONST. art. 2, § 12; OKLA. CONST. art. 7, § 11(b); OR. CONST. art. 2, § 10; PA. CONST. art. 5, § 17(a); PA. CONST. art. 6, § 2; R.I. CONST. art. 3, § 6; S.C. CONST. art. 5, § 16; S.C. CONST. art. 6, § 3; S.D. CONST. art. 5, § 10; TENN. CONST. art. 2, § 26; TEX. CONST. art. 16, § 12; TEX. CONST. art. 16, § 40; UTAH CONST. art. 7, § 21; UTAH CONST. art. 8, § 10; VT. CONST. ch. 2, § 54; VA. CONST. art. 6, § 11; WASH. CONST. art. 4, § 15; W. VA. CONST. art. 8, § 7; WIS. CONST. art. 7, § 10(1); WIS. CONST. art. 13, § 3; WYO. CONST. art. 5, § 27; WYO. CONST. art. 6, § 19.

sensible state, desiring the full loyalty of its office holders, might thus well prefer a strict incompatibility rule.

Even when the federal office in any dual arrangement is a minor one, problems remain. Various conflicts of interest may arise as to vital policy matters. More subtle conflicts of interest are possible too. Office holders may find it difficult fairly to allocate their time and energy if they are in effect holding down two jobs. If the two offices are both elective, it may prove impossible to satisfy fairly different electoral constituencies with different interests. If the two offices are appointive or judicial, the same conflict would ensue. No person can well serve two masters at the same time. Federal-state incompatibility is a vital protection against conflicts of interest.

Finally, there is the problem of the threat of preferment that is created just by the possibility of simultaneous dual federal-state office holding, even when no one is actually then engaging in it. The mere legality of such dual office holding could cause state officials to jockey with one another for federal jobs.⁵⁴⁰ In the process, they might be tempted collectively to sell-out vital state interests with each official thus hoping to win federal favor and office. The *status quo* rule of federal-state incompatibility frees state officials from this prisoner's dilemma.⁵⁴¹ It eliminates the possibility of entering into an unequal bargain, thus preventing unseemly and undesirable competition among state officers for federal good will.⁵⁴²

CONCLUSION: SEPARATION OF POWERS, SEPARATION OF INSTITUTIONS, OR SEPARATION OF PERSONNEL?

We come now to the end of our story, having defended in isolated discussion thus far: 1) the Incompatibility Clause of Article II, Section 6; 2) the unwritten federal tradition of judicial-executive incompatibility; and, 3) the tradition, codified in state constitutional

⁵⁴⁰ See *supra* notes 495-96 and accompanying text (identifying a similar prisoner's dilemma preferment problem for federal judges, absent a federal judicial executive incompatibility rule).

⁵⁴¹ Another way to free state officials from this dilemma would be to require that no state officer be given any type of federal office or power unless all other state officers in the category also received the same federal office or power. Such a generality-of-preferment rule would be analogous to the rule proposed above wherein we defend the practice of giving judges the arguably executive powers to conduct naturalizations and weddings on the ground that all judges are being treated alike. See *supra* note 505.

⁵⁴² It is no longer possible to argue, as it was in 1787, that a rule of federal-state incompatibility would prevent the "best and the brightest" from going to Washington to work for the national government. Indeed, a more realistic concern might be that such a rule would keep too many of the "best and the brightest" from working for state governments. While we find this concern telling, we nonetheless conclude that it is overcome by: 1) the tendency, now well-established, for most politicians to begin their careers in state politics, only later seeking national office; and 2) by the dangerous conflicts of interest that dual federal-state office-holding would create.

law, of federal-state incompatibility. Consider now whether there are any common themes.

A first theme, it seems to us, is the steady growth over the last two hundred years of support for the one person, one office principle. This growth in support is plainly evident in the Framers' decision to depart from British practice by including an Incompatibility Clause in the federal Constitution. It is also evident in the growth over two hundred years of the by now vibrant judicial-executive and federal-state⁵⁴³ incompatibility traditions.

But various aspects of our constitutional law suggest growing public support for constitutionalizing the one person, one office rule in other contexts as well. For example, the states, our laboratories of democracy and constitutionalism, have experimented with even more sweeping constitutional incompatibilities than those hitherto discussed. Thus, at least seventeen states disallow some forms of dual service in more than one position within the executive department of a state's government,⁵⁴⁴ and at least twenty states specifically preclude the Governor from simultaneously holding another executive office within that state's government.⁵⁴⁵ At least nineteen states forbid the dual holding of state and local governmental offices, and twenty-eight states forbid judges from practicing law.⁵⁴⁶

⁵⁴³ It should be remembered that federal-state incompatibility provisions in state constitutional law can only have the effect of forcing the vacation of the state office. A state constitutional prohibition on dual office holding cannot force a state officer to give up her seat in Congress because the United States Constitution declares that "[e]ach House shall be the Judge of the . . . Qualifications of its own Members." U.S. CONST. art. I, § 5, cl. 1. See *State ex rel. Wettengel v. Zimmerman*, 24 N.W.2d 504 (Wis. 1946) (refusing to enjoin Wisconsin State judge from seeking Republican nomination for the United States Senate on ground that the United States Constitution grants Senate the sole power to judge the qualifications of its members).

⁵⁴⁴ ALA. CONST. art. 17, § 280; ARK. CONST. art. 6, § 22; DEL. CONST. art. 3, § 11; FLA. CONST. art. 2, § 5; IND. CONST. art. 2, § 9; LA. CONST. art. 4, § 2; ME. CONST. art. 9, § 2; MASS. CONST. pt. 2, ch. 6, art. 2; MONT. CONST. art. 6, § 5; NEB. CONST. art. 4, § 2; N.C. CONST. art. 6, § 9(1); OR. CONST. art. 2, § 10; S.C. CONST. art. 6, § 3; TENN. CONST. art. 2, § 26; TEX. CONST. art. 16, § 40; VT. CONST. ch. 2, § 54; W. VA. CONST. art. 7, § 4.

⁵⁴⁵ ALA. CONST. art. 5, § 130; ALASKA CONST. art. 3, § 6; ARK. CONST. art. 6, § 11; CAL. CONST. art. 5, § 2; CAL. CONST. art. 5, § 12; HAW. CONST. art. 5, § 1; IND. CONST. art. 5, § 8; IND. CONST. art. 5, § 24; IOWA CONST. art. 4, § 14; ME. CONST. art. 5, pt. 1, § 5; MASS. CONST. pt. 2, ch. 6, art. 2; N.H. CONST. pt. 2, art. 93; N.J. CONST. art. 5, § 1, para. 3; N.C. CONST. art. 6, § 9(1); N.D. CONST. art. 5, § 3; OHIO CONST. art. 3, § 14; OR. CONST. art. 5, § 3; PA. CONST. art. 4, § 6; S.C. CONST. art. 4, § 2; TENN. CONST. art. 3, § 13; TEX. CONST. art. 4, § 6; VA. CONST. art. 5, § 1.

⁵⁴⁶ State laws forbidding dual holding of state and local governmental offices include:

ALASKA CONST. art. 3, § 6; ALASKA CONST. art. 4, § 14; ARIZ. CONST. art. 4, pt. 2, § 5; ARK. CONST. art. 6, § 22; CONN. CONST. art. 3, § 11; FLA. CONST. art. 2, § 5; HAW. CONST. art. 6, § 3; ILL. CONST. art. 4, § 2(e); KY. CONST. § 165; ME. CONST. art. 5, pt. 1, § 5; ME. CONST. art. 9, § 2; MASS. CONST. pt. 2, ch. 6, art. 2; MICH. CONST. art. 4, § 8; MO. CONST. art. 3, § 12; MONT. CONST. art. 6, § 5; N.M. CONST. art. 4, § 3(A); N.Y. CONST. art. 13, § 13(a); OHIO CONST. art. 2, § 4; PA. CONST. art. 5, § 17(a); S.C. CONST. art. 3, § 24; S.C. CONST. art. 4, § 2;

These facts make clear that the rule of one person, one office is fast becoming the constitutional norm in America. Another way of putting this point is that we Americans have come to understand the "separation of powers" as entailing also a separation of personnel. Thus, of the forty states that now have a general separation-of-powers clause or provision in their state constitutions, eleven provide only that the powers of one branch of the government may not be exercised by either of the other branches,⁵⁴⁷ while the other twenty-nine also prevent individuals from exercising the power of more than one branch at the same time.⁵⁴⁸ The rule of one person, one office is here to stay at the level of state constitutional law. America has progressed from a separation of powers to a separation of institutions to a separation of personnel.

A second general theme is the close connection between ethics rules and the separation of powers. Both, obviously, are concerned with preventing corruption and the abuse of concentrated power. Less obviously, both are concerned with the problem of conflicts of interest as well. We have seen how the threat of conflicts of interest runs like a thread through all three of the major constitutional separation-of-personnel issues discussed above. The Incompatibility Clause protects against Cabinet members with differing national and state electoral loyalties. The judicial-executive incompatibility tradition protects against presidential preferment of pliant, ambitious judges for simultaneous executive office. The federal-state bar in the state constitutions protects against the related threat of federal preferment of disloyal state officials for simultaneous national office.

In all of these instances, the Incompatibility Principle forbids government officers from trying to serve two masters at the same time.

W. VA. CONST. art. 6, § 13; see *supra* note 474 for state laws forbidding judges from practicing law.

Finally, Tennessee *purports* to create an incompatibility between service as a Minister of the Clergy and the holding of public office. TENN. CONST. art. 9, § 1. Several states also *purport* to make it unconstitutional for atheists to hold public office. See, e.g., ARK. CONST. art. 19, § 1; MISS. CONST. art. 14, § 265; N.C. CONST. art. 6, § 8; S.C. CONST. art. 4, § 2; S.C. CONST. art. 6, § 2; S.C. CONST. art. 17, § 4; TENN. CONST. art. 9, § 2. *But see* *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating such state constitutional restrictions on federal constitutional grounds).

⁵⁴⁷ ALASKA CONST. art. 3, § 43; ARIZ. CONST. art. 3; CONN. CONST. art. 2; ILL. CONST. art. 2, § 1; MASS. CONST. pt. 1, art. 30; N.H. CONST. pt. 1, art. 37; N.C. CONST. art. 1, § 6; OKLA. CONST. art. 4, § 1; R.I. CONST. art. 5; S.D. CONST. art. 2; VT. CONST. ch. 2, § 5.

⁵⁴⁸ ARK. CONST. art. 4, § 2; CAL. CONST. art. 3, § 3; COLO. CONST. art. 3; FLA. CONST. art. 2, § 3; GA. CONST. art. 1, § 2, para. 3; IDAHO CONST. art. 2, § 1; IND. CONST. art. 3, § 1; IOWA CONST. art. 3, § 1; KY. CONST. § 28; LA. CONST. art. 2, §§ 1, 2; ME. CONST. art. 3, §§ 1, 2; MD. CONST. DEC. OF RIGHTS, art. 8; MICH. CONST. art. 3, § 2; MINN. CONST. art. 3, § 1; MISS. CONST. art. 1, §§ 1, 2; MO. CONST. art. 2, § 1; MONT. CONST. art. 3, § 1; NEB. CONST. art. 2, § 1; NEV. CONST. art. 3, § 1; N.J. CONST. art. 3, § 1; N.M. CONST. art. 3, § 1; OR. CONST. art. 3, § 1; S.C. CONST. art. 1, § 8; TENN. CONST. art. 2, §§ 1, 2; TEX. CONST. art. 2, § 1; UTAH CONST. art. 5, § 1; VA. CONST. art. 3, § 1; W. VA. CONST. art. 5, § 1; WYO. CONST. art. 2, § 1.

The rule is: Whatever your constituency, electoral or otherwise, serve it and it alone, while renouncing all others.

This brings us to a third general normative theme, which is the way in which the rule of the separation of personnel fosters competition and deconcentrates power. By guaranteeing a multiplicity of government *actors* as well as *institutions*, the separation of personnel prevents any one actor from monopolizing government power. Instead, a competitive, adversarial dialogue is set up out of which policy must emerge. For those who believe, as we do, in the inherent value of competition⁵⁴⁹ and constitutional dialogue,⁵⁵⁰ this consequence of the separation of personnel is a happy one indeed.

Fourth, the story we have told of the growth of two incompatibility traditions interestingly illustrates the complex interplay between "real world" practice and both federal and state constitutional law. This interplay has also been shown to be at work in the growth of the congressional committee system, America's Incompatibility Clause-induced alternative to parliamentary government.⁵⁵¹

Fifth, the three separation-of-personnel problems we have considered all reveal the relevance to incompatibility of inequalities of bargaining power. In each instance, constitutional incompatibility rules were defended normatively in part because of inequalities of bargaining power. Thus, we defended the Incompatibility Clause because we thought it essential to protect the President, *and the national constituency which he represents*,⁵⁵² from Congress, the most dangerous (and powerful) branch of government. Similarly, we normatively defended judicial-executive incompatibility as being necessary to protect the judiciary, the least dangerous branch, from the reality and the appearance of being "corrupted" by the hope of executive preferment for office. Finally, we normatively defended federal-state incompatibility as being necessary to prevent the officers of the once-sovereign states from being "corrupted" by preferment for office in the powerful and

⁵⁴⁹ See ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., 5th ed. 1930).

⁵⁵⁰ Steven G. Calabresi, *Thayer's Clear Mistake*, 88 Nw. U. L. REV. 269, 275 (1993) (defending American-style dialogic judicial review over European-style Constitutional Court judicial review).

⁵⁵¹ Another "jurisprudential" lesson to be drawn may be the underappreciated value of simple, clear-cut constitutional rules. The constitutional provisions that are most often the focus of our attention are those whose meanings are so obscure that they produce a great deal of litigation and scholarly discussion. Yet, the most effective constitutional commands are often those, like the Incompatibility Clause, whose directives are so clear that even the most clever dare not try to avoid them.

⁵⁵² Technically, the Vice President also represents the same national constituency, but those of us who have worked for a U.S. Vice President know that, in many respects, they represent a constituency of one. See Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913 (1992).

now dominant national government. In each of these instances, an incompatibility rule was essential to overcoming deep-rooted inequalities of power among the departments and levels of our government.

Finally, we have seen throughout our study of the problems addressed by this Article a truly astounding array of unintended consequences. The Framers wrote an ethics-rule Incompatibility Clause into the Constitution with the purpose of stopping corruption, and they ended up foreclosing the emergence of parliamentary government in America, leaving us instead with the congressional committee system. The Framers thought constitutional judicial-executive incompatibility was unnecessary, and it turned out, painfully, to be quite necessary after all. The Framers declined to constitutionalize federal-state incompatibility because they wanted to give the states a break, with the result that the states have now constitutionalized it themselves, most likely to protect their power.

What, then, will be the next unanticipated consequence of legal change in this area? Only one prediction seems safe. Today, the Incompatibility Clause, and the principle it embodies, seems to be the cornerstone of the entire American constitutional structure. If the CCS and other advocates of repealing the Clause succeed in pulling out that stone, we must expect that the entire glorious structure will come crashing down.