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Journal

UCLA School of Law Public Law & Legal Theory Series

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Publication Date

2016-05-04



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PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES

RESEARCH PAPER NO. 16-23

POLITICAL PARTIES, VOTING SYSTEMS, AND THE SEPARATION OF POWERS

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In 65 American Journal of Comparative Law 229 (2017)

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Political Parties, Voting Systems, and the Separation of Powers†

This Article aims to show that whatever the formal arrangements on the separation or “fusion” of executive and legislative powers—whether presidential, parliamentary, or semi-presidential—the way any constitution operates in terms of concentrating or dispersing power is significantly a function of both the political party and electoral systems in place. They can not only fuse what a constitution’s executive-legislative relations provisions separate, but also separate what they fuse. As a result, the same set of institutional relations can function quite differently in separation-of-powers terms depending on party and electoral system contexts.

In so doing, the Article broadens and deepens the insight that the original Madisonian framework of institutional competition between the President and Congress has been rewritten by the subsequent, unanticipated development of the modern political party system, so that concentration or dispersal of political power—unified or divided government—depends mostly on electoral outcomes. It broadens the insight by showing this is true of all forms of government and not only the U.S. presidential system. It deepens it by drilling down one layer further and taking into account how party systems and electoral outcomes are themselves affected by the method of voting employed. The Article seeks to counter the tendency of constitutional lawyers to focus on interbranch relations alone and to overlook other important institutional variables in thinking about separation of powers and constitutional design more generally. It also aspires, through the use of comparative and historical examples, to enhance our understanding of the U.S. system of “separation of parties, not powers.”

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† <http://dx.doi.org/10.1093/ajcl/avx030>

INTRODUCTION

In a justly celebrated article, Daryl Levinson and Richard Pildes demonstrated that the original Madisonian framework of institutional competition and separated powers between the President and Congress has been radically rewritten by the subsequent, unanticipated development of the modern political party system.¹ The result is that the actual diffusion or concentration of power between the executive and legislative branches is mostly a consequence of electoral outcomes. When the same party wins both the White House and Congress, the United States has “unified” government resembling parliamentary systems, notwithstanding the formal separation of the two branches. Only during periods of “divided” government, where different parties control the two branches, does the Framers’ conception of institutional checks and balances—of ambition checking ambition—come close to reflecting the reality of American politics.² In short, depending on electoral outcomes, the modern party system joins what the Madisonian system sought to keep asunder.

This Article generalizes Levinson and Pildes’s insight from a comparative perspective to show that it is true of all forms of government and not only the U.S. presidential system. Whatever the formal institutional arrangements on the separation or “fusion” of executive and legislative powers—whether presidential, parliamentary, or semi-presidential—the way any constitutional system operates in terms of concentrating or dispersing political power is significantly a function of the party system in place and electoral outcomes at any given time. In other words, in addition to the branches of government, political parties are a key site of political competition and a central factor in the relative concentration or dispersal of power in all systems. They can not only fuse what a constitution’s executive-legislative relations provisions separate, but also separate what they fuse. As a result, the same set of institutional relations can function quite differently in separation-of-powers terms depending on the party political and electoral context. For example, as we shall see in Part II, without altering its basic institutional structure, the parliamentary system in the United Kingdom has changed fundamentally over time from one of fairly robust political separation of power between the executive and the legislature to a norm of strongly unified government, all due to changes in the party system. At the most basic level, whether a polity has a one-party, two-party, multiparty, or dominant-party system impacts the concentration or dispersal of power regardless of its form of government and structure of legislative-executive relations.

1. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

2. *Id.*

In addition to broadening the Levinson–Pildes analysis in this way, the Article’s comparative focus also “deepens” it, in the sense of drilling down one layer further to take into account how party systems and election outcomes are themselves significantly shaped by the electoral system employed. For example, all other things being equal, a proportional representation (PR) electoral regime resulting in a multiparty system tends to make unified governments—situations where the executive can rely on solid majority support in the legislature—less likely to arise in practice across all three main forms of government: presidential, semi-presidential, or parliamentary. Accordingly, a system with the identical set of political institutions as the United States but with a proportional representation rather than a first-past-the-post electoral system would—and does—have a different likelihood of unified versus divided government, of concentrated versus more dispersed political power, and in this way, may approximate the Madisonian model more than the actual United States. And so, too, with the other forms of government. Indeed, as we will see, semi-presidential systems can range from perhaps having the most highly concentrated political power, where a majoritarian voting system is combined with concurrent presidential and legislative elections, to the most fragmented, where proportional representation and nonconcurrent elections are combined.³

Moreover, as with Levinson and Pildes’s account of U.S. presidentialism, the founding paradigms of both parliamentarism (Britain) and semi-presidentialism (the German Weimar and French Fifth Republics) did not anticipate or fully account for the role and operations of the modern party political system in their initial institutional designs and thus have led the systems to function in ways that similarly defy the framers’ understandings or expectations.

In presenting its arguments, the Article will follow Duverger’s rule and divide electoral/party systems into the binary of majoritarian/two-party and PR/multiparty systems for legislative elections.⁴ This simplifies the analysis because (1) there are several forms of both majoritarian and PR electoral systems,⁵ as well as various

3. See *infra* Part III.

4. Duverger’s rule (or law) consists of the following pair of propositions: (1) one-seat districts with plurality/majoritarian electoral rule tend to reduce the number of parties to two; and (2) multi-seat districts with proportional representation tend to be associated with more than two parties. MAURICE DUVERGER, *LES PARTIS POLITIQUES* (1951); MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (1954) [hereinafter DUVERGER, *POLITICAL PARTIES*]. See also the discussion in MATTHEW S. SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 206–08 (1992).

5. The two main types of majoritarian systems are: (1) first-past-the-post (plurality) in a single general election and (2) majority in a second round, run-off election between the two leading candidates from the first round. I discuss some of the differences between two of the major types of PR systems, closed- and open-list PR, *infra* text accompanying notes 78–82.

combinations of the two;⁶ (2) two-party systems, or more often two-party blocs, may emerge from some or all of these versions of PR;⁷ and (3) majoritarian voting systems do not necessarily result in a two-party system.⁸ Nevertheless, the aim of the Article is to establish and illustrate the general importance of party and electoral systems for how legislative-executive relations function in all forms of government rather than to provide a detailed mapping of all permutations or context-sensitive variables.⁹

The Article is primarily aimed at comparative constitutional law scholars and advisors to counteract any potential occupational hazard of focusing too closely on legislative-executive powers and relations alone, and overlooking other crucial institutional factors in thinking about or acting on questions of constitutional design. So, for example, a great deal of attention has been paid in the constitutions of new and transitional democracies to the form of executive power and executive-legislative relations in an attempt to create stable governing power while minimizing the risk of reversion to authoritarian presidencies.¹⁰ But, mostly for disciplinary reasons, constitutional law scholars, drafters, and advisors have generally paid less attention to the impact of electoral systems and party competition on the concentration or dispersal of political power, on the reality and effectiveness of checks and balances, and it is one of the major points of this Article to stress that, more complex though this exercise becomes, both must be taken into account in thinking about constitutional design (and its limits) in context.

A final word of clarification: this Article is *not* claiming that there is no independent role of formal interbranch relations at all in shaping either the overall concentration/dispersal of political power or the organization and conduct of political parties.¹¹ To the contrary,

6. Such as the “mixed member proportional” systems in Germany, Mexico, and New Zealand, which allocate a certain number of seats by voting in single-member constituencies and the remainder by PR.

7. For example, under Germany’s mixed-member PR system, there are two main parties or blocs: the Christian Democratic Union (CDU)/Christian Social Union (CSU) bloc and the Social Democratic Party (SPD).

8. India is sometimes viewed as an example because: (1) Although most single-member constituency elections are contests between two main parties, they are often not between the same two parties; and (2) Before the current Bharatiya Janata Party (BJP) government of Prime Minister Modi, no single party had achieved a parliamentary majority since 1984. Nonetheless, at the national level, only the BJP and the Congress Party are governing parties.

9. Factors other than institutional powers/relations and party-electoral systems can have significant influence on the concentration or diffusion of political power. Thus, the specific nature of the ballot used and who controls it can make split-ticket voting easier, more difficult, or impossible. Thanks to Rick Pildes for providing this example.

10. I discuss the examples of Egypt and Tunisia in *infra* Conclusion.

11. Obviously, for example, whether a president can veto legislation and, if so, whether the legislature can override a veto by ordinary or two-thirds majority vote is likely to be an important factor in the balance between executive and legislative power—except perhaps, where there is an electorally dominant political party. On the impact of institutional separation or fusion of powers on the organization and

I will explain why unified government in presidential systems generally only resembles, but does not match the degree of unity typical in two-party or Westminster-style parliamentary systems.¹² Rather, its claim is that *both* interbranch relations and electoral/party systems help to determine the degree of unity/division in all forms of government and in any given political system. But the reverse relationship—of how electoral systems and party competition help to shape executive-legislative relations and the actual concentration or dispersal of political power—is also an important one that needs to be more fully appreciated and taken into account by constitutional scholars and lawyers.¹³ In addition to making this claim, the Article also aims to illustrate it generally and systematically across all forms of government.¹⁴

In Part I, I explain how, like Levinson and Pildes's account of the transformation of the Madisonian framework in the United States by the operation of the unanticipated modern party system, the functioning of both parliamentary and semi-presidential systems has differed from original expectations due to a failure to fully take into account the impact of party politics on institutional arrangements. Moreover, as in the United States, this failure was partly willful, in that framers and expositors held similar and familiar negative views toward parties that have a long history in political theory and among political elites. The ongoing legacy of this failure continues in the general neglect of political parties and the mode of legislative election in modern constitutions. In Parts II–IV of the Article, I analyze each form of government to explain how modern party and electoral systems impact institutional allocations of executive and legislative power and affect the degree and likelihood of unified or divided governments. With respect to each, I first look at the situation under majoritarian/two-party systems and then under PR/multiparty systems to show how the same set of institutional relations can have quite different consequences in terms of concentrated or dispersed political power depending on these variables as well as on electoral outcomes. Finally, having employed a comparative perspective to expand the analysis, the Article returns in Part V to look anew at the United States through this broader lens and explain how it adds to,

conduct of political parties, see DAVID J. SAMUELS & MATTHEW S. SHUGART, *PRESIDENTS, PARTIES, AND PRIME MINISTERS: HOW THE SEPARATION OF POWERS AFFECTS PARTY ORGANIZATION AND BEHAVIOR* (2010).

12. See *infra* Part IV.

13. Here I echo the sentiment expressed by Cindy Skach in her chapter, *Political Parties and the Constitution*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 874 (Michel Rosenfeld & András Sajó eds., 2012).

14. Although scholarship in comparative politics focuses on this half of the picture that constitutional law scholars often ignore, much of it tends to focus on one form of government or the other—presidential, parliamentary, or semi-presidential—and how it works in different countries and contexts, rather than comparing forms of government themselves. One exception here is the overview by Cindy Skach. See *id.*

enriches, and perhaps also somewhat changes our understanding of the U.S. system of separation of parties, not powers. The Conclusion briefly applies the Article's core thesis to the "fragile democracies"¹⁵ of Tunisia and Egypt immediately following the 2011 revolutions.

I. ORIGINAL PARADIGMS AND SUBSEQUENT EVOLUTION

Levinson and Pildes's central thesis is the existence of a large gap between the original design, aspirations, and expectations of the Madisonian system of checks and balances, focused on interbranch relations, and the way it has evolved to function, in which competition between political parties is the central driving force. Constitutional lawyers have a tendency to compound this original error by continuing to view political competition as primarily institutional or interbranch in nature rather than driven by partisan party politics.¹⁶ Because this original system was crafted in the late eighteenth century, before modern party politics came into being, whereas parliamentary and semi-presidential systems are of more recent vintage, it might well be thought that both of these alternative forms of government must have been designed with the role and operation of political parties firmly in mind.

In fact, this was not so. In each case, the founding versions of the model—parliamentary government in Britain and semi-presidentialism in Germany's Weimar Republic and France's Fifth Republic—were hugely influential and created path-dependent limits on the imaginations of subsequent constitution drafters. And in each case, albeit for slightly different reasons, a similar gap appears between the original design and how the system actually functions, given the modern centrality of party politics. Indeed, all three founding models reflect a common and deeply rooted antiparty sentiment among political elites.¹⁷ Moreover, although a few adjustments have been made in some more recent iterations of the basic paradigms to acknowledge and incorporate the role of party competition, constitutions typically continue today, as they have since 1945, to combine detailed specifications of the relative institutional powers of executives and legislatures with far briefer provisions (if any) dealing with both political parties and the electoral system to be used in legislative (as distinct from presidential) elections.¹⁸

15. See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

16. Apart from Levinson & Pildes, *supra* note 1, another notable exception to this tendency is Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

17. See *infra* text accompanying notes 47–50. For a superb study of the long history of antiparty sentiment in political theory, see NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* (2008).

18. See *infra* text accompanying notes 51–58.

A. *Parliamentary Government*

The original system of parliamentary government emerged, after a long evolutionary process, in mid-nineteenth century Britain.¹⁹ The traditional key separation of power between King and Parliament was reconstituted by the new separation between the king's government in parliament and the other, non-ministerial members of the legislature, a separation which, although it involved some overlapping office holding, was still institutional in nature. The executive was indirectly elected by, and politically responsible to, the House of Commons as a whole, which consisted of relatively independent members capable of meaningful deliberation and collectively forming an institutional view of the public interest. As long as it continued to enjoy the support of a majority of such members, the government exercised significant legislative powers in addition to executive ones (reflected in the concept and prioritizing of "government bills"), meaning that there was a partial fusion of the two functions and not only personnel.²⁰ But the possibility of losing that support was a real one, so that executive dependence on—and political accountability to—Parliament reflected the practice and not merely the theory of governance.

This practice and theory of the institutional separation of power developed approximately half a century *before* the modern political party system, which was born in response to increases in the franchise after 1867 and reached its mature form only with the near full enfranchisement of the British working class in 1918²¹ and the creation of its instrument, the Labour Party, which displaced the Liberal Party as the second party in the two-party system and held governmental office for the first time in the 1920s.²² As will be discussed in greater detail in Part II, the new mass party politics changed almost everything in how the parliamentary system operated—subjecting members of parliament to rigid party discipline through the whip system, transferring real power from Parliament to the political party, and reversing the original system of political dependency so that the primary task of ordinary legislators became

19. See, e.g., Denis Baranger, *Parliamentary Law and Parliamentary Government in Britain: Some Historical Remarks*, in CONSTITUTIONALISM AND THE ROLE OF PARLIAMENTS 15 (Katja S. Ziegler, Denis Baranger & Anthony W. Bradley eds., 2007).

20. See *infra* text accompanying notes 67–68.

21. The Great Reform Act of 1832 (Representation of the People Act 1832, 2 & 3 Will. 4, c. 45) resulted in the enfranchisement of approximately one in seven adult males. The Reform Act of 1867, 30 & 31 Vict. c. 102, by giving the vote to all male householders (property taxpayers), roughly doubled the previous number, which increased to 60% of adult males and no females in 1884. Under the 1918 Act, 8 & 9 Geo. 5 c. 64, all men over the age of twenty-one and women over thirty were enfranchised, with this age discrimination ending in 1928.

22. The 1922 general election was the first in which the Labour Party surpassed the Liberals, in both votes and seats. Ramsay Macdonald was the first Labour Prime Minister, taking office as the head of minority governments in 1924 and 1929.

supporting their party leaders in governmental office, or the quest for it, increasingly at all costs.

This gap between the "original" system of parliamentary government and its subsequent transformation by the modern party political system is best evidenced by the work that in many ways is the *Federalist Papers* of the British parliamentary system: Walter Bagehot's *The English Constitution*, published in 1867—the very year of the first major expansion of the franchise.²³ Like Madison's before him, Bagehot's brilliant and politically acute analysis of his country's constitutional system focuses on institutions and institutional interactions—which are the "efficient" ones exercising real power (the Cabinet and House of Commons) and why, versus the merely "dignified" (the monarch and House of Lords)—and mostly ignores party politics, especially of the non-parliamentary, non-gentleman's club variety. As Richard Crossman put it in his well-known 1963 introduction to the book: "Of the modern party, Bagehot had not even a premonition—partly because he had never visited America where it was already dominant when he wrote. Throughout *The English Constitution*, he describes party organization as weak at Westminster and almost nonexistent outside."²⁴ Indeed, like Madison, Bagehot expressed hostility to the type of "sectarian government"²⁵ or faction he thought would be the inevitable consequence of an expanded franchise and unfiltered democracy, which he opposed.²⁶ Crossman summed up the influence of the book as follows:

It was not until well after Bagehot's death that this system was fundamentally transformed by the transfer of effective power from the floor of the Commons to the great party machines and the bureaucracy in Whitehall. Yet this was the very period when *The English Constitution* was finally accepted, not only as the locus classicus for the mores of Whitehall and Westminster, but as the definitive and authoritative account of how, in a democracy, power is divided between the electorate, the Commons and the Cabinet.²⁷

Even before his death, Bagehot's book, first translated into French in 1869,²⁸ would have some impact on the establishment of

23. See *supra* note 21.

24. R.H.S. Crossman, *Introduction* to WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 1, 39 (Fontana/Collins 1963) (1867).

25. *THE ENGLISH CONSTITUTION*, *supra* note 24, at 159.

26. *Id.* at 277:

But in all cases it must be remembered that a political combination of the lower classes, as such and for their own objects, is an evil of the first magnitude; that a permanent combination of them would make them . . . supreme in the country; and that their supremacy, in the state they are now, means the supremacy of ignorance over instruction and of numbers over knowledge.

27. Crossman, *supra* note 24, at 37.

28. WALTER BAGEHOT, *LA CONSTITUTION ANGLAISE* (M. Gauhiac trans., Paris, Germer Baillière 1867).

parliamentary government in the French Third Republic in 1875, the first parliamentary *republic*. And later, as the “definitive and authoritative account,” it would influence the development of parliamentary government in monarchical Italy at the end of the nineteenth century and also the post-monarchical “constrained” parliamentarism of the 1919 Weimar Republic.

B. *Semi-Presidentialism*

The Weimar Republic is generally recognized as the founding model of semi-presidentialism, with its division of executive power between the directly elected Reich President as head of state and the Chancellor who, as head of the government, was politically responsible to the legislature, the Reichstag. Although the Weimar model was a little different than subsequent iterations of semi-presidentialism, in that the division of power between the two executives was intended to be more “vertical” or situation-specific than truly concurrent (in normal times, the Chancellor was mostly in charge, but the President’s powers grew in crisis situations), its main “framer,” the liberal Interior Minister Hugo Preuss, did not focus much attention on the impact of party politics on the operation of the elaborate, carefully designed institutional system. In part this was because there had been little experience of political parties *exercising* governmental power under the previous monarchical regime of the Kaiser, and in part due to a Rousseauian (perhaps also Madisonian²⁹) conception of democracy as expressing the people’s single, general will rather than representing conflicting notions of the public good, much less private interests. As one commentator put it:

Preuss’s idealistic conception of cooperative democracy prevented him, like so many other Weimar democrats, from paying enough attention to the great significance of parties in a democratic state. . . . [E]ven democratically oriented state law scholars left the discussion of parties to conservative authors such as Heinrich Triepel, who bemoaned their influence over representative bodies and flirted with the idea of a parliament of estates.³⁰

In addition to this fact that the system itself was not designed with political parties in mind, the first directly elected president, Paul von Hindenburg (1925),³¹ was aggressively antiparty and sought to minimize their influence by preferring independent, non-party ministers in his cabinets.³² This created a doubly unfavorable

29. Levinson & Pildes, *supra* note 1, at 2318.

30. Christoph Schoenberger, *Hugo Preuss: Introduction*, in WEIMAR: A JURISPRUDENCE OF CRISIS 110, 114 (Arthur Jacobson & Bernhard Schlink eds., 2002).

31. The first President of the Weimar Republic, Friedrich Ebert (1919–1925), was elected by the Reichstag, under a provisional procedure of the constitution.

32. Cindy Skach, *The “Newest” Separation of Powers: Semipresidentialism*, 5 INT’L J. CONST. L. 93, 114 (2007).

context in which the Weimar system operated, for what turned out to be the crucial political feature of its existence was the radically fragmented party system and almost continuous political crises resulting in significant part from its particular proportional representation method of voting.³³ For nearly 50% of its entire existence (1919–1933), and an even higher percentage after President Ebert's death in 1925, Weimar operated under "the most difficult subtype of semi-presidentialism—divided minority government,"³⁴ where no single party or coalition is able to secure majority support in the legislature.³⁵

Somewhat similarly, the second, and undoubtedly *most* influential version, of semi-presidentialism, the French Fifth Republic of 1958, was also framed in a context that was highly ambivalent toward the role and operation of political parties. Formed in reaction to the instability and perceived careerism/short-termism of party politics under the parliamentary Third and Fourth Republics,³⁶ the Fifth was intended by its founder, Charles de Gaulle, not only to restrict the power of the legislature in favor of the executive,³⁷ but also to limit "the regime of parties"³⁸ in favor of the national interest. Like Field Marshall von Hindenburg, General de Gaulle, the military hero who saw himself as standing above party politics and embodying the nation, refused to join any existing party—whether as head of the provisional government in 1944, when summoned from retirement in June 1958 and offered the prime ministership of the Fourth Republic to deal with the threat of military rebellion during the Algerian crisis, or after using this leverage to demand the new more presidentialist constitution he

33. Rather than several multimember constituencies, it employed a single, national one, and also held presidential and legislative elections at different times and on different timetables. Both of these features tend to increase the number of small political parties and make workable governing coalitions more difficult to achieve. For more details, see *infra* Part III.

34. See Skach, *supra* note 32, at 115.

35. For more on "divided minority government" and the other party configurations under semi-presidentialism, see *infra* Part III. As Cindy Skach recounts, part of the problem was the reluctance, mostly for internal political reasons, of the Social Democratic Party (SDP), the largest party from 1919 to 1932, to join governing coalitions. See Skach, *supra* note 32, at 114–15.

36. In his memoirs, de Gaulle describes his resignation as head of the provisional government in January 1946, his attitude towards the subsequent Fourth Republic, and his long-term strategy for replacing this parliamentary republic with a presidential one as follows:

I must, for whatever length of time was necessary, let the party system display its noxiousness once more, determined as I was not to act as cover or a figurehead for it Meanwhile, with an eye to the future, . . . I introduced the referendum system . . . and thus created the democratic means of one day founding a good [constitution] myself, to replace the bad one which was about to be concocted by and for the parties.

CHARLES DE GAULLE, MEMOIRS OF HOPE: RENEWAL AND ENDEAVOR 7–8 (1971).

37. Article 34 of the French Constitution contains a list of enumerated legislative powers, with residual lawmaking power granted to the executive. 1958 CONST. art. 34.

38. 2 CHARLES DE GAULLE, DISCOURS ET MESSAGES 37 (1970).

had long sought and then established within a span of three months.³⁹ Accordingly, the semi-presidential system was designed in significant part not to take into account the operation of party politics but to limit and transcend it. Like both Napoleons and some progressive reformers in the United States before him,⁴⁰ de Gaulle's signature political tool was the popular referendum, appealing to the people directly over the heads of the parliamentary parties that he mostly refused to work with or through.⁴¹ Even when he permitted his followers to form the new Gaullist Union for the New Republic to try and ensure him a sympathetic majority in the forthcoming parliamentary elections of November 1958, he refused to serve as its leader. Moreover, de Gaulle's insistence in 1962 on a shift to direct popular election of the President from the original indirect election by a somewhat rigged electoral college of regional notables⁴² was intended to augment the legitimacy and authority of the office and further remove it from party politics by strengthening its hand in the event that Parliament ever supported a prime minister opposed to the president's policies. For once in place, in such a political battle, the legislature would no longer be in a position to claim greater legitimacy as the only popularly elected branch. So although this constitutional amendment, ratified by referendum without the textually required approval of the legislature,⁴³ did not create the possibility of "divided majority government" or "cohabitation,"⁴⁴ it did to some extent strengthen the political position of the President when it eventually occurred.⁴⁵

The founding paradigms of all three modern forms of government, therefore, reflected in some significant way the deeply rooted antiparty sentiment that preexisted the rise of the modern mass political party but survived it and continues to thrive in various forms.⁴⁶ In her magisterial work on the subject,⁴⁷ political theorist

39. The Fifth Republic was established on October 4, 1958.

40. See ROSENBLUM, *supra* note 17, at 202–04, 286–87.

41. De Gaulle called for popular referendums on five occasions between 1958 and 1969: in September 1958 on the new presidential constitution itself; in January and April 1961 on self-government and the independence for Algeria; in October 1962 on a constitutional amendment establishing direct election of the president; and in April 1969 on a constitutional amendment transforming the Senate into an advisory body only and permitting grassroots groups to participate in advising government on a regional level. In each case, he turned the referendum into a vote of confidence in his leadership, announcing that he would resign if his proposal were defeated, which happened on the fifth and final occasion. Since de Gaulle, no referendums have been held on domestic issues, only on matters relating to the European Union.

42. The electoral college substantially overrepresented more conservative rural areas. 1958 CONST. OF THE FIFTH FRENCH REPUBLIC art. 6.

43. The French Constitutional Council upheld the lawfulness of the amendment nonetheless.

44. See *infra* Part III.

45. See *infra* Part III.A.

46. For a recent analysis and critique of the antiparty "democratic romanticism" of contemporary U.S. politics, see Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804 (2014).

47. See ROSENBLUM, *supra* note 17.

Nancy Rosenblum identified two "glorious traditions of antipartyism" that go back as far as Plato and the Roman Republic, respectively. The first is "holism," the objection to political parties based on their distinctive threat to the integrity and unity of the political order as entities which presume pluralism and have "partiality and opposition *as their aim*."⁴⁸ Rousseau's hatred of parties as detracting from the unity and uniformity of the "general will" is perhaps the key postclassical contribution to this tradition. The second tradition, although it accepts the existence of pluralism and partiality in political society, nonetheless views parties as excessively or "fatally" divisive.⁴⁹ Originating in explanations for the fall of the Roman Republic, this tradition looks to other, less destructive mechanisms for balancing and harmonizing plurality in political society, especially the notion of "the mixed constitution" in which all classes and sectors of society are represented, and which also has a long list of adherents.⁵⁰

The framers and expositors of the parliamentary and semi-presidential paradigms just discussed, as well of course as the Madisonian system itself, not only failed to see or anticipate the impact of political parties on their models, but did not *want* to do so. For all three models are, to a significant extent, not simply non-party but antiparty, within the broad traditions that Rosenblum identifies and analyzes. Thus, for Madison and Bagehot, the problem with parties and the reason they wished to prevent or ignore their emergence was divisiveness. Pluralism and partiality should be managed through less incendiary (and vulgar) forms of political competition and checking devices than the extreme sectarianism or faction of parties that would likely usher in a swift race to the bottom in terms of the content and quality of political discourse. For Preuss, Hindenburg, and de Gaulle by contrast, although to be sure the divisiveness of parties (proven to be fatally harmful as far as the latter was concerned) was also anathema, the deeper problem was that they undermined the essential achievement of national and political unity. As former war heroes, Hindenburg and de Gaulle perhaps naturally viewed political society, even democratic politics, on the military model as a collective entity with a single, common goal; for Preuss, as for Rousseau, parties deflected focus and attention from the democratic general will.

Part of the ongoing legacy of these hugely influential and paradigm-setting first versions of parliamentarism and semi-presidentialism, with their focus on institutions rather than political parties, is the continuing discrepancy in most modern constitutional systems of both varieties between the detailed specifications of the institutional powers and interactions of the executive and legislative

48. *Id.* at 11.

49. *Id.*

50. *Id.* at 81-89.

branches on the one hand, and the brevity or absence of provisions dealing with political parties and the mode of legislative election on the other. The extent of this inequality underscores the general failure of constitutional drafters and legal scholars to acknowledge that it is the combination of both that is crucial in assessing how the system will likely—or does—operate in the broad realm of separation-of-powers values.

Thus, even the most party-politics-sensitive of post-1945 constitutions tend to include only a brief and general article (or articles) acknowledging the role of political parties in contributing to the formation of the public will in a democracy, guaranteeing the right to join and establish a political party, sometimes along with trade unions and other civil society associations, and requiring them to respect the fundamental principles of the constitution (or, in some instances, face prohibition).⁵¹ This is more of a rights-based, freedom of association conceptualization than a structural, separation of powers one. More specifically, but somewhat exceptionally, the German Basic Law grants the right to a parliamentary minority of 25% to establish an investigative committee,⁵² and the South African, Turkish, and a few other constitutions include the right of all political parties to public funding on an equitable and proportional basis.⁵³ The Turkish constitution is unusual in having two long and detailed articles devoted to political parties, but they mostly consist of restrictions and enumerate the criteria for which a party may be banned.⁵⁴ Eight constitutions around the world contain provisions requiring legislators to vacate their seats if they change political party.⁵⁵

While in presidential and semi-presidential regimes the exact mode of (inevitably majoritarian) presidential election is almost always prescribed in the constitution, starting with the Madisonian system itself, this is far less frequent for the critical and less constrained choice of *legislative* election. Approximately half of all current constitutions do not specify the mode of legislative election,

51. See, e.g., GRUNDGESETZ [GG] [BASIC LAW] art. 21 (Ger.).

52. *Id.* art. 44(1). This provision has formed the subject matter of at least two important constitutional court decisions, in which the Court has acknowledged the importance of minority party rights for the separation of powers. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 8, 2002, 105 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 197; BVerfG Aug. 2, 1978, 49 BVERFGE 70 (involving similar provisions in state constitutions), discussed in DONALD KOMMERS & RUSSELL MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 216–23 (3d ed. 2012). See also Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 697–99 (1998). The new Tunisian constitution also grants rights to the opposition in the Chamber of Deputies. See CONST. OF TUNISIA (2014) art. 60.

53. See, e.g., S. AFR. CONST., 1996, § 236; TÜRKİYE CUMHURİYETİ ANAYASASI (1982) [CONSTITUTION], art. 68(8) (“The state shall provide the political parties with adequate financial means in an equitable manner.”).

54. TÜRKİYE CUMHURİYETİ ANAYASASI arts. 68–69.

55. They are Belize, Namibia, Nepal, Nigeria, Seychelles, Sierra Leone, Singapore, and Zimbabwe.

but leave it to ordinary—or sometimes organic—legislation.⁵⁶ Even where the basic choice between a PR or majoritarian electoral system is specified, the details are almost always left to be provided by the legislature.⁵⁷ One of many examples that could be given about the importance of this issue from a separation of powers perspective is the South African constitution, which prescribes PR in Article 46.⁵⁸ Had it not, successive African National Congress (ANC) governments might have been tempted to change to a first-past-the-post or other majoritarian system, which would almost certainly have given it the necessary two-thirds majority in parliament to amend the constitution at will (like the Fidesz party in Hungary⁵⁹), thereby further consolidating and concentrating its power.

Having explained a similar gap in all three general forms of government between original design/expectations and how they evolved to function, the Article now turns to examine the common mechanism that substantially affects their operation in terms of diffusing or dispersing political power: political parties (themselves partially structured by the chosen electoral system). In the next section, I consider parliamentary systems and in Parts III and IV, semi-presidentialism and presidentialism, respectively.

II. PARLIAMENTARY SYSTEMS

The presidential system of government first invented in the United States in the late eighteenth century is generally defined by (1) its independently elected executive and legislative branches, and (2) the inability of either branch to end the term of office of the other prematurely.⁶⁰ By contrast, the parliamentary system that emerged in the United Kingdom and then France in the nineteenth century, is defined by a set of formal dependencies. With only a single,

56. Including the constitutions of Afghanistan, Australia, Canada, Chile, Egypt, France, Germany, India, Indonesia, Italy, Japan, Peru, South Korea, and Zambia. For example, election law is left to ordinary legislation in Germany and organic law in France, although the parliamentary procedure for enacting—and amending—organic laws is the same as for ordinary ones (they are, however, subject to automatic pre-promulgation review by the Constitutional Council). While it does not specify anything about electoral systems per se, article I of the U.S. Constitution has some significant limiting implications on what systems can be used for the House and (especially) Senate elections. See U.S. CONST. art. I.

57. For example, I am not aware of any constitution that specifies the choice between an open- and closed-list PR system. For more on this distinction, see *infra* text accompanying notes 78–82.

58. “The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members by an electoral system that . . . (d) results, in general, in proportional representation.” S. AFR. CONST., 1996, § 46(1).

59. Elected in 2010 by a mixed system which gave them 68% of the seats but under 53% of the vote, the Fidesz party utilized its two-thirds majority in the legislature to replace the country’s constitution with one that further concentrated its power by, among other things, reducing the independence of the judiciary.

60. Save for impeachment in the case of the president. In semi-presidential systems, the president is usually empowered to dissolve the legislature.

parliamentary election, the executive is indirectly (or perhaps better, implicitly) elected by the legislature at the outset and remains politically dependent on, or responsible to, it in that the legislature can remove the government from office at any time if it loses the support of a majority of members. At the same time, the executive can typically dissolve the legislature and call a new election before the maximum (or, where it exists, the otherwise fixed⁶¹) term of the legislature expires. These were among the features that led Bagehot to famously describe the essence of parliamentary or cabinet government as the “fusion” of legislative and executive powers, as distinct from their separation in presidential (and monarchical) systems.⁶²

As with presidentialism, these spare defining characteristics of parliamentarism permit a good deal of variation among parliamentary systems with respect to other, more contingent features. Institutionally, the two main variables are probably (1) whether ministers must, may, or cannot also be members of the legislature,⁶³ and (2) the extent to which power is, or has become, more centralized in the head of government (the prime minister or chancellor) as distinct from being exercised collectively by the cabinet as a whole.⁶⁴ As we shall see shortly, in terms of how parliamentary systems actually operate from a diffusion/concentration of power perspective, a very important “noninstitutional” variable is the type of electoral system employed: majoritarian or proportional representation.

A. *Majoritarian / Two-Party Systems*

As previewed above,⁶⁵ in theory, and during the nineteenth century in practice, the parliamentary system in Britain meant that the government—the prime minister and cabinet—no longer served at the pleasure of the monarch, but of the House of Commons. Despite the partial fusion of executive and legislative functions and personnel in the cabinet, Parliament managed to hold the government politically accountable to it. The traditional British conception of the separation of power between King and Parliament⁶⁶ continued

61. The United Kingdom has recently replaced its traditional maximum (five-year) term with fixed-term parliaments and more limited powers of early dissolution. An earlier general election can be called only after a vote of no confidence in the government or by a two-thirds parliamentary vote, ending the previous unilateral power of the prime minister to request a dissolution under the royal prerogative. The two-thirds vote mechanism was employed (successfully) for the first time by Theresa May in calling a “snap” general election for June 8, 2017. See *The Fixed-Term Parliaments Act 2011*, c.14.

62. See *THE ENGLISH CONSTITUTION*, *supra* note 24, at 65–66.

63. For example, in the United Kingdom they must, in Germany they may, and in Finland they cannot, be MPs.

64. Among parliamentary systems, power is perhaps most centralized in Germany and Canada and least centralized in Italy.

65. See *supra* text accompanying notes 19–28.

66. See, e.g., ADAM TOMKINS, *PUBLIC LAW* (2003).

to have real bite, albeit now in the guise of the division between the King's ministers and their non-ministerial parliamentary colleagues, resulting in genuine *political* dispersal and checking of power, if no longer full institutional separation and independence of office. Such political dependency of the executive on the legislature was the primary reason that the Framers of U.S. presidentialism had ultimately rejected the proposal for congressional election of the president, assuming that this would overly aggrandize the legislature, which they feared as the most dangerous branch.⁶⁷

This original equilibrium and ability of the legislature to take a collective institutional perspective depended on the relative independence of members of parliament and the weakness of the party system, as during the period in which Bagehot wrote.⁶⁸ With the subsequent growth and dominance of the modern party political system to organize the new mass electorates, the typical electoral outcome in first-past-the-post, two-party systems (such as the United Kingdom) of a single majority party in parliament without majority electoral support has reversed the dependency. As party political affiliation, rather than individual record and qualities, became all-important for voting purposes, the reelection prospects of government and individual members of parliament were increasingly intertwined at the one and only dual-function election. Thereafter, the primary task of "backbench" majority party legislators was no longer to check and hold the government politically accountable but to maintain it in office, increasingly at all costs. This new electoral interdependence of government and parliament resulting from the modern party system has really become the *dependence* of the latter on the former. The executive dominates parliament through the whip system in order to maintain necessary party unity in the face of continuous partisan attack by the minority second, or opposition, party: the alternative government-in-waiting. Accordingly, without any significant alteration of formal institutional powers or relations, the entire working of the parliamentary system in Britain changed—from a more divided or pluralistic to (usually) a strongly unified governance structure—as a result of the rise of the modern party political system in the

67. As Gouverneur Morris put it at the Federal Convention: "One great object of the Executive is to control the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves . . . It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny . . ." 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 52 (1911). In *Federalist* 48, James Madison voiced a similar view: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. . . [I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." *THE FEDERALIST* NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

68. "In [an] age [1832–1867] in which neither national party labels nor an electorate voting almost solely with reference to those labels had emerged, 'control' over the actions of backbenchers was slight." 1 *ENGLISH PARTY POLITICS: 1600–1906*, at 83 (Alan Beattie ed., 1970).

first half of the twentieth century. And this was duplicated in other Westminster-style systems. In his classic work on political parties, Maurice Duverger described the result of this change as follows:

Officially Great Britain has a parliamentary system In practice the existence of a majority governing party transforms this constitutional pattern from top to bottom. The party holds in its hands the essential prerogatives of the legislature and the executive . . . Parliament and Government are like two machines driven by the same motor—the party. The regime is not so very different in this respect from the single party system. Executive and legislature, Government and Parliament are constitutional facades: in reality the party alone exercises power.⁶⁹

As evidence of this change, between 1832 and 1945 there were seventeen successful votes of no confidence in the British Parliament resulting in the resignation of the prime minister. Since 1945, there has only been one.⁷⁰ Indeed, not since 1895 has a majority-party government been voted out of office by Parliament. As another illustration of the lost relative independence of members of the legislature, consider the political career of Winston Churchill. He started out as a Conservative Member of Parliament, crossed the floor to join the Liberal Party in 1904—then the second party in the two-party system—for which he subsequently served in several cabinet positions, including Home Secretary. He was reelected as an independent MP in 1924, finally switching back (“re-ratting” as he described it⁷¹) to the Conservatives the following year—serving as Chancellor of the Exchequer—and becoming party leader in November 1940 only after Neville Chamberlain’s death and seven months into his wartime prime ministership.

The normal product of the modern party system is a strongly unified government of a single party with few political or institutional checks on its highly concentrated power.⁷² Precisely because the result of legislative elections determines which party will hold executive power, the selection of legislators is virtually a by-product of party contestation for control of the government. If voters vote for an individual at all rather than a party, it tends to be the party leader and not the individual legislative candidate. Accordingly,

69. DUVERGER, *POLITICAL PARTIES*, *supra* note 4, at 124.

70. James Callaghan in 1979.

71. “They had said you could rat but you couldn’t re-rat” (quoted by his private secretary in JOHN COLVILLE, *THE FRINGES OF POWER: DOWNING STREET DIARIES, 1939–1955*, at 345 (1986)).

72. This development is a major reason that many parliamentary democracies have recently turned to judicial review of legislation for the first time. See Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613 (2014).

under majoritarian electoral systems, unified, single-party government is more or less the norm, rather than episodic or temporary as it tends to be in presidential systems, especially where legislative and executive elections are partially staggered rather than concurrent.⁷³

Only on those occasions where there is no single majority party does there tend to be a crack in the strongly unified nature of government in majoritarian/two-party parliamentary systems and a resulting diffusion of political power, both among parties and between legislative and executive branches. Where parliamentary elections occasion the formation of a coalition government, as in the United Kingdom between 2010 and 2015 (for the first time since 1945), the parties themselves share power to a greater or lesser extent, so that there is some dispersion among these central political actors. After the Conservatives returned to office as a normal majority government in May 2015, we learned much more about the important policy constraints imposed by its Liberal Democrat coalition partner.⁷⁴ This dispersion in turn leads to potentially greater vulnerability in the legislature as policy accommodations between party leaders can create sources of disaffection among backbench party members, who may believe that their own reelection prospects are not so tied to the party leadership as usual. Frequently, junior coalition partners suffer at the polls because their distinct party platform, comparatively little of which will be acted upon, becomes blurred in voters' minds while they are held responsible for agreeing to senior-partner policies that run counter to their own (and their election promises), as with the Liberal Democrats' catastrophic showing in the 2015 election.⁷⁵ Where a minority government takes office, there is greater scope for political accountability to the legislature in a bid to retain majority support, leading to some dispersal of power to Parliament and an unwinding of the political fusion between executive and legislative power. It is no coincidence that the only instance of a British government losing a vote of confidence in the House of Commons since 1945, triggering a general election that

73. There has been a reduction in the frequency of "cohabitation" in France since presidential and parliamentary elections were made largely simultaneous. *See infra* Part III.A. In the United States, there is a marked difference in the likelihood of unified or divided government between midterm and presidential year congressional elections.

74. It was already obvious in 2010 that the Liberal Democrats had prevented the Conservatives from implementing their manifesto pledge to repeal the Human Rights Act 1998, c. 42, a major piece of constitutional legislation enacted by the previous Labour government. But after May 2015, it became clear from the actions of the new Conservative government that the Liberal Democrats had also blocked major policy initiatives in the areas of inheritance and income taxes, spending cuts, and data protection.

75. The Liberal Democrats went from fifty-seven to eight seats in the May 2015 election, and from 22% of the total votes to 7.9%. For example, at the 2010 election, the Liberal Democrats had opposed tuition increases for universities but, once in the coalition government, were forced to accept them by the Conservatives.

forced it from office, involved a minority government. In Canada, only minority governments have ever lost votes of confidence, on six occasions.⁷⁶

B. *PR/Multiparty Systems*

By contrast, what is exceptional with a majoritarian/plurality electoral rule is the norm under PR. In parliamentary regimes with proportional representation electoral systems, there is almost never a single political party with a majority of seats in the legislature. The main point of PR is to prioritize representativeness over “efficiency,” providing more tailored options for voters than the “broad church” or one-size-fits-all nature of the major parties in a two-party system, standardly leading to a multiparty system.⁷⁷ The result is typically more divided government, not because of institutional separation but because of the balance of party politics. Two or more parties share executive power in a coalition government, and the executive as a whole is somewhat more dependent on the legislature as it often cannot take continued support more or less for granted as is usual in two-party systems. Smaller parties in multiparty systems tend not to be “all-purpose” entities whose main political interests lie in supporting or opposing the government whatever its position, but are more issue driven and so more selective in their voting—whether inside or outside the coalition. The religious parties in Israel are a classic example of this. Accordingly, overall there is less concentration of power and a less comprehensive fusion of executive and legislative functions.

Among PR systems, one major division is between closed- and open- (or preferential-) list systems. In a closed-list PR system (CLPR), voters are presented with, and vote for, ranked and closed lists of party candidates for legislative office. If the party wins n seats, the first n candidates on that list are the ones to whom these seats are assigned. By contrast, in an open-/preferential-list system (OLPR), voters are allowed to express a preference for which individual candidates on the list should be assigned the n seats won by the party. OLPR systems vary by how much say they give to voters in this selection, ranging from merely changing the default order proposed by the party to entirely determining the rank of candidates, i.e., the n most voted-for candidates are the ones to whom the party's seats are assigned.⁷⁸

What practical difference, if any, does the choice along the spectrum from closed- to preferential- to completely open-list PR systems

76. They are: Meighen (1926), Diefenbaker (1965), Trudeau (1974), Clark (1979), Martin (2005), and Harper (2011).

77. See SHUGART & CAREY, *supra* note 4, at 7–14.

78. For this description of the difference between CLPR and OLPR systems, I have relied in significant part of the concise statement contained in José Antonio Cheibub & Gisela Sin, *Order in Chaos: Intra Party Coordination in Open List PR Systems* (Apr. 3–6, 2014), <http://publish.illinois.edu/giselasin/files/2014/08/Order-in-Chaos-Intra-Party-Coordination-in-Open-List-Proportional-Representation-Systems.pdf> (paper presented at the 72nd Annual Midwest Political Science Association Conference).

make in terms of the prospect or reality of concentrated/diffused political power? Although “[l]ittle is currently known about the effects of the different types of [preference-list] PR systems,”⁷⁹ certain differences between the more basic distinction of closed- versus open-list systems have been well established. For example, PR systems overall result in higher representation of women than majoritarian ones, and CLPR more than OLPR.⁸⁰ More directly relevant, CLPR—as, for example, in South Africa—strengthens the hand of the party leadership/leader and so concentrates more power within it, as candidates are entirely dependent on the party selectors rather than voters for their presence and rank on the list. Promoting and rewarding party loyalty is the usual consequence. By contrast, under OLPR, candidates face intra-party electoral competition (i.e., competition from fellow party candidates) and so have greater incentives to cultivate voters and respond to their interests and demands, including presumably the interests of powerful private and sectional interests.⁸¹ In many respects, this is similar to the impact of party primaries in majoritarian electoral systems versus the increasingly centralized party selection of candidates in traditional general election only, first-past-the-post contests,⁸² although the effects of OLPR likely differ somewhat due to the intra-party competition at the general election itself.

A second division among PR systems relates to the size of the district/constituency. The larger the district, the more “representative” it can be in terms of accommodating, distinguishing, and recognizing different viewpoints among voters. At the extreme, a single national district is likely to generate multiple small, special interest parties, at least in the absence of a significant threshold requirement. As illustrated by Israel, this version of PR makes it more difficult to build a coalition and form a government in the first place, and then hold it together, given the relative priorities attached to national policy goals versus more parochial, specialized interests on the part of such smaller parties. In other words, such a system elevates representativeness over efficiency.

The potential costs of such lesser fusion and greater dispersal of power among parties and between the legislature and executive under PR are threefold. First, as exemplified by the Italian “First Republic” of 1946–1993 and the French Third and Fourth Republics, are the “efficiency” costs of greater political instability than in two-party

79. Matthew S. Shugart, *Comparative Electoral Systems Research: The Maturation of a Field and New Challenges Ahead*, in *THE POLITICS OF ELECTORAL SYSTEMS* 25, 43 (Michael Gallagher & Paul Mitchell eds., 2005).

80. See Michael Gallagher, *Conclusion* to *THE POLITICS OF ELECTORAL SYSTEMS* 535, *supra* note 79, at 555–57.

81. *Id.* at 557–62.

82. On how primaries have weakened parties and their leadership in the United States, see Pildes, *supra* note 46.

parliamentary systems. Presidential and semi-presidential systems similarly promise greater stability, due to their independent institutions and fixed terms of office, although gridlock and pressure for presidential overreaching may be alternative costs of more “separated” government. The evidence of greater governmental instability within multiparty systems has, however, declined significantly in more recent times and is no longer obvious.⁸³ The second potential cost relates to what political scientists refer to as the “identifiability” of governmental alternatives at the time of election.⁸⁴ This is the lesser democratic accountability and transparency that may occur where government formation depends on what can be lengthy postelection negotiations and deals among party elites,⁸⁵ and resulting policy compromises that may not reflect the preferences of any party’s voters. Thirdly, and also concerning accountability, it is easier for voters to throw out unpopular governments in their entirety under majoritarian than PR parliamentary systems. Where single-party government is the norm, governments must be reelected or rejected at election time. By contrast, where they are not “unitary actors,” successive governments may contain some of the same parties regardless of electoral outcome.⁸⁶ This perhaps creates a different, temporal form of (partially) concentrated political power within the parties than the fuller but potentially briefer one within majoritarian/two-party systems.

What the above discussion shows clearly is that the same institutional system of parliamentary government can function very differently in terms of unified or divided government depending on the electoral/party system in place: from post-World War II Italy (approximately forty-five government resignations due to either parliamentary votes of no confidence or coalition breakdowns⁸⁷) to the post-World War II United Kingdom (one government forced from office by legislative vote or coalition breakdown).⁸⁸ Moreover, the

83. See, e.g., LAWRENCE DODD, *COALITIONS IN PARLIAMENTARY GOVERNMENT* (2015).

84. G. BINGHAM POWELL, *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* (2000).

85. Israel, Turkey, and especially Belgium, are recent examples of countries in which postelection coalition negotiations were prolonged. Italy installed its third “unelected” prime minister in a row in 2014, appointed by the President without a mandate from a recent electoral victory as party leader. These are Mario Monti (2011–2013), Enrico Letta (2013–2014), and Matteo Renzi (February 2014–December 2016). Indeed, Monti and Renzi were not members of the legislature when appointed, the latter becoming prime minister upon defeating Letta in a party leadership contest.

86. Gallagher, *supra* note 80, at 575.

87. Giuseppe Ieraci & Francesco Poropat, *Governments in Europe (1945–2013): A Data Set 90* (Edizioni Università di Trieste, DiSPeS Working Paper No. 4, 2013).

88. This is not to deny that other differences among parliamentary systems—in institutional details or allocations of power, context, and culture—may also help to explain outcomes.

history of a single parliamentary system—the United Kingdom—exhibits a fairly wide portion of this possible spectrum as it changed from a weak party system of largely independent members of parliament to a strong party system of largely dependent ones.

Three further examples illustrate the independent importance of electoral/party systems in shaping the concentration/diffusion of power in parliamentary systems. First, in 1994, New Zealand switched from its traditional majoritarian, first-past-the-post voting system in single-member constituencies to a “mixed member proportional representation” system along the lines of Germany⁸⁹ in an attempt to counter the widespread perception of executive dominance in its strongly unified system.⁹⁰ The result has been that, since then, no single party has achieved a majority of seats in the unicameral parliament by itself, and there has been significant power sharing among parties entering into “supply and confidence agreements”⁹¹ with the largest party, resulting in substantial leverage over policy outcomes for the small Maori party.⁹²

Second, in 2015 Italy changed its electoral law for the Chamber of Deputies in a new attempt to counter its historic governmental instability. The statute, known as the Italicum, gives a majority-ensuring bonus amounting to a total of 54% of parliamentary seats to the political party that either receives more than 40% of the vote in the party-list PR first round of elections or (more realistically) wins the second-round vote between the two best performing parties in the first round. The remaining 46% of seats are allocated on a PR basis according to the first round of votes. This new system, particularly in combination with the separate planned reform of the Senate to be a nonelected body with limited powers, was designed to concentrate power far more than before in the winning party and its leadership, especially the prime minister. However, its future is now extremely uncertain in the wake of the popular rejection of the Senate reform by referendum in December 2016 and a Constitutional Court decision the following month declaring the second-round bonus unconstitutional, effectively returning the lower house to the PR status quo ante.

Third, where there is a *dominant* political party, such as the ANC in South Africa, the existing (parliamentary) form of executive-legislative relations would seem to make relatively little difference to its accumulation or exercise of power: whether parliamentary, presidential, or semi-presidential, it would be unified or concentrated

89. That is, combining a certain number of seats for single-member constituencies with PR on a national list basis for the remainder.

90. See, e.g., GEOFFREY PALMER, *THE UNBRIDLED EXECUTIVE* (1979).

91. These are agreement or pacts to support the governing party on critical votes in the legislature that fall short of formal coalitions.

92. *Relationship Accord and Confidence and Supply Agreement with the Māori Party*, MĀORI PARTY (Dec. 11, 2011), <https://www.parliament.nz/resource/0000178768>.

under each.⁹³ What appears to make more difference is (1) the constitutionalization of a PR electoral system⁹⁴ and (2) the requirement of a two-thirds parliamentary majority for constitutional amendments, the former of course making the latter more difficult to achieve.⁹⁵ The only other factors preventing a complete consolidation of power and unchecked authority are the constitutional provisions establishing an independent constitutional court and electoral commission, where party writ mostly does not run.

Finally, as we have seen, electoral rules and party systems can to some extent separate what formal executive-legislative institutional relations provisions fuse together. Both the nineteenth-century parliamentary system in Britain and modern PR/multiparty systems demonstrate the possibility of significant division and dispersal of political power—among parties within a government,⁹⁶ and between executive and legislative branches. At the extreme, minority or coalition governments in both two-party and multiparty systems can resemble divided government in presidential systems. Even under unified governments in two-party parliamentary systems, political parties function to supplement, if not entirely replace, the legislature as the main body to which the executive is politically responsible and accountable. For in these systems, it is increasingly more common for prime ministers to resign from office as a result of losing the confidence of the political party they lead than of the legislature as a whole.⁹⁷ Indeed, this possibility is arguably now the major practical political check on executive power.

III. SEMI-PRESIDENTIALISM

Semi-presidentialism combines an independent, directly elected, nonceremonial president (as head of state) with a prime minister (as head of government) and cabinet that are politically responsible to, and removable by, the legislature. In so doing, it also combines the two “purer” forms of presidential and parliamentary government

93. The recent referendum in Turkey amending the constitution from a parliamentary to a presidential republic perhaps illustrates the point in that, given the electoral success of the AKP since 2002 and the concentration of political power in its leader, Recep Tayyip Erdogan, the switch is widely seen as primarily (though not exclusively) one from a *de facto* to a *de jure* presidential system. It is far from clear, however, that Turkey is a dominant-party democracy; the AKP's electoral victories in recent years, including the referendum, have been narrow and seemingly tainted by its increasingly authoritarian and repressive governing style.

94. *See supra* note 58.

95. In the 2014 elections, the ANC once again fell just short of this supermajority, winning 249 of the 400 seats in the National Assembly, down from 264 in the 2009 election.

96. Lijphart has termed this aspect of multiparty parliamentary systems an “informal separation of powers.” AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITY AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 24–25 (1984).

97. Fairly recent examples include Margaret Thatcher and Tony Blair (in the United Kingdom), and Kevin Rudd, Julia Gillard, and Tony Abbott (in Australia).

and, by creating a tripartite institutional system of president, prime minister/government, and legislature, establishes an additional layer of separation of powers by dividing executive power between the dual offices of president and prime minister.⁹⁸ Even more than with the other two forms of government, these spare definitional essentials permit, and have resulted in, numerous specific variations among semi-presidential systems in the relative powers of the two dual executives and on the relationship between the legislative and executive branches.⁹⁹ Indeed, two major subgroups have been identified: (1) president-parliamentary regimes, in which the prime minister and government are responsible to, and dismissible by, *both* the legislature and the president; and (2) premier-presidential regimes, in which the prime minister and government are responsible to, and dismissible by, the legislature alone.¹⁰⁰ As this difference indicates, presidents, as a general matter, hold greater power under president-parliamentary than premier-presidential regimes. Russia is a leading current example of the former subgroup, France of the latter.¹⁰¹

Semi-presidentialism is currently the single most popular choice of form of government among new and transitional democracies.¹⁰² This is largely because it is widely viewed as reducing the costs and dangers posed by the two purer forms. On the one hand, in the context of overly strong executives in the recent authoritarian past, it promises to temper the perils of pure presidentialism by creating the additional layer of separation of power inherent in the dual executive offices. On the other, it is also thought to reduce the risks of instability that a pure parliamentary system would bring in a context lacking mature, institutionalized political parties, as well as eliminate the perceived legitimacy problem of an indirectly elected leader.¹⁰³

Despite its antiparty origins¹⁰⁴ and more complex institutional system, like the other two forms, semi-presidentialism's concentration/dispersal of power is not fixed but varies greatly depending on the nature and state of the party system and party politics in the

98. On semi-presidentialism generally, see Skach, *supra* note 32; ROBERT ELGIE, *SEMI-PRESIDENTIALISM: SUB-TYPES AND DEMOCRATIC PERFORMANCE* (2011); Matthew S. Shugart, *Semi-Presidential Systems: Dual Executive and Mixed Authority Patterns*, 3 *FRENCH POL.* 323 (2005).

99. For a very helpful survey of these differences, see Sujit Choudhry & Richard Stacey, *Semi-Presidentialism as a Form of Government: Lessons for Tunisia* (International IDEA & the Center for Constitutional Transitions at NYU Working Paper Series, No. 2, 2013).

100. SHUGART & CAREY, *supra* note 4, at 23–27.

101. Although French presidents do not have the power to dismiss prime ministers or other members of the cabinet, President de Gaulle essentially fired Prime Minister Georges Pompidou in 1968 when he unilaterally “accepted his resignation.” If this were other than an exceptional event, the distinction between the two subgroups of semi-presidentialism would of course collapse in practice.

102. Choudhry & Stacey, *supra* note 99.

103. *Id.* (noting also the path-dependent reason for choosing semi-presidentialism among countries with presidential traditions).

104. See *supra* Part I.B.

legislature, and the electoral system that underlies and structures them. It ranges from a potentially highly concentrated version where there is both a majoritarian voting system and concurrent presidential and legislative elections, to a highly fragmented version where there is neither.

A. *Majoritarian / Two Party Systems*

Where the same political party or bloc wins both the separate presidential and legislative elections, a similar possibility of unified government as that in pure presidential systems exists.

Under this party configuration—what Cindy Skach refers to as “consolidated majority government”¹⁰⁵—there may be a little more friction, resulting from both a formal division among three institutions rather than two, and any personal rivalry between the dual executives. But political power is *de facto* concentrated in the clear governing party—and typically in the president as its leader who, unlike the prime minister, has direct electoral legitimacy.

The likelihood and duration of this party configuration is substantially a function of both the electoral system employed and the relative timing of the separate presidential and legislative elections. Presidential elections—whether in presidential or semi-presidential systems—are, by definition, winner-take-all events, with only a single office to be filled,¹⁰⁶ and so necessarily employ one or other majoritarian electoral system: (a) party primaries and a general election, as in the United States; (b) first-round and run-off elections, as in France; or (c) straight plurality/first-past-the-post.¹⁰⁷ But legislative elections, with multiple seats, are not so constrained and can be organized on any available basis. Unified or consolidated majority government under semi-presidentialism is far more likely to occur under a majoritarian electoral system, as in France,¹⁰⁸ because (as in parliamentary systems) this is more likely to result in a majority single party in the legislature. Where it does not, however, there are two main possibilities: (1) a minority or coalition government of the

105. Skach, *supra* note 32, at 101.

106. Assuming, of course, the norm of a single-person presidency. There have been, and are, a handful of exceptions, such as the three-person presidency in Bosnia-Herzegovina, negotiated under the Dayton Accords (one Bosniak and one Croat, elected by the Federation, and one Serb elected by the autonomous Serb Republic within the country). General Framework for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 (1996).

107. Although for current purposes, I am treating the three as equivalent, it has been argued that—especially in the context of a PR/multiparty system for legislative elections—the choice between (b) and (c) can affect the likelihood of bargaining and coalitions between the parties before the election, and hence the election’s “efficiency” and the “identifiability” of governmental options. See SHUGART & CAREY, *supra* note 4, at 208–16.

108. The National Assembly in France consists of 577 single member constituencies employing a similar two-round first-past-the-post electoral system as presidential elections.

same party as the president, with the similar possibilities of shared executive power and greater dependence on the legislature as under parliamentarism; and (2) a legislative majority for the non-presidential party (or coalition of parties opposed to the president). This latter form of divided government—"cohabitation" or what Skach calls "divided majority government"—realizes more of the institutional separation of powers potential of semi-presidentialism as, unlike in a pure presidential system, executive power is split between two officials of opposite parties. Compared with consolidated majority government, where power is usually concentrated in the president, under a divided majority power tends to shift to the prime minister, with the president more in the role of "opposition" leader within the government.

Similarly, the probability and duration of a unified government is also importantly a function of the timing of the two separate elections: the closer together they are, the more likely one party or bloc is to win both.¹⁰⁹ This factor of the electoral cycle is an additional variable in the overall concentration/dispersal of political power that does not exist in single-election parliamentary systems. Presidential elections exert a strong "pull" on legislative elections so that concurrent ones are more likely to result in a president-controlled government; nonconcurrent elections minimize or reverse this pull and increase the probability of a prime minister-controlled one.¹¹⁰ France has provided a natural experiment in this phenomenon, as the 2002 change from staggered to near simultaneous elections, brought about by reducing the presidential term from seven to the same five years as the legislature, has (as intended) mostly made cohabitation a thing of the past. In 2002, 2007, and 2012, newly elected presidents enjoyed unified governments, whereas during nine of the previous sixteen years, presidents were forced to appoint prime ministers of the opposing party.¹¹¹

Moreover, nonconcurrent elections create the conditions for rival claims to exclusive control of the executive by presidents and prime ministers of opposing parties. Thus, a newly elected legislative majority opposed to the incumbent president, or a newly elected president faced with a sitting cabinet reflecting the previous legislative elections, will each likely claim that only they have the legitimacy deriving from the most recent expression of the popular will.¹¹² By contrast, concurrent elections do not give rise to such a claim.

Accordingly, the configuration of semi-presidentialism with a first-past-the-post voting system for parliament and concurrent

109. SHUGART & CAREY, *supra* note 4, at 220–27.

110. *Id.* at 260.

111. This record was further extended to 2017 when recently elected President Macron achieved a substantial legislative majority of 350 out of 577 seats for his brand new La République En Marche! party (in alliance with the centrist Democratic Movement) in the elections of June 2017.

112. SHUGART & CAREY, *supra* note 4, at 58.

presidential and legislative elections creates the greatest likelihood of even more highly concentrated power than under “unified government” in a presidential system: what might be called “super-presidentialism.”¹¹³ For here, a president is not only the directly elected head of state and (at least de facto) party leader, but also effectively controls the party-based parliamentary government as the prime minister’s “boss.”

B. *PR/Multiparty Systems*

With a form of proportional representation for legislative elections, there is a greater likelihood of a non-single party (i.e., a coalition) government, either including or excluding the president’s party, and a new third option of “divided minority government.”¹¹⁴ This is a situation of fragmented authority in which neither the president, the prime minister, nor any party or coalition enjoys majority support in the legislature. Here, there is the possibility of maximal diffusion of power—between a president and prime minister of different parties, and between the government and the legislature—along with the obvious prospect of instability and ungovernability. This possibility is enhanced by three other factors that affect the relative concentration/dispersal of political power under this version of semi-presidentialism.

The first two relate to the type of PR employed. As we have seen, PR systems that prioritize representation over efficiency by creating very large—at the extreme, a single, national—multimember districts/constituencies, and thereby increase the likelihood of a greater number of small, special interest parties, may be faced with extreme fragmentation in which it is harder to build governing coalitions, keep them together, or both. The second PR-related factor is open or closed party lists, with the implications for party strength, control, and centralization discussed above.¹¹⁵ Finally, the electoral cycle once again has a significant impact on the party-related pattern of governance. As part of the gravitational pull of presidential elections, their inherently majoritarian nature—which tends towards a two-party/bloc system—also typically reduces the number of parties in concurrent elections *even under PR*. Despite the formal separation of elections, the big-party bias of presidential elections has some carryover effect, so that ticket splitting is comparatively rare, and minor parties, which either run no presidential candidate at all or no plausible contender, are more “minor” under concurrent elections than nonconcurrent ones.¹¹⁶ Accordingly, elections are more *independent*, and multiparty systems are more likely to thrive, when presidential

113. Thanks to Bruce Ackerman for suggesting this term.

114. See Skach, *supra* note 32.

115. See *supra* text accompanying notes 78–82.

116. SHUGART & CAREY, *supra* note 4, at 227.

and legislative elections take place at different times. The later years of the ill-fated Weimar Republic exemplify two of these conditions under which divided minority government is most likely to take root and bring with it the greatest risks of extreme fragmentation, ungovernability, and (especially when armed with significant emergency powers) presidential unilateralism. For the Weimar constitution combined the presidential-parliamentary form of semi-presidentialism with nonconcurrent presidential and legislative elections¹¹⁷ and a PR system for the latter based on a single, nationwide district without a threshold requirement for representation.¹¹⁸ But at a basic level, what all three configurations under semi-presidentialism clearly illustrate is that the sharing and division of power among political parties under various electoral outcomes and systems is at least as important in how this form of government operates in terms of dispersing or concentrating authority as the institutional separations themselves.

IV. PRESIDENTIALISM

Presidentialism within a majoritarian/two-party or bloc political system yields the original Levinson–Pildes scenario: regardless of the formally separated and independent executive and legislative powers, party competition creates episodic periods of unified or divided government depending on the political alignment or disjunction between the presidency and congressional majorities. Where the same party controls both branches, U.S. government resembles “fused” parliamentary government. Where it does not, party contestation is superimposed on the institutional separation: from constitutional check to potential political checkmate.

Here it is probably accurate to say that presidential unified government “resembles” but does not quite approach the degree of unity in equivalent two-party parliamentary systems for two major reasons. First, the reelection and promotion prospects of legislators of the same party are not as closely tied to the executive in presidential systems as in parliamentary ones due to the fact that in the latter, voters only have a single vote and not a separate one for executive and legislative offices. Accordingly, they must reduce or convert all relevant considerations—national policy versus local interests, individual appeal of the candidate versus that of the party leadership, and legislative versus executive capabilities—into a single metric in a way that is not true in presidential systems, where a separate vote for each can reflect some or all of these factors. In other words, in presidential systems—and especially ones with majoritarian, single-member districts—there is a distinction between voting

117. The presidential term was seven years, the legislative term was four.

118. By contrast, the modern German system has a relatively high threshold of 5%.

for a national executive and for a local representative to the national legislature, and candidates for the latter are able to take this into account when campaigning. With the limited and partial exception of OLPR, voters in parliamentary systems effectively vote for a party—or a party leader—rather than individual legislators.

Second, the strength of the party system as a whole tends to be structurally or inherently greater in parliamentary systems than in presidential ones precisely because only in the former is the executive politically accountable to the legislature. Unified or divided government in a presidential system may determine whether legislation is enacted, its content, and a variety of other matters depending on the particular system, but not the executive's continuance in office. Where that is at stake, and legislators' own political fortunes in terms of reelection or promotion are significantly tied to that of the executive through party identity and affiliation, individual interests merge into the collective in a sink-or-swim mentality; mavericks and individual consciences are luxury items.¹¹⁹ Especially in two-party parliamentary systems, party discipline is an inherent consequence of the vote of confidence, as the loss or gaining of governmental office may well turn on it. By contrast, political parties in presidential systems can afford to be more tolerant and loosen the whip, because there is no vote of confidence and the separation of electoral campaigns means that the fortunes of the party's executive and legislative representatives are less entwined. In other words, differences in institutional powers help to shape the logic, organization, and conduct of party politics.¹²⁰

Apart from the United States and the Philippines, all presidential systems employ PR for their separate legislative elections.¹²¹ This is, no doubt, because the "efficiency" rationale behind a majoritarian rule decreases in importance relative to the "representativeness" rationale where there is a separately elected executive, unlike in parliamentary systems. So moving from U.S.-style presidentialism to presidentialism with multiparty/PR systems changes the dynamics of executive-legislative relations, as it does with the other forms of government, even though of course the essential institutional arrangements remain the same.¹²² Thus, the likelihood of a unified government significantly decreases in that any single-party majority in the legislature, including that of the president, becomes far less probable. Moreover, absent the need to form and maintain a government, coalitions among legislative parties are both less urgent and more likely to be looser and less stable. One very visible example of

119. See *supra* text accompanying notes 68–70.

120. On this relationship more generally, see SAMUELS & SHUGART, *supra* note 11.

121. SHUGART & CAREY, *supra* note 4, at 257.

122. Again, there are many variations among nonessential institutional arrangements, including presidential legislative, decree, emergency, and unilateral appointment powers, which may also affect the relative concentration or diffusion of power.

this is Brazil, where former President Dilma Rousseff's legislative coalition progressively unraveled over the course of a year, resulting in lopsided votes to impeach her in the Chamber of Deputies and to convict in the subsequent Senate trial.¹²³ Consequently, a form of divided minority government is often the likeliest outcome, with the president facing a fragmented, relatively leaderless legislature. Although not as debilitating as the corresponding configuration under semi-presidentialism—where the formation and survival of the government itself is placed at risk by the fragmentation—this scenario arguably raises the perils of presidentialism in their most dangerous form.¹²⁴

As with semi-presidentialism, the probability of one political configuration versus another (unified, divided majority, or divided minority) in a presidential system depends not only on the electoral rule employed for legislative elections—majoritarian/plurality or PR—but also on the electoral cycle; that is, the relative timing of the two separate elections. In majoritarian systems, where elections are concurrent, the “pull” towards the president's party increases the chances of unified government; partially nonconcurrent, i.e., midterm, elections reduce their likely duration. Shorter windows of opportunity created by the latter also tend to alter the incentives of how presidents and parties employ their brief periods of the most unified power,¹²⁵ although even here the unity is less than in parliamentary systems because some or all legislative party members will be facing the electorate sooner rather than later. Fully nonconcurrent elections increase the chances of divided (majority) government.

In PR (that is, most) presidential systems, concurrent elections similarly tend to bolster the presidential party at the expense of minority ones and make some sort of workable governing coalition more likely. Where CLPR is employed, the increase in party discipline over the rank and file that this entails is relatively greater than in parliamentary systems, where such discipline is more inherent,¹²⁶ and adds to the government's unity. By contrast, OLPR detracts from it by rendering legislators relatively more independent of the party and thus more focused on the local/sectional interests that help them to get elected and reelected. Similarly, because concurrent elections tend to reduce the number of legislative parties,¹²⁷ they also make governing coalitions more manageable and stable. On

123. In early August 2015, two parties—the Democratic Labor Party and the Brazilian Labor Party—withdrew from the governing coalition in Congress, ultimately leading to the lower-house vote for impeachment in April 2016, her suspension from office, and finally her Senate conviction and permanent replacement by Vice President Michel Temer in August 2016.

124. See Juan Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

125. See Ackerman, *supra* note 124.

126. Due to the vote of confidence. See *supra* text accompanying note 120.

127. See *supra* text accompanying note 116.

the other hand, the combination of PR with fully or partially nonconcurrent elections increases the likelihood of both divided majority (or minority) coalition configurations and a greater number of parties.¹²⁸

V. REVISITING THE MADISONIAN SYSTEM

Looking at the topic through a comparative lens not only broadens the analysis to other forms of government but also deepens our understanding of the U.S. system of separation of parties, not powers.

First, it suggests that the Framers were wrong not only about how the U.S. system would play out but also about the alternatives to presidentialism that they considered and ultimately rejected. They firmly believed that an executive elected by the legislature would be dependent on the legislature, which they wanted to avoid at all costs. An independent executive was viewed as an essential bulwark against the perceived greatest risk of legislative tyranny.¹²⁹ But modern party politics in parliamentary systems (in which the executive is indirectly or implicitly elected by the legislature), especially those with U.S.-style single member constituencies, has resulted in legislative dependence on the executive. So, ironically, in the contemporary context of the waning powers of legislatures generally (i.e., under all forms of government) relative to executives (as well as courts and administrators),¹³⁰ one of the currently perceived merits of presidentialism is to provide stronger guarantees of the independence of the legislature than other systems, contrary to the Framers' own assessment and priorities. Perhaps, in hindsight, they might have preferred the modern parliamentary system with its seemingly greater check on legislative ambitions if they had known how it would play out. Or perhaps they would acknowledge that their priority had been misplaced.

Second, relative to the office the Framers created, one of the important new sources of power that a modern president enjoys is of course his or her role as party leader. How does this common role compare as a source of power between presidents and prime ministers? On the one hand, due to the generally greater strength of parties in parliamentary systems—stemming from both the logic of a single election for the executive and the legislature as well as

128. See *supra* text accompanying note 116.

129. See *supra* note 65.

130. There is a large literature in the United States on the growth of executive power. See ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973); BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010). As discussed, the increasing concentration of power in the executive in parliamentary democracies has been one important reason for the turn to judicial review in these countries. See PALMER, *supra* note 90; Gardbaum, *supra* note 72. Finally, the general problem of dealing with the legacy—and institutions—of overly powerful and authoritarian executives and rubber stamp legislatures has been a major focus of constitutional design in new and transitional democracies. See, e.g., Choudhry & Stacey, *supra* note 99.

the political responsibility of the executive to Parliament discussed above—a prime minister will typically derive more power from this source. On the other hand, there are two factors that pull in the opposite direction. First, U.S. presidents are not faced with a shadow counterpart, that is, an official opposition party leader, who serves as a singular focus of political criticism and continuous assessment of comparative effectiveness and suitability for office. In contrast, the losing presidential candidate, qua candidate, usually disappears quickly from the central political stage and is not replaced by any one alternate leader at the same “level” or branch of government who can plausibly act from the outset as a “president-in-waiting.” Second, the modern U.S. president’s role as party leader incorporates the political independence of the executive office itself. That is, the independent survival that partly defines the executive power under presidentialism carries over to the position as head of the party. In short, a president cannot be thrown out as party leader during his or her term of office in the way that prime ministers can and sometimes are,¹³¹ which has become the major political check on their power during normal periods of majority government in two-party systems.

Third, how does the unity of unified governments compare? As we have seen, unified governments in two-party presidential systems are typically less unified than governments in similar parliamentary systems because in the latter, legislators’ reelection and promotion prospects are more directly and closely tied to the executive in a single, dual-purpose election than even in concurrent separate elections. It is harder to say if coalition governments in multiparty parliamentary systems are overall more or less unified because parties share power within the executive, which is not generally the case in the other two systems. Although semi-presidentialism may create a certain friction even between presidents and prime ministers of the same party as compared with the single-person executive of presidentialism, the former system tends to yield greater executive-legislative unity than the latter where a single party controls both branches because it typically results in a presidential-controlled parliamentary government, despite the separate elections.

Fourth, the timing of elections is critical in determining not only the likelihood of unified governments but also how unified they are and how long such unity is likely to last. Once again, in parliamentary systems it is in significant part because legislators are always elected at the same time as the executive that their reelection prospects are so intertwined. French semi-presidentialism has virtually eliminated the possibility of cohabitation by changing the timing of presidential and legislative elections to be nearly simultaneous.

131. In addition to the prime ministers/party leaders in two-party systems listed *supra* note 97, Enrico Letta was deposed as party leader (and so as prime minister) by Matteo Renzi, in February 2014.

Staggered elections, as partially in the United States and previously fully in France, tend to reduce the likelihood and duration of unified governments but also arguably their cohesiveness, as legislators up for early reelection cannot afford to be seen as too close to or supportive of a president who is actually or potentially unpopular at that time.

Fifth, the existence or absence of the direct popular election of chief executives has important consequences for relative power within the political system. Undoubtedly, this change has given U.S. presidents greater national democratic legitimacy and authority, compared to the Framers' expectations in creating the indirect method of the Electoral College. In two-party parliamentary systems, the absence of direct national popular election of the prime minister (as chief executive versus legislator) reduces the relative democratic legitimacy and authority of the office, and perhaps of the government as a whole. It does, however, cohere with and support the concept of more collective cabinet government, in that some, many, or all ministers—depending on the parliamentary system in question—are elected in the same way and so have a broadly similar level of direct legitimacy as the prime minister.¹³² In multiparty parliamentary systems, this absence of direct election arguably additionally reduces the government's democratic legitimacy as a whole where coalitions are put together after the election as the result of mostly private interparty negotiations and deals. In semi-presidentialism, although direct popular election of the president enhances his or her legitimacy, as in the United States, it also creates the possibility of power-sapping cohabitation where separate presidential and legislative elections produce divided government, something that is virtually impossible with legislative election of the president.

Finally, although as this Article has demonstrated, the general phenomenon of "separation of parties, not powers" is far from distinctive to the U.S. political system, the underlying Madisonian concern with dividing government and fragmenting political power is much more so. The risk-averse strain in American political culture that is deeply skeptical and fearful of government meant that from the outset (and ever since), high priority was attached to dispersing and slicing up political power, to creating checks and balances, and to multiplying veto players. Accordingly, the largely unanticipated developments in, and unintended consequences of, the party

132. In a few parliamentary systems, the prime minister may not be a directly elected politician at all. Two of the last three Italian prime ministers (Monti and Renzo) were not members of parliament when appointed to office. Accordingly, the ministers in these cabinets who were also MPs arguably had *greater* democratic legitimacy than the prime ministers. In some parliamentary systems, the prime minister and other ministers cannot also be MPs and so must resign their seats on appointment, like cabinet members in the United States and in most presidential and semi-presidential systems.

system that have created the possibility of unified government are widely viewed as problematic, and as undermining the proper and desirable system of separated powers. Even Levinson and Pildes feel obliged to survey and propose mechanisms for reforming the current system to create more division and friction during times of unified government.¹³³

Outside the United States, this focus and priority are less evident, the contexts and political cultures in which the interaction of legislative/executive powers and party/electoral systems plays out are somewhat different. Other democratic political values play a role in the assessment of its impact. As we have seen, from its origin, separation of power was one element in parliamentarism, but never at the expense of workable government. It was always more about political accountability and responsibility of the government to parliament—and later also to the electorate—than about checks and vetoes. Within majoritarian/two-party systems, unified or “efficient” government was generally viewed as a strength, and only more recently has the party-based concentration of power in the executive come to be seen as a problem.¹³⁴ Within PR/multiparty versions, by contrast, it is the priority attached to the values of democratic “representation,” voice, and inclusiveness that results in the dispersal of political power through the party system rather than the desire for checks and vetoes per se—for it is these values that the concentration of power undermines. Accordingly, it is representation and voice that are traded off against governmental efficiency, rather than Madisonian-style individual liberty. The same goes for the vast majority of presidential systems outside the United States that employ PR for legislative elections. French semi-presidentialism began as an attempt to increase the stability and workability of government after the experience of multiparty parliamentarism under the Third and Fourth Republics. Today, it is popular among newer democracies because of its perceived promise of balancing the values of effective political leadership, representation, and antiauthoritarianism.

CONCLUSION

For constitutional designers and drafters in particular, issues concerning the dispersal or concentration of power should no longer be thought of as exhausted by allocations of legislative/executive powers and interbranch relations, but must also equally take into account the other half of what determines how these relations function in practice: namely, the electoral and political party system contexts within which they operate. This is especially important in

133. See Levinson & Pildes, *supra* note 1, at pt. III.

134. A problem to which judicial review has increasingly been seen as a solution. See Gardbaum, *supra* note 72.

the case of “fragile democracies,”¹³⁵ where the ultimate goal of stable and successful transition from authoritarianism requires a flexible and context-specific focus on the interactions between formal institutional options and local political conditions.

Political parties can fuse executive and legislative power under any form of government. So where there is an electorally dominant political party—whether the old PRI in presidentialist Mexico, the Muslim Brotherhood’s Freedom and Justice Party in Morsi’s semi-presidentialist Egypt, or the ANC in parliamentary South Africa—it is unclear how much difference form alone makes. Here, it is prudent to rely primarily on other means to counter the undue concentration of power, such as federalism and independent courts, prosecutors, and electoral commissions,¹³⁶ as well as significant supermajority rules for constitutional amendment. Parties can also separate power under all forms, even the “fused” parliamentary one under coalition and minority governments. And from the perspective of diffusion, each form works better when there is some type of divided party support.

Semi-presidentialism is currently a highly popular form of government, particularly among new and transitional democracies with recent authoritarian pasts. This is because it holds out the promise of dividing and checking executive authority while also avoiding the risk of unstable parliamentary politics, especially in systems without mature, institutionalized parties. Yet, however well crafted, the realization of this promise depends significantly on party and electoral politics. Egypt’s reasonably elaborate and artfully drawn semi-presidential constitution of December 2012 was undermined in this regard by the unequal condition of the political groupings in terms of organization and preparedness and the electoral returns that almost inevitably followed from them. The non-competitiveness of the multiple small and divided liberal-secular parties compared to the two Islamist ones in the legislative elections of November 2011–January 2012, compounded slightly by the mixed majoritarian and PR electoral system in place,¹³⁷ meant that despite only a narrow presidential election victory, as head of a unified or consolidated majority government of the Muslim Brotherhood, President Morsi was not required to—and did not—engage in any form of power-sharing, either interparty (between Islamists and liberal-secularists) or intraparty (among the various offices and branches).¹³⁸ This perceived

135. See Issacharoff, *supra* note 15.

136. On the latter, see Michael Pal, *Electoral Management Bodies as a Fourth Branch of Government*, 20 REV. CONST. STUD. (SPECIAL ISSUE) 85 (2016).

137. Two-thirds of the seats were allocated on a PR basis and one-third on a majoritarian, constituency basis.

138. In the sense that the concentration of power in a president is greatest under the “consolidated majority” scenario. See Skach, *supra* note 32, at 93. This unity and concentrated power was undoubtedly augmented by the army’s closure of parliament under a Supreme Constitutional Court order, meaning that *de facto* Egypt reverted to fully presidential, one-branch government.

partisanship and failure to reach out to opponents rapidly detracted from any cross-party sense of engagement in a common enterprise. In addition, the inherent inflexibility of the presidential office, or lack of a temporal power sharing possibility,¹³⁹ meant that he was legally and politically unchallengeable in office for the full term regardless of mounting opposition and dwindling popularity, which increased the likelihood of the ultimate military coup.

By comparison, the balance of party politics and sentiment in Tunisia may enable the new, well-designed semi-presidential constitution of January 2014 to work more successfully there. Following the period of power sharing between the Islamist party Ennahda, which held a plurality of seats, and the leading secular parties after the constituent assembly election in 2011, the legislative elections of October 2014 under the new constitution gave the main secular party bloc (Nidaa Tounes) eighty-five, and Ennahda sixty-nine, out of the 217 seats and have resulted in the formation of two successive Nidaa Tounes-led unity governments. This suggests that there is no clear Islamist majority party or ineradicable cross-party hostility and suspicion.

Constitutions are not written, and the institutions they establish do not operate, in a political vacuum. The occupational hazard of constitutional lawyers is to sometimes act as if they are and do. Curiously, this is less evident in the realm of federalism, recently widely employed as a mechanism for diffusing power vertically, between center and regions, in the context of political societies deeply divided by ethnic, racial, or religious gulfs.¹⁴⁰ Here, proffered constitutional solutions tend to be intensely tied to the particularities of context and the relative strengths of political factions and parties. Few offer abstract or universal institutional remedies. As increasing numbers of new constitutions are drafted and the academic discipline of comparative constitutional law continues to develop in partial response, recognition of similar types of more complex, two-way interactions between political branches and parties should inform constitutional scholarship on executive-legislative relations. In short, neither separation of powers nor separation of parties alone.

139. Arend Lijphart, *Presidentialism and Majoritarian Democracy*, in 1 *THE FAILURE OF PRESIDENTIAL DEMOCRACY: COMPARATIVE PERSPECTIVES* 97 (Juan Linz & Arturo Valenzuela eds., 1994).

140. For a helpful overview, see Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism*, in *COMPARATIVE CONSTITUTIONAL LAW* 356 (Tom Ginsburg & Rosalind Dixon eds., 2011).