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## Government in Opposition

**ABSTRACT.** In the past generation, in countries in all parts of the world, using all different forms of constitutional government, a new form of separation of powers has emerged in greater numbers, what this Article calls “government in opposition.” After democratic elections are held, power to govern is granted to the winners of those elections—but substantial power to govern is also granted to the losers of those elections as well. This Article first discusses how this emerging regime of separation of powers differs from other major forms of separation of powers, and in doing so introduces a new way of understanding the major systems of separated power that the world’s constitutional democracies have created. After providing some examples and illustrations of how this new, government in opposition system of separated powers operates—and why it has proven to be so consequential in so many countries—this Article discusses how government in opposition rules have much to offer constitutional designers around the world. In fragile democracies and stable democracies alike, government in opposition rules can better constrain power and stabilize the core elements of constitutional democracy, better prepare all parties to govern effectively, more fairly involve all interests in the process of governing—and can do all of this at minimal cost. To illustrate this point, this Article closes with a discussion of how government in opposition rules might work in the United States, and how they might remedy some of the current political and constitutional problems that we face.

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**INTRODUCTION**

We all remember Wednesday morning, November 5, 2008, the morning after the 2008 American presidential election between Republican Presidential nominee John McCain and Democratic Presidential nominee Barack Obama. President-elect Obama won a clear majority of the national popular vote, a landslide in the electoral vote, and his Democratic Party captured more seats in the House of Representatives and the Senate. But imagine if the next day, despite such a major Democratic victory, because of a constitutional or other legal obligation, Obama was required to name a Republican such as Senator Orrin Hatch as his Attorney General—putting Hatch in control of the future of judicial appointments and wiretapping programs—and Obama was required to name his former rival McCain as his new Secretary of Defense, in charge of Obama’s military policy in Afghanistan and Iraq.

This idea about government—of granting losing political parties the right not just to dissent from and obstruct the efforts of the winning political party, but also to exercise the power to govern as well—is an approach to government I call “government in opposition.” In the past several decades, rules granting losing, minority parties the power to act like winning, majority parties—rules this Article references as government in opposition rules—have spread around the globe, infusing the fundamental law of dozens of democratic countries, including countries as diverse as Argentina, Britain, Chile, Germany, and South Africa. Such government in opposition rules helped resolve constitutional crises in post-apartheid South Africa, are at the core of the discussion about how to resolve the current political crisis in Zimbabwe, and have dominated the constitutional discussions when leaders in Afghanistan and Iraq met to draft their new constitutions.

The spread of government in opposition rules as a means of dividing power among political groups is one of the most consequential innovations in constitutional design in the past several decades. Indeed, when Great Britain first experimented with government in opposition rules in the early nineteenth century, then-Harvard University President Lawrence Lowell called it “the greatest contribution of the nineteenth century to the art of government.”<sup>1</sup> Yet governments in opposition rules have received almost no attention in the academic literature. In legal scholarship, there have been a few articles raising the possibility of the occasional, obscure rule that permits minorities of various

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1. A. LAWRENCE LOWELL, *THE GOVERNMENT OF ENGLAND* 451 (1924).

sorts to exercise majority power,<sup>2</sup> and a few articles mentioning in passing specific examples of such rules.<sup>3</sup> In the political science literature, Arend Lijphart makes an occasional, brief reference to government in opposition rules when discussing his idea of “consociationalism,”<sup>4</sup> but devotes little attention to them, and unfortunately goes astray from government in opposition principles in important respects. But even these few and brief academic discussions of similar issues tend to focus on government in opposition rules as merely a random set of quirky, disconnected, and largely insignificant rules. There has been no discussion of how government in opposition rules—when grouped together—can form part of a deliberate, new, and alternative form of separation of powers.

This Article is an exercise in comparative and American constitutional law, examining the constitutional approaches of many different countries in pursuit of the most desirable constitutional structure, both in general for all constitutional designers, and more specifically for the United States. This Article is therefore a mix of the analytical and the normative; analytical in the sense that this Article is presenting an innovative “new”<sup>5</sup> or “newer”<sup>6</sup> separation of powers that has eluded the attention of scholars to this point; and normative in the sense that this Article offers a partial (albeit qualified) endorsement of the many institutional virtues of this emerging addition to separation of powers technologies, for the United States and for all other sorts of constitutional democracies.

Part I will begin our exploration of government in opposition by examining how constitutions around the world and in the United States have decided to

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2. See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) [hereinafter Gerken, *Dissenting by Deciding*]; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) [hereinafter Gerken, *Second-Order Diversity*]; Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74 (2005). For further discussion of these articles and their relationship to this Article, see *infra* Section II.A.
  3. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1051-52 (2004); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316, 2368-75 (2006).
  4. See, e.g., Arend Lijphart, *Consociational Democracy*, 21 WORLD POL. 207 (1969) (discussing how fragmented societies divide power among ethnic groups to preserve stability).
  5. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (presenting the idea of parliamentary democracies with constitutional courts as the “new” form of separation of powers).
  6. See Cindy Skach, *The “Newest” Separation of Powers: Semipresidentialism*, 5 INT’L J. CONST. L. 93 (2007) (arguing that semipresidential systems of separation of powers are an even more recent system of separation of powers than the form Ackerman discusses).

separate powers among winning and losing political coalitions.<sup>7</sup> One of the fundamental issues of constitutional design that countries have addressed as part of these divisions of powers is how to divide authority among winning political coalitions. Parliamentary systems largely avoid this question by creating a singular winner who controls almost all of the levers of government. By contrast, other systems (presidential and semipresidential) create the potential for multiple winning political coalitions and divide bundles of authority between these multiple winners among the branches or levels of government, or within the branches of government.

But while these systems recognize and protect losing political parties, they do not give these losing parties the substantial powers afforded to winning coalitions to govern and to make law (what this Article will term “winners’ powers”). As Part II discusses, then, government in opposition rules differ

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7. Two important points must be made about this very purposeful use of the phrase *political coalitions*, and the discussion of how constitutions divide power among political coalitions. First, there are other criteria that constitutions might use to divide authority among different groups beyond which *political* coalition one belongs to—for instance, ethnic or religious groups might be considered “majorities” or “minorities,” rather than political parties receiving more or less votes being considered as the relevant majorities and minorities. In Canada, for instance, there is a polarizing debate about whether to grant “asymmetrical powers for Quebec . . . in order to give it the jurisdictional tools to preserve and promote its [ethnic, linguistic and even religious] identity.” Sujit Choudhry, *Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory*, 5 INT’L J. CONST. L. 606, 632 (2007). In Lebanon, some governmental positions have been apportioned according to religious background. See, e.g., Richard Hrair Dekmejian, *Consociational Democracy in Crisis: The Case of Lebanon*, 10 COMP. POL. 251, 254 (1978) (discussing the situation in Lebanon whereby a ratio of six Christians to five Muslims are seated in the Chamber and there is an even division in the Cabinet). This Article, though, does not focus on ethnic or religious majorities or minorities and how power is allocated between those groups, unless those cleavages are in some way relevant to the distribution of power between *electoral* majorities and minorities.

A second important point about the use of the phrase “political coalition” is the decision to use the word *coalition* rather than party. To the American reader, the use of the word “coalition” is not necessary. As a practical matter, in the American system there is competition between the Democratic Party and the Republican Party, and so all I need discuss is the division of power between *the* winning party and *the* losing party rather than the winning and losing coalition, with some exceptions—such as Ross Perot winning nineteen percent of the nationwide popular vote in 1992, and Ralph Nader perhaps tipping the balance in the State of Florida to George W. Bush. See YANEK MIECZKOWSKI, *THE ROUTLEDGE HISTORICAL ATLAS OF PRESIDENTIAL ELECTIONS* 142 (2001). More commonly, though, the winner in democratic elections around the world consists of several parties, and the loser also consists of several parties. Since this is an exploration of government in opposition mostly in those countries, account must be taken of the presence of several political parties on the winner and loser side, and so this Article refers to winning and losing political *coalitions* rather than singular *parties*.

from these other regimes of separation of powers not in their treatment of winning coalitions, but in their treatment of losing coalitions, and their recognition that losing political coalitions should also have the capacity to exercise the power that winning coalitions usually possess to govern and to make law. Part II focuses on the different mechanisms that have been used in various countries to empower losing parties in this way—to give losers the power to govern in the executive, legislative, and judicial branches. In several other papers beyond this Article, I take up other tasks related to the discussion in Part II of the emergence of government in opposition rules, such as examining how these rules were created in part because they were seen as better forms of protection for political minorities than judicial review, and how the emergence of these rules has changed the nature of political opposition in Western democracies, including the United States.

After Part II, this Article turns to a discussion of whether government in opposition rules would be welcome additions to how the power to govern is distributed, focusing first in Part III on how these rules benefit all constitutional systems, and then in Part IV more specifically on what these rules could add to the American constitutional system. As part of this analysis, these Parts argue that government in opposition rules are constructive additions to the institutional design of countries that fall anywhere on the spectrum from the most to the least “fragile democracies.”<sup>8</sup> Government in opposition rules are welcome parts of constitutional systems, in other words, for the over two-hundred-year-old Constitution of the United States, as well as for the new and incredibly fragile constitution of Iraq.

As Part III discusses, government in opposition rules help resolve one of the most problematic and underappreciated questions in constitutional design: how to prevent a very successful political movement from gaining too much control—what this Article calls the problem posed by the “illiberal democrat.”<sup>9</sup>

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

9. I borrow this phrase “illiberal democracy” from Fareed Zakaria. See FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 17 (2003) (“Across the globe, democratically elected regimes, often ones that have been re-elected or reaffirmed through referenda, are routinely ignoring constitutional limitations on their power and depriving their citizens of basic rights.”). Various other phrases have been used to describe the phenomenon that Zakaria is describing, such as Guillermo O’Donnell’s use of the phrase “delegative democracy.” See Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 1, 59-60 (1994) (“Delegative democracies rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit.”). But illiberal democracies and delegative democracies are different from what is called “competitive” or “electoral” authoritarianism. In that situation, the elections themselves are unfair, even beyond what suppressions of rights follow from the elections. See Tom Ginsburg, *Lessons from Democratic*

Whether it is a result of the actions of a Roosevelt or a Bush in the United States—or a Blair or Putin overseas—constitutional democracies and the idea of checks and balances are shaken to their cores when a hugely successful political leader, elected apparently legitimately at the ballot box, captures all of the branches and powers of government. This is because the other major modalities of separation of powers, after either one election or many elections, permit winning political coalitions to exercise almost unlimited power. Adding government in opposition rules, by contrast, permits losing coalitions to maintain real power and constrain successful political figures, regardless of how successful particular winning coalitions might be in democratic elections.

Government in opposition rules not only better constrain winning coalitions, but they also better train losing political coalitions—losing parties under such rules have experience using the powers afforded by the government, and therefore are ready to assume power should they win elections or otherwise be called upon to exercise substantial control over the levers of power. At bottom, losing political coalitions are also treated more fairly, because when they receive a major portion of the vote, they are also permitted control of major parts of the process of governing.

Part IV turns to the American scene, and discusses some of the benefits that a framework government in opposition statute or constitutional amendment would have for the American constitutional system. It suggests the adoption of a regime that would guarantee that some significant number of executive, legislative, and judicial positions of authority be granted to losing political coalitions. Such a regime would help resolve the central crisis posed by the current American separation of powers, that of “unified government,” when one political party controls all of the levers of power. This regime would ensure that even during unified government, the dominant political coalition is constrained. Moreover, this new regime would ensure that losing political coalitions are adequately represented, in the political and bureaucratic process, in a way that both parties when in power have prevented for decades. No matter how much the winning political coalition might want, the main losing political voices would not only be heard in our institutions of government, but would also occasionally govern.

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*Transitions: Case Studies from Asia*, 52 ORBIS 91, 92 (2008) (“Electoral authoritarianism refers to a system with the apparent trappings of democracy, such as elections and a nominally independent media and judiciary, in which channels for participation and accountability are manipulated and constrained to ensure dominance of one faction.”).

## I. SEPARATIONS OF POWERS: THE CONSTITUTIONAL LAW OF WINNING POLITICAL COALITIONS AND LOSING POLITICAL COALITIONS

As we will see in this Part, several centuries of constitutional design have yielded many approaches to dividing authority among winning political coalitions and losing political coalitions, in part by presenting different answers to one of the central questions related to the constitutional separations of powers: “How many elections should a political movement win before gaining how much lawmaking authority?”<sup>10</sup> One regime of separation of powers (“parliamentarism”<sup>11</sup>) requires winning coalitions to win one election, and solely by virtue of winning that one election, this political coalition obtains “full authority.”<sup>12</sup> Other regimes (“[p]residentialism”<sup>13</sup> and “semipresidentialism”<sup>14</sup>) require winning coalitions to win several—and several different types—of elections, and until and unless these winning coalitions achieve these victories, such a constitution grants the various winning coalitions different types of powers either within a branch and level of government, or among the branches and levels of government. Separation of powers regimes, in addition to addressing issues related to the allocation of authority among winning coalitions, also provide protection for losing political coalitions. But, as this Part will discuss and as Part II expands on, these existing separation of powers technologies only recognize powers for losing coalitions *as* losing coalitions—there is no provision for granting winning coalitions’ powers not just to electorally triumphant parties or coalitions, but also to electorally defeated parties or coalitions.

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10. See Ackerman, *supra* note 5, at 643.

11. See Skach, *supra* note 6, at 95 (“Parliamentarism is characterized by a fusion of powers and a mutual *dependence* between the executive and the legislative powers. This is due to the fact that the chief executive (usually a prime minister or chancellor) emanates from the legislature after elections and needs the confidence of the legislature in order for his government to survive the duration of the legislature’s term.”).

12. See Ackerman *supra* note 5, at 648 (defining full authority as when “the same party wins enough elections in a row to take control of all the relevant powers”).

13. See Skach, *supra* note 6, at 95-96 (“Presidentialism is the opposite: it is a system characterized by the separation of powers and a mutual *independence* of the executive and legislative powers. This is because the chief executive (a popularly elected president) and the legislature are elected independently of each other, for fixed terms of office, and both can survive for their respective terms without the other’s approval.”).

14. See *id.* at 93 (“[S]emipresidentialism . . . combines a popularly elected head of state with a head of government who is responsible to a popularly elected legislature.”).



*A. Terminological Preliminaries: Winners' Powers and Losers' Powers*

This Article discusses political “winning coalitions” and political “losing coalitions.” The political coalition that receives a controlling share of the vote in a democratic election is the “winner” of that election. When French President Nicolas Sarkozy, for instance, was elected President of France on May 6, 2007, *The New York Times* referenced his “triumph” and declared him the “elected president” of France.<sup>15</sup> And just as elections produce winning parties or coalitions, they also produce losing parties or coalitions. The Democratic Party and its nominee John Kerry lost the 2004 American presidential election; Segolene Royal and the French Socialists lost the 2007 French presidential election. Elections, in other words, produce winning political coalitions and losing political coalitions.

This is all obvious and basic so far, but the important point to be made is not just that elections produce winning coalitions and losing coalitions, but also that the powers afforded by government range on a continuum from the ideal types of winners' powers to losers' powers. On one end of the conceptual spectrum are winners' powers. The power to govern means having the capacity to use the sovereign power of the state to order and coerce binding, obligatory endeavors. The power to govern gives the entity exercising that power the capacity to control the operations of entities of government in order to coerce action. This might mean controlling the agenda of a committee or of a legislature, or enacting statutes, or controlling a panel of judges that will issue a binding decision. The power to govern, then, is a classic Weberian power, meaning that it is really the power to control the legitimate use of violence by the government.<sup>16</sup>

On the other end of the conceptual spectrum are losers' powers.<sup>17</sup> Rather than the power to use the sovereign capacity of the state to command and control matters, losers' powers are the power to act as a minority, not the power to act as a majority—losers' powers are powers to prevent the exercise of winners' powers. Losers' powers can involve having the power to dissent, to

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15. See Elaine Sciolino, *Sarkozy, Elected in France, Vows Break With Past*, N.Y. TIMES, May 7, 2007, at A1.

16. See MAX WEBER, *ECONOMY AND SOCIETY* 56, 65 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1922).

17. The concept of losers' powers is also captured, albeit not in the legal or constitutional (and more in the political) sense by George Tsebelis, who talks about “veto players,” political actors who have the power to prevent government from acting. See George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289 (1995).

note the problems with what the government is doing.<sup>18</sup> Losers' powers can involve the power to obstruct, to prevent winning coalitions from doing what they so desire, as is seen via the usage of a special procedural mechanism such as the legislative filibuster. Importantly, though, when an entity uses its losers' powers, the power of government to act is not invoked, but rather is prevented or forestalled from being invoked. Losers' powers are the power to block and forestall; winners' powers are the power to legislate and to coerce.

Of course, in reality these conceptual extremes blur together. The filibuster in the United States Senate might seem like an example of losers' powers, because it permits a group of Senators to prevent the Senate from approving a law. In practice, though, by filibustering one law, this group of Senators might be forcing other Senators, the House of Representatives, and the President to negotiate and bargain with them, thereby giving them more ability to influence the enactment of a law – more ability to exercise, practically speaking, winners' powers. So it is important to remember that within every power might be some elements of winners' powers and some of losers' powers. The distinction is not binary, but rather on a continuum.

It is important to distinguish between winning coalitions and losing coalitions, and winners' and losers' powers, because this Part will examine how these two axes of constitutional design have been used to create different regimes of separation of powers in different countries. None of the traditional, established regimes recognize that winners' powers and losers' powers do not need to be granted exclusively to winning coalitions and to losing coalitions. One of the innovations of government in opposition, then, is the structural point that winning coalitions are not necessarily given all winners' powers, and losing coalitions are not granted solely losers' powers. Winning coalitions can be given losers' powers (which is presumably less controversial) but losing coalitions can also be given some – and some substantial – winners' powers.

### *B. Apportioning Winners' Powers: Parliamentary and Presidential Regimes*

Existing separation of powers regimes recognize a singular winning coalition or multiple winning coalitions, and then allocate the substantial

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18. See Gerken, *Dissenting by Deciding*, *supra* note 2, at 1752 (“This Article uses the term ‘dissenter’ in a more specific sense, to refer to someone who subscribes to an outlier view on an issue that she deems salient to her identity. A dissenter is someone whom we would naturally term an ‘electoral minority’ because of the positions she holds.”); see, e.g., STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE AND THE MEANINGS OF AMERICA*, at xi (1999) (defining dissent as “speech that criticizes existing customs, habits, traditions, institutions, or authorities”).

majority of winners' powers to the singular winner or among the several winning coalitions. In parliamentary systems, there is a singular winner, and this winner is granted the substantial majority of available winners' powers, with very few constraints on these powers which are unrelated to the winning coalitions' powers. In presidential and semipresidential systems, there are (or at least can be<sup>19</sup>) multiple winning coalitions, and each winner is granted the substantial majority of winners' powers that are associated either within a different branch of government, a particular subdivision of one part of government, or of a different level of government. This strategy, then, by creating multiple winning coalitions and giving them separate and (often) overlapping bundles of winners' powers to use against one another and to further their power, ensures that, as James Madison famously said in *Federalist* 51, "ambition [is] made to counteract ambition."<sup>20</sup> In none of these systems, though, are losing coalitions given the power to control government.

First of all, in many parliamentary regimes, "a political movement need win only one election before gaining plenary authority."<sup>21</sup> This is because legislative and executive powers are not separated, but are conjoined, and the winner of an election is granted all of the legislative power, as well as all of the executive power. A voter in these parliamentary systems casts a single ballot, for a political party, and the party or parties receiving the most ballots then selects (usually) the leader of their party<sup>22</sup> to become the executive in control of the

19. Just as winning coalitions in parliamentary systems control all of the levers of power, so too can winning coalitions in presidential and semipresidential systems control all of the levers of power, but in the latter systems they must win several elections to do so. So, while in parliamentary systems there is always one winner, in presidential systems there is *the possibility* of more than one winner. When there is one winner that controls all of the bundles of winning coalitions' powers in a presidential or semipresidential system ("unified" government), the unity of power causes problems in such a system similar to those faced in parliamentary systems. See Levinson & Pildes, *supra* note 3, at 2315 ("Recognizing that these dynamics shift from competitive when government is divided to cooperative when it is unified calls into question many of the foundational assumptions of separation-of-powers law and theory.").
20. THE FEDERALIST No. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001).
21. Ackerman, *supra* note 5, at 643.
22. It is not always the case that the leader of the party receiving the most votes is selected as the Prime Minister. In Japan, for instance, the Prime Minister selected after the 1993 election was from the Socialist Party, not from the Liberal Democrats, even though that party had three times as many seats. In Norway, after the 2001 election the Prime Minister was selected from the fifth-most successful party, the Christian People's Party. See Geoffrey Palmer, *The Cabinet, The Prime Minister and the Constitution*, 4 N.Z. J. PUB. & INT'L L. 1, 25 n.55 (2006). The only limitation is that the Prime Minister selected must be from the winning *coalition*, even if the Prime Minister is not from the plurality *party*.

government. In Great Britain, for instance, in the 1997 elections forty-four percent of those casting a ballot cast a singular ballot for Labour, thirty-one percent for the Conservatives, seventeen percent for the Liberal Democrats, and seven percent for other parties.<sup>23</sup> Because this meant that the Labour Party won 418 out of 658 seats in the House of Commons, it became the majority party in the Commons. The House of Commons selects the Prime Minister, and so led by the Labour Party, the House of Commons selected Tony Blair to be the next Prime Minister of Great Britain. This meant that, by virtue of winning the 1997 parliamentary elections, Blair controlled the executive branch, and elected political figures associated with him controlled the legislative branch as well. A leader in a British-style parliamentary regime must ensure that he or she receives the support of the members of his winning coalition in the legislature and in the cabinet, but this normally does not present problems for the British Prime Minister, since unified party voting transpires “so close to 100 percent [of the time] that there [is] no . . . point in measuring it.”<sup>24</sup>

In parliamentary systems, the primary political constraints on winning coalitions and their exercise of winners’ powers come from within the same winning coalition—which means that all winners’ powers are exercised by winning coalitions. In presidential and semipresidential systems, another source of constraint is the potential for the exercise of winners’ powers by several different winning coalitions. This is the strategy used in presidential regimes: winning coalitions exercising winners’ powers constraining other winning coalitions and their exercise of winners’ powers. The various winning coalitions recognized by presidential regimes can either be located among the branches of government (presidentialism), or both among and within a branch of government (semipresidentialism).

In presidential systems, since there is a directly elected executive and a separately elected legislature, there is the potential for different winning coalitions, and each winner is granted its own bundle of winners’ powers. As a practical matter, since almost every presidential country with a legislature has two houses in the legislature, this means that in presidential systems, rather than there being a singular winner (as in a parliamentary system), there is the potential for at least two and sometimes three winning coalitions: the winner

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23. See Harold D. Clarke, Marianne C. Stewart & Paul F. Whiteley, *New Models for New Labour: The Political Economy of Labour Party Support, January 1992–April 1997*, 92 AM. POL. SCI. REV. 559, 559 n.1 (1998).

24. SAMUEL H. BEER, MODERN BRITISH POLITICS 350 (1965). This is true even though there is a “higher incidence of backbench rebellion and dissent . . . [since] the mid-1960’s.” Anthony Mughan & Roger M. Scully, *Accounting for Change in Free Vote Outcomes in the House of Commons*, 27 BRIT. J. POL. SCI. 640, 640 (1997).

of the presidency, and the winner of elections for each house of the legislature. Therefore, while in parliamentary systems the checks on winning coalitions come from within the winning coalition, in presidential systems the checks on winning coalitions derive from the existence of other winning coalitions and their usage of winners' powers. One key element of constitutional design, though, remains the same, and differentiates these systems from government in opposition: the checks on winning coalitions come from one version or another of winning coalitions and winning coalitions utilizing winning coalitions' powers.

Another version of presidential government, rather than creating the potential for multiple winning coalitions, and granting them the bundles of winning coalitions' powers that go with control of a particular branch of government, is to divide up the bundles of powers that go with control of a particular branch of government. This can happen with the executive branch, where one winner (the directly elected executive) is granted one bundle of executive winners' powers, and another winner (the executive accountable to the legislative majority coalition) is granted another bundle of executive winners' powers. This form of government is usually called "semipresidentialism," and has grown in popularity in recent years. Indeed, when the Berlin Wall fell and about thirty or so countries crafted constitutions, the most common constitutional form chosen was semipresidentialism.<sup>25</sup> The directly elected and superior executive, as one winner, is given certain winners' powers; the deputy executive, as another winner, is given a certain bundle of winning coalitions' powers, and then the winning coalitions of the elections for the two branches of the legislature are given their own bundle of winning coalitions' powers. The conflict—and the check—then operates in the same manner that it does in a purely presidential regime. There are different winning coalitions, and the winning coalitions are constrained by other winning coalitions and by winner-related institutions exercising winning coalitions' powers.

Another institutional variation of this notion of multiple winners exercising overlapping bundles of winners' powers comes in the form of federalism. Even more than winners' powers being granted to winners of federal elections, the winners of various state elections are granted winners' powers. It is still the case, though, that only winning coalitions are granted winners' powers—there are just more and more varied winning coalitions because there are political coalitions that have triumphed at the state level as well as at the federal level.

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25. See Skach, *supra* note 6, at 93.

Parliamentary, presidential, and semipresidential democracies all feature institutions that cannot be categorized neatly as winning coalitions or losing coalitions, and are what this Article calls “winner-related institutions.” These institutions—while not themselves elected and therefore not directly part of winning coalitions—are appointed or empowered by winning coalitions. Perhaps the most notable example of this—of winner-related institutions exercising winners’ powers—is the constitutional court, a court with the power to invalidate laws passed by a legislature for running afoul of a constitution. No matter how bureaucratic and nonpolitical the mentality of these constitutional courts in all forms of democracies, by and large constitutional court judges still are appointed through political processes controlled by winning coalitions,<sup>26</sup> and they enter the judicial system already possessing notoriety and reputations.<sup>27</sup> The result is that, although in imperfect ways, constitutional courts in parliamentary democracies have strong ties to winning political coalitions because they are appointed by these winning coalitions.

This situation creates all sorts of principal-agent problems, meaning that courts are imperfect winner-related institutions, but are winner-related institutions nonetheless, and should the winner so desire, can be manipulated by winning political coalitions. An extreme example of this comes from Japan. In Japan, the justices of the supreme court are appointed by the party that controls the executive branch,<sup>28</sup> meaning the Prime Minister appointed by the winning coalitions that control the Diet, the most powerful house of the Japanese legislature.<sup>29</sup> The leaders of this all-powerful winning coalition appointing the supreme court justices always “appoint justices old enough (generally in their early 60s) not to change their views before mandatory

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26. See, e.g., Kim Lane Scheppele, *A Comparative View of the Chief Justice’s Role: Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1766 (2006) (“Constitutional judges are typically selected by some combination of presidential or prime ministerial appointment and parliamentary approval . . .”). It is still the case, though, that there are elements of the judicial system that cannot be called winner-related, because they operate using principles similar to the civil service. See *id.* at 1767 (“Within countries that have constitutional courts, ordinary court judges typically have civil service careers in which they enter the lower-level judiciary first and are promoted up through the ranks on the basis of seniority and merit.”).
27. See *id.* at 1768 (“Because the vast majority of constitutional judges enter the judiciary from either academia or the higher reaches of politics, they are often well known before they issue any decisions at all.”).
28. See KENPŌ, art. 79, para. 1 (“The Supreme Court shall consist of a Chief Judge and such number of judges as determined by law. All such judges except the Chief Judge shall be appointed by the Cabinet.”).
29. See *id.* art. 67, para. 1 (“The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet.”).

retirement at age 70.”<sup>30</sup> The result has been that “the Japanese Supreme Court is deferential in the extreme.”<sup>31</sup>

It should also be noted that not all institutions in parliamentary or both forms of presidential democracies can easily be characterized as obviously controlled by winning coalitions or losing coalitions, and so there are some sources of constraint even if winning coalitions succeed beyond the highest of expectations. Some institutions, such as bureaucratic institutions<sup>32</sup> or careerist lower courts in some countries,<sup>33</sup> are hardly related to winning or to losing political coalitions. And parliamentary democracies still have presidents, who might be from losing political parties, and can have significant powers in some countries.<sup>34</sup>

Despite these structural differences between parliamentary, presidential, and semipresidential regimes, one fundamental similarity remains: the traditional versions of these regimes all feature winners’ powers that are exercised either directly by winning political coalitions or by those appointed

30. See J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331, 333 (2001).

31. *Id.*

32. This is particularly true in countries outside the United States, where fewer bureaucratic officials tend to be political appointees. Compare PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 7-13 (1995) (“Between 1960 and 1992, the number of department secretaries increased from 10 to 14, the number of deputy secretaries from 6 to 21, under secretaries from 14 to 32, deputy under secretaries from just 9 to 52, assistant secretaries from 81 to 212, deputy assistant secretaries from 77 to 507.”), with Pablo T. Spiller & Santiago Urbiztondo, *Political Appointees vs. Career Civil Servants: A Multiple Principals Theory of Political Bureaucracies*, 10 EUR. J. POL. ECON. 465 (1994) (noting that there are fewer political appointees outside the United States).

33. Germany has largely adopted the system used by West Germany, in which “German judges, after a three to five year probationary period, become career state employees with lifetime tenure. Whatever political influence exists on the recruitment and promotion of state judges, it is less than that for federal judges and is mediated mostly through state administrative bureaucracies and candidate self-selection.” David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1816 (1988).

34. Indeed, as one article discusses, the range of prominent powers held by presidents can include

the president’s exclusive discretion to dissolve parliament (Italy), the requirement of countersignatures of cabinet decrees (Italy), suspensory veto over legislation (Czech Republic, Slovakia), the power to decree new laws (Greece for some time after 1975), and appointments to high offices, sometimes (as in the Czech Republic and Slovakia) including ministries.

Scott Mainwaring & Matthew S. Shugart, *Juan Linz, Presidentialism, and Democracy: A Critical Appraisal*, 29 COMP. POL. 449, 451 (1997).

or otherwise strongly controlled by winning political coalitions. In parliamentary regimes, there is always a singular political winner; in presidential and semipresidential regimes, there are multiple political winners. But no matter what, winners' powers are exercised by those political coalitions that, at one point or another, won a democratic election or carried the favor of those who won such an election. If you wanted to govern in any of the major constitutional democratic systems around the world, at least until recently, you had to win some form of election.

## II. A CONSTITUTIONAL INNOVATION: GOVERNMENT IN OPPOSITION

After several hundred years of constitutional government, the manners in which powers are divided into constitutional democracies are relatively finite, as Part I discussed. Winners' powers are given either to singular or multiple winning political coalitions; and losers' powers are given to losing political coalitions. What has happened in the past several decades, though, has been the adoption of the idea that constraint and checks in separation of powers can be provided not just by dispersing winners' powers among *winning* coalitions, but by actually granting such powers to *losing* political coalitions. As this Part will discuss, in the constitutions, statutes, and other foundational legal commitments recognized in many countries, the coercive, decisional power of the state is granted to those *losing* elections as well as those winning elections.

To be clear, government in opposition is not a type of democratic system on its own, but rather an aspect of a democratic system. In countries with government in opposition rules, such rules do not obviate the question of whether there should be an independently elected executive (as in a presidential or semipresidential system) or whether the chief executive should be selected by another directly elected institution (the legislature, as in a parliamentary system); whether there should be two houses of the legislature or a single house of the legislature, and so on. In other words, there are still other foundational questions about what institutions to create, and what powers each institution should exercise.

Even though constitutional designers have to resolve other questions of institutional structure in addition to questions about government in opposition rules, it is also the case that every constitutional system has to consider whether to adopt government in opposition rules. Arend Lijphart has argued that some forms of power-sharing are better suited for parliamentary than



semipresidential or presidential democracies,<sup>35</sup> but it is emphatically the case that all forms of democracies have government in opposition rules. Parliamentary systems such as Britain and Germany have these rules; presidential systems such as Argentina and the United States have these rules; and semipresidential systems like Slovakia have these rules. In this way, whether to have government in opposition rules (and how many and what kinds to have) forms one of the few genuinely universal questions of institutional design that must be addressed and resolved by all constitutional designers in all democracies—and, as this Part will discuss, by all branches of democratic government.

*A. An Unnoticed Innovation in Constitutional Form*

This Part will discuss the various forms of government in opposition rules, and the key design questions that countries implementing these rules face, before turning to some examples of how these rules are used with great significance by all the branches of government that constitutional democracies have known. This discussion and typology of how government in opposition rules work and how they matter is necessary because, as mentioned briefly earlier, scholars have not really noticed government in opposition rules. Heather Gerken and Adrian Vermeule have both written helpful articles identifying a genre of rules which permit those in the minority to act as majorities on occasion. Vermeule labeled these rules “submajority rules,” which he has defined as rules which permit “a voting minority . . . the affirmative power to change the status quo.”<sup>36</sup> Likewise, Gerken examines what she

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35. See Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 101 (2004) (arguing that power-sharing among parties works better in parliamentary systems because “the cabinet in a parliamentary system is a collegial decision-making body—as opposed to the presidential one-person executive with a purely advisory cabinet—it offers the optimal setting for forming a broad power-sharing executive”); see also Mainwaring & Shugart, *supra* note 34, at 454 (“[M]ost presidential democracies offer greater prospects of dividing the cabinet among several parties. This practice, which is essentially unknown among the Westminster parliamentary democracies, is common in multiparty presidential systems.”). This Article later discusses how Lijphart goes astray in including other forms of institutional structures along with government in opposition rules in his prescription of consociationalism. In addition, the descriptive part of Lijphart’s project misses out on how many countries are either partly or substantially consociational, or at least have substantial government in opposition rules, because his primary argument is that “consociationalism was successful in Belgium since the end of World War I, Lebanon from 1943 to 1975, and in Malaysia since 1955.” Jurg Steiner, *Consociational Democracy as a Policy Recommendation: The Case of South Africa*, 19 COMP. POL. 361, 364 (1987).

36. Vermeule, *supra* note 2, at 74.

entitles, in different places, “second-order diversity” and “dissenting by deciding,” which Gerken defines as “dissent taking the form of state action. . . . [in] disaggregated [institutions].”<sup>37</sup> For both Vermeule and Gerken, though, this genre of rules empowering minorities are merely idiosyncratic phenomena, appearing in (somewhat) random and inconsequential places in political and social life; neither scholar appreciates how these rules have effected a revolution in constitutional separation of powers around the world.<sup>38</sup>

If there is any area of scholarship that has recognized the comprehensive significance of government in opposition rules, it is the debate about Arend Lijphart’s notion of “consociational democracy.”<sup>39</sup> But Lijphart’s discussion of these minority governance rules as systemic, government in opposition rules occurs when he groups together government in opposition rules with *other types of rules*, creating what he calls “consociational democracy,” which is characterized by government in opposition rules and other features. Beyond the basic idea of government in opposition – that losing parties should exercise winners’ powers, which are reflected in the “grand coalition” and “proportionality” parts of consociationalism – Lijphart adds a series of other rules that he argues are necessary parts of being classified as a consociational democracy.

Lijphart also requires that each different political group have a mutual veto over major policy decisions affecting all groups,<sup>40</sup> and that each group exercises “segmental authority” – the authority for each group to make its own policies, affecting only its own communities – for a regime to be consociational.<sup>41</sup> Because of this grouping together of government in opposition rules with other sorts of institutional arrangements, the precise benefits of these government in opposition rules in particular – not to mention how they came into existence and how they compare to other modalities of separating power – are lost. As

37. Gerken, *Dissenting by Deciding*, *supra* note 2, at 1747-48.

38. Indeed, Vermeule seems to believe that his “submajority rules” function primarily, if not exclusively, as transparency devices which empower political minorities to demand public accountability of majorities. See Vermeule, *supra* note 2, at 74 (“Submajority rules enable minorities to force public accountability and transparency upon majorities, thereby increasing the force of principled deliberation and argument in official decisionmaking.”). The sorts of rules that Vermeule is discussing give losing coalitions winners’ powers that command winning coalitions to do things, such as provide information. In fact, though, as this Part discusses, government in opposition rules extend far beyond simply permitting minorities to demand sunlight be placed on majorities; they also give minorities real decisional authority.

39. See Lijphart, *supra* note 4, at 207.

40. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* 36-38 (1977).

41. *Id.* at 41-44.

Part III discusses, government in opposition rules constrain the exercise of winners' powers in substantial but not excessive ways; when grouped together with the mutual veto and segmental autonomy aspects of consociationalism, Lijphart's vision of power-sharing constrains the exercise of winners' powers all too much by reinforcing political polarization and cleavages.

*B. A Typology of the Innovation in Constitutional Form*

One of the results of government in opposition rules not being studied as their own, distinctive, separately important phenomenon is that the many forms and types of government in opposition rules have been ignored. Before the emergence of government in opposition rules is presented, and the normative virtues of these rules are discussed, we must first understand the various forms of government in opposition rules. As the next two Parts will discuss, some aspects of government in opposition rules are more redeeming than others.

One type of variation in government in opposition rules is the degree of *legal or other coercion* involved in the exercise of winners' powers by losing coalitions. Consider the first type of rule, the mandatory government in opposition rule. This sort of rule means that, regardless of the preferences of the winning political coalition, losing political coalitions *must* exercise winners' powers.

The exact nature or legal source of the mandatory part of these rules might vary. For instance, the interim constitution that South Africa adopted in 1994 required that parties receiving a certain percentage of the vote be granted executive deputy president positions.<sup>42</sup> Some of the powers that the losing political coalition enjoys in Britain derive from a series of statutes enacted over the years, or from internal rules adopted by the legislature.<sup>43</sup> The mandatory

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42. See S. AFR. (Interim) CONST. 1993 art. 84(1) ("Every party holding at least 80 seats in the National Assembly *shall be entitled* to designate an Executive Deputy President from among the members of the National Assembly.") (emphasis added).

43. The financial and other resource support that is provided to the opposition from the public fisc is a function of statute. See Ministerial and Other Salaries Act, 1997, c. 62 (Eng.); Ministerial and Other Salaries Act, 1975, c. 27 (Eng.); Ministers of the Crown Act, 1937, 1 Edw. 8 & 1 Geo. 6, c. 38 (Eng.). Some issues of resource support are defined by orders-in-council, another form of legislation (one that is made under the name of the Queen by the Privy Council). See Ministerial and Other Salaries Order, 1994, S.I. 1994/3206 (U.K.) (increasing salaries); Ministerial and Other Salaries Order, 1991, S.I. 1991/2886 (U.K.) (increasing salaries); Ministerial and Other Salaries Order, 1987, S.I. 1987/1836 (U.K.) (increasing salaries). Some other elements of losing coalition power, such as control over the proceedings of Parliament at certain moments, are provided by legislative rule. See AUTH. OF

part of the mandatory government in opposition rule might also stem from an informal—albeit practically binding—convention. In Argentina, the losing political coalition receives a certain percentage of committee chair positions, not by the command of a formal constitutional, statutory, or legislative rule, but as a matter of informal convention.<sup>44</sup>

In contrast to mandatory government in opposition rules are rules which merely *permit* losing political coalitions to exercise winners' powers. Contrast, for instance, the rule in the South African interim constitution requiring losing parties to be given executive deputy president positions with the situation in Great Britain during World War II. During World War II, Great Britain formed a "war cabinet," meaning a cabinet composed of members of many different political coalitions, including the chief opposition party of Prime Minister Winston Churchill's Conservative government, the Labour Party, and its leaders.<sup>45</sup> Churchill was under no obligation to appoint these opposition leaders, but did so of his own volition.

We could also add a third permutation of answers to the question of whether losing political coalitions are guaranteed by law to exercise winners' powers. In addition to government in opposition rules requiring this result, or those permitting this result, we can also imagine rules which do not require government in opposition, but do more than merely permit it; they actually *encourage* it (so perhaps these rules fall on the spectrum between rules permitting government in opposition and those which mandate government in opposition). One genre of rule that could encourage opposition parties to exercise winners' powers is a supermajority voting rule. It might be the case that the majority has a sufficient supermajority to be able to exercise all winners' powers without needing the votes of members of losing coalitions. More likely still, the majority in a particular governmental entity might not have the requisite supermajority, but from time to time might be able to secure

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THE HOUSE OF COMMONS, STANDING ORDER OF THE HOUSE OF COMMONS 15, *available at* <http://www.publications.parliament.uk/pa/cm200708/cmstords/105/105.pdf>. Other parts of government in opposition in Britain stem from practically binding conventions, such as those providing that the opposition party will chair the Public Accounts Committee. *See* HOUSE OF COMMONS INFO. OFFICE, FACTSHEET P2 PROCEDURE SERIES (JUNE 2009), *available at* <http://www.parliament.uk/documents/upload/P02.pdf>.

44. *See* HONORABLE CÁMARA DE DIPUTADOS DE LA NACIÓN, REGLAMENTO DE LA CÁMARA DE DIPUTADOS DE LA NACIÓN, COMENTADO POR GUILLERMO CARLOS SCHINELLI (Dirección de Información Parlamentaria 1996).
45. *See* STEVEN F. HAYWARD, CHURCHILL ON LEADERSHIP: EXECUTIVE SUCCESS IN THE FACE OF ADVERSITY 146 (1997).

the votes of members of the minority in order to achieve the requisite supermajority margin for particular votes.<sup>46</sup>

But supermajority rules also could lead to a situation where, rather than constantly trying to achieve minority votes in order to obtain the supermajority margin, the minority itself can exercise winners' powers a certain part of the time. In Germany, for instance, "[h]alf the members of the Federal Constitutional Court [(FCC)] [are] elected by the *Bundestag* and half by the *Bundesrat*."<sup>47</sup> In practice, "[t]he Bundestag appoints its members through a two-thirds vote of a Judicial Selection Committee . . . and the Bundesrat through a two-thirds vote of the body as a whole."<sup>48</sup> The result has been that losing political parties as well as winning political parties have been able to nominate and appoint many of their own candidates to the FCC,<sup>49</sup> and this system of losing political coalitions appointing judges because of supermajority rules is true of the appointments process for constitutional courts in several other countries as well.<sup>50</sup> This has become the negotiated solution to the supermajority requirement; it is a government in opposition rule because it means that losing parties actually appoint judges to the FCC, and the framework FCC statute does not require it, but certainly encourages this by virtue of the supermajority requirement.

In addition to the question of how aggressively to require or encourage—or permit—losing political coalitions to exercise winners' powers in the first place, there is also the question of *how* to determine the precise amount of

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46. This would be the situation, for instance, in a United States Senate where the majority party has sixty or more senators. In a situation where the majority political coalition does not have a filibuster-proof majority, it has two choices. It can make ad hoc arrangements, which is what happened as a result of the battle over judicial appointments in the United States in 2005. Fourteen United States Senators—seven Democrats and seven Republicans—reached an agreement about how to handle particular judicial appointments, and reached a vague agreement about how to handle later appointments. See Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST, May 24, 2005, at A1. The other choice, though, is to reach a more permanent arrangement that permits the losing political coalition to exercise winners' powers some of the time, and in return that the losing political coalition will support the exercise of winners' powers by winning coalitions the rest of the time.
  47. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law], May 8, 1949, art. 93 (F.R.G.).
  48. Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQUIRY L. 49, 68 n.40 (2002).
  49. See DONALD P. KOMMERS, *THE FEDERAL CONSTITUTIONAL COURT 120-28* (1994) (tracing this system all the way back to the first appointment of Constitutional Court Justices in 1951).
  50. See Ginsburg, *supra* note 48, at 67 (discussing similar approaches implemented in constitutional systems around the world, including in Bulgaria, Korea, and Mongolia).

government in opposition rules that a democratic system will feature. The means to determine the precise amount of government in opposition rules that a system will feature really vary on two axes, the first axis being *how often* these rules determining the amount of winners' powers are revisited and revised, and the second axis being *what formula* is used to determine how many government in opposition rules there should be when these rules are examined (regardless of how often this revisiting of the amount of government in opposition rules might or might not transpire). In other words, democratic systems first have to answer whether the exact amount of government in opposition should be *fixed* or *negotiated*, and then whether government in opposition rules should be *proportionate* or determined according to some other formula.

Some countries set in advance the exact amount of government in opposition power that will be exercised. The "Seven Member Rule" in the United States is a federal statute that empowers seven members of the House Committee on Government Operations or five members of the Committee on Governmental Affairs of the Senate to compel information of "[a]n executive agency."<sup>51</sup> There is no negotiation or discussion after each election, or after each house of Congress is convened for a new session, to determine if members of the relevant committees shall have the power to compel information. That power for losing groups in Congress is fixed, in this case by statute.

This fixed amount of government in opposition power to be exercised can be done by either fixing a *formula* – for instance, the understanding in Portugal that losing political coalitions will have the same percentage of committee chair positions as they occupy seats in the legislature<sup>52</sup> – or actually fixing a more precise, party-specific *result*, as is done in Switzerland, where since the 1959 elections the main four political parties are each given a certain number of cabinet positions (and that amount did not change based on the results of later elections). After the 1959 elections in Switzerland, the *Zauberformel* ("magical formula") was created, which provided that the Free Democratic Party (FDP) would be given two cabinet positions, the Christian Democratic People's Party (CVP) would be given two cabinet positions, the Social Democratic Party (SPS) would be given two positions, and the Swiss People's Party (SVP) would be given one position.<sup>53</sup> The alternative to these forms of fixing the amount of government in opposition power is to leave it up to negotiation after the

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51. 5 U.S.C. § 2954 (2006).

52. See NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS, PAPER NO. 2, COMMITTEES IN LEGISLATURES: A DIVISION OF LABOR 16 (1996).

53. See Gerhard Lehmruch, *Consociational Democracy and Corporatism in Switzerland*, 23 PUBLIUS 43, 50-51 (1993).

relevant election. For instance, the precise number of committee chair positions to be allocated to the opposition party in the British House of Commons varies from election to election, based on negotiations.<sup>54</sup>

This addresses the questions of *how* the exact amount of government in opposition is determined, but there is also a question of *how much* government in opposition there will be. In general, this question seems to be answered one of two ways: (1) winners' powers are divided proportionately (which, as was just mentioned, is used to apportion committee chair positions in Portugal), or (2) winners' powers are divided through some other mechanism. For instance, in Canada certain legislative committees—not necessarily in an amount proportionate to the number of seats held by that party in the legislature—are traditionally chaired by the opposition party (in particular, the Public Accounts Committee in Canada is traditionally chaired by the opposition party).<sup>55</sup>

The final variable in the institutional design of government in opposition rules is whether they are *generally applicable*, or whether they permit *only* losing coalitions to exercise potentially available winners' powers. A generally applicable government in opposition rule is one that would permit any group not having a majority of the votes—no matter how constituted (meaning it could be constituted of defecting members of the winning political coalition as well as of members of the losing political coalition)—to exercise winners' powers. The contrasting sort of rule is one that permits a minority grouping to exercise winners' powers, but that minority grouping can be constituted only of members of a losing political coalition.

The Seven Member Rule in the U.S. Congress mentioned earlier is a generally applicable rule, in that it permits any seven members of the House Committee on Government Operations and any five members of the Committee on Governmental Affairs of the Senate to compel information, regardless of whether these seven/five members are from the winning or from the losing political coalition.<sup>56</sup> By contrast, the rules in the interim South African Constitution which entitled losing political coalitions to hold executive deputy president positions are not generally applicable government in opposition rules, and instead only provide for the exercise of executive power

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54. See HOUSE OF COMMONS INFO. OFFICE, *supra* note 43.

55. See C.E.S. Franks, *The Dilemma of the Standing Committees of the Canadian House of Commons*, 4 CAN. J. POL. SCI. 461, 464 (1971).

56. See 5 U.S.C. § 2954 ("An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.") (emphasis added).

by the political parties who did not constitute the winning political coalition in the previous election. The interim constitution provided that any “party holding at least 80 seats in the National Assembly” has the authority to appoint its own executive deputy president.<sup>57</sup>

### C. *The Forms of Government in Opposition*

Before turning to the normative virtues of government in opposition rules in the next Part, this Section discusses the forms of government in opposition rules in the various branches of government.<sup>58</sup> Government in opposition rules exist for the legislative, executive, and judicial branches, in all forms of constitutional democracies. And in all forms of constitutional democracies, government in opposition rules have been structurally important aspects of the political dynamic.

#### 1. *Legislative Government in Opposition*

First, in the legislative branch, losing political coalitions are sometimes given the power to chair standing or temporary committees, or are given special powers on a committee even if they do not chair the committee. In several countries, losing political coalitions chair important legislative committees. In Germany, losing political coalitions hold several important committee chair positions. The chair positions of these committees are allocated based on the percentage of seats held by a political coalition in the legislature. If a political party occupies thirty percent of the seats in the Bundestag, that party will receive thirty percent of the committee chair positions.<sup>59</sup> There are other countries—a mix of parliamentary, presidential, and semipresidential—which use the same system as Germany and Portugal, with a mandatory (legislative rule), fixed, proportional system of government in opposition when it comes to committee chair positions.<sup>60</sup> In Great Britain,

57. S. AFR. (Interim) CONST. 1993 art. 84(1).

58. One other regime of note is the regime in a growing number of countries providing operational and other funding only for *losing* political coalitions. See Richard S. Katz & Peter Mair, *Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party*, 1 PARTY POL. 5, 17 (1995) (“Access to state subventions is also unaffected; indeed, in some systems, such as Ireland and the UK, parties currently in opposition are actually accorded a higher level of subvention precisely because they lack the immediate resources of parties currently in government.”).

59. See NAT’L DEMOCRATIC INST. FOR INT’L AFFAIRS, *supra* note 52, at 16.

60. See *id.*



while there is an informal norm of granting losing political coalitions committee chair positions, the precise number of committee chair positions occupied by the losing political coalition fluctuates based on negotiations, not based on the fixed proportional system used by Germany and Portugal (this floating allocation of committee chair positions to losing coalitions is also true of the system of committee assignments in parliamentary Canada, semipresidential Slovakia,<sup>61</sup> and presidential Argentina<sup>62</sup>). Indeed, in the current British Parliament, the opposition Conservatives and Liberal Democrats together hold more committee chair positions than the governing Labour Party does.<sup>63</sup>

There is a wide variation in the powers that committee chairs exercise, but even in the countries with the weakest powers afforded to committee chairs, this genre of government in opposition rules can make a major difference. In Great Britain, where committee chairs tend to have less power than in other democracies,<sup>64</sup> the winners' powers exercised by the member of the opposition party chairing the Public Accounts Committee<sup>65</sup> has often been quite important. In 2005 and 2006, against the wishes of the Labour government of Prime Minister Tony Blair, the Public Accounts Committee, led by Conservative Member of Parliament (MP) Edward Leigh (Con-

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61. In Slovakia, the opposition members control the Environment Committee—and thus Slovakia's position on global warming—by holding not just the chair but also a majority vote of fifteen to five votes.
  62. See Mark P. Jones & Wonjae Hwang, *Party Government in Presidential Democracies: Extending Cartel Theory Beyond the U.S. Congress*, 49 AM. J. POL. SCI. 267, 277 (2005) (stating that losing political coalitions occupied twenty-three percent of committee chair positions between 1989 and 2003).
  63. Labour currently holds nine committee chairs, while the Conservatives hold six chairs and the Liberal Democrats hold four. See UK Parliament, *Parliamentary Committees, Commons Select Committees*, [http://www.parliament.uk/parliamentary\\_committees/parliamentary\\_committees16.cfm](http://www.parliament.uk/parliamentary_committees/parliamentary_committees16.cfm) (last visited Nov. 11, 2009).
  64. See COLIN PILKINGTON, *REPRESENTATIVE DEMOCRACY IN BRITAIN TODAY* 183-205 (1997).
  65. The Public Accounts Committee in the House of Commons has traditionally been chaired by a member of the losing political coalition. See Nevil Johnson, *Opposition in the British Political System*, 1997 GOV'T & OPPOSITION 487, 492. That Committee examines "the accounts showing the appropriation of the sums granted by Parliament to meet the public expenditure, and [since 1934] of such other accounts laid before Parliament as the Committee may think fit." See UK Parliament, *Committee of Public Accounts*, [http://www.parliament.uk/parliamentary\\_committees/committee\\_of\\_public\\_accounts.cfm](http://www.parliament.uk/parliamentary_committees/committee_of_public_accounts.cfm) (last visited Nov. 21, 2009).

Gainsborough),<sup>66</sup> commenced a series of investigations into the practices of Blair's Home Office (akin to the American Attorney General) in dealing with foreign nationals when they are released from prison, particularly in the case of rejected asylum-seekers.<sup>67</sup>

Because Leigh and the Public Accounts Committee possessed powers to compel the Home Office to provide information, the Blair Government had no choice but to cooperate with this Conservative-led investigation. Eventually, this investigation uncovered that many foreign nationals denied asylum had been improperly released into society and had committed a range of violent crimes such as murder or various sexual offenses.<sup>68</sup> Because of this Conservative-led effort by the Public Accounts Committee, Blair removed one of the giants of his party, Charles Clarke, from his position as Home Secretary,<sup>69</sup> and Clarke's resignation made Blair and the Labour Party drop rapidly in national polls.

Even when losing political coalitions are not given all of the winners' powers that are associated with chairing an entire legislative committee, they are still sometimes given specific, discrete winners' powers afforded to legislative committees. In the American Congress, there is the Seven Member Rule referenced earlier. In several countries, in a system modeled after a series of rules in the German Bundestag, committee minorities have even broader winners' powers; losing political coalitions have 'One-Fourth Powers' and 'One-Third Powers.' One-fourth of the members on any Bundestag committee may discharge an issue under consideration by the committee and force the entire Bundestag to discuss it,<sup>70</sup> force hearings on issues,<sup>71</sup> and call witnesses to such hearings.<sup>72</sup>

Losing political coalitions have used these discrete winners' powers to great effect. In 2004, for instance, when the Republicans controlled the presidency

66. See UK Parliament, Committee of Public Accounts, Members, [http://www.parliament.uk/parliamentary\\_committees/committee\\_of\\_public\\_accounts/committee\\_of\\_public\\_accounts\\_members.cfm](http://www.parliament.uk/parliamentary_committees/committee_of_public_accounts/committee_of_public_accounts_members.cfm) (last visited Nov. 21, 2009).

67. See *MP Dubs Home Office 'Incompetent,'* BBC NEWS, Apr. 25, 2006, [http://news.bbc.co.uk/1/hi/uk\\_politics/4944786.stm](http://news.bbc.co.uk/1/hi/uk_politics/4944786.stm).

68. See Oliver King et al., *Blair Backs Clarke To 'Put Things Right,'* GUARDIAN, Apr. 26, 2006, <http://www.guardian.co.uk/print/0,,329465577-108101,00.html>.

69. See *Clarke Is Fired in Cabinet Purge,* BBC NEWS, May 5, 2006, [http://news.bbc.co.uk/1/hi/uk\\_politics/4975938.stm](http://news.bbc.co.uk/1/hi/uk_politics/4975938.stm).

70. See Rules of Procedure of the German Bundestag, July 2, 1980, BGBl. I at 1273, last amended by Gesetz [G], Feb. 12, 1998, BGBl. I at 428, art. VII, rule 69a(5) (F.R.G.).

71. *Id.* art. VII, Rule 70(1).

72. *Id.* art. VII, Rule 70(2).

and both houses of Congress, the senior Democrat on the House Committee on Government Reform, Henry Waxman from California, used the Seven Member Rule to pressure the Bush Administration to release certain information about the cost of the new Medicare prescription program after the Administration initially refused to do so.<sup>73</sup> The release of these cost estimates for the prescription plan caused problems for the Bush Administration, since the cost of the plan was much higher than expected. Representative Waxman also used the Seven Member Rule on other occasions.<sup>74</sup>

Losing political coalitions have also been granted a form of winners' powers by being given the authority to compel information from winning coalitions. These winners' powers can come in the form of an "elite" information disclosure law limited to elite political figures,<sup>75</sup> or an information disclosure law to be utilized by any member of the general public. The most prominent form of elite information disclosure law is the "Question Days" procedure used in several parliamentary democracies, and most recently suggested for the United States by former Republican presidential nominee John McCain.<sup>76</sup> The Question Days procedure permits losing coalitions to compel information about any topic, either in writing or on the floor of the legislature; there are also more narrow practices that permit losing political coalitions to obtain information about narrower, more specific matters, such as

73. Letter from Rep. Henry A. Waxman, Ranking Minority Member, House of Representatives, to Tommy G. Thompson, Sec'y, Dep't of Health & Human Servs. (Mar. 2, 2004) (on file with author).
74. See *Waxman v. Evans*, No. CV014530LGB(AJWX), 2002 WL 32377615 (C.D. Cal. Jan. 18, 2002) (deciding that the Bush Administration had an obligation to release certain census data), *rev'd as moot*, 52 F. App'x 84 (9th Cir. 2002). Importantly, the district court in this case rejected any notion that the Seven Member Rule presented a nonjusticiable political question. *Id.* at \*3-4.
75. The Seven Member Rule, mentioned earlier, *supra* note 51, functions as a form of elite information disclosure law, permitting losing political coalitions—not the general public—to compel information from executive agencies. The general public has its own Freedom of Information Act (FOIA), but in many important respects FOIA does not sweep as broadly as the Seven Member Rule. For instance, the Seven Member Rule states that “[a]n [e]xecutive agency . . . shall submit any information requested of it relating to any matter within the jurisdiction of the committee.” 5 U.S.C. § 2954 (2006) (emphasis added). By contrast, FOIA includes a list of exceptions to its disclosure requirements. See *id.* § 552(b).
76. See George F. Will, Op-Ed., *McCain's Question Time*, WASH. POST, May 29, 2008, at 19 (quoting McCain as stating that he “will ask Congress to grant me the privilege of coming before both houses to take questions, and address criticism, much the same as the prime minister of Great Britain appears regularly before the House of Commons”). Sudha Setty has recently written an article advocating the same. See Sudha Setty, *The President's Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL J.L. & PUB. POL'Y 247 (2008).

security briefings provided to opposition political candidates.<sup>77</sup> In Britain, the former leader of the Conservative Party, Michael Howard, used the Question Days procedure during the years preceding the 2006 national election to great effect, including in July 2004 when he requested information about Blair's education policies that led to Blair having to admit that his policies were a "scandal."<sup>78</sup> The British media quickly noted that this admission was a victory for Howard, made possible by his usage of the Question Days procedure.<sup>79</sup>

In addition to controlling all or part of the operations of a particular committee, losing political coalitions sometimes exercise the winners' powers that go along with controlling the operations of the *entire* legislative body. In Canada, the chief opposition party is granted control of the House of Commons for twenty days a year.<sup>80</sup> The opposition receives control of the legislature for the same number of days in Great Britain and New Zealand.<sup>81</sup> During these days when the minority controls the legislature—called either "Opposition Days" or "Supply Days"—the losing political coalition is able to overrule or defeat motions or items put forward by the winning coalition, and to control the debate in the legislature.<sup>82</sup>

## 2. *Executive Government in Opposition*

Because of an increasingly common series of institutional changes, losing political coalitions also exercise winners' powers in the executive branch, while maintaining their identity as active members of the losing political coalition. In South Africa, the Interim Constitution of 1993 guaranteed executive positions for members of losing political coalitions. If a political party received at least

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77. In New Zealand, for instance, the Security Intelligence Service is mandated to brief the leader of the losing coalition as well as the Prime Minister, providing information about national security and other threats. See DEP'T OF THE PRIME MINISTER & CABINET, SECURING OUR NATION'S SAFETY (2000), <http://www.dPMC.govt.nz/dPMC/publications/securingoursafety/sis.html>. A similar system has been followed in the United States with minority members of certain committees in Congress and with presidential candidates. See Eric Lipton, *Security Briefings for the Other Guy*, N.Y. TIMES, Aug. 3, 2004, at A12.

78. 423 PARL. DEB., H.C. (6th ser.) (2004) 831-33.

79. See *Blair Admits Schools Literacy 'Scandal'*, DAILY MAIL, July 7, 2004, <http://www.dailymail.co.uk/news/article-309438/Blair-admits-schools-literacy-scandal.html>.

80. Inside Canada's Parliament: The Institution, <http://www.parl.gc.ca/Information/library/inside/institutions-e.htm#role> (last visited Sept. 9, 2009).

81. See AUTH. OF THE HOUSE OF COMMONS, STANDING ORDER OF THE HOUSE OF COMMONS 18 (2007), available at <http://www.publications.parliament.uk/pa/cm200708/cmstords/105/105.pdf>.

82. See Inside Canada's Parliament: The Institution, *supra* note 80.

eighty seats in the National Assembly—meaning at least twenty percent of the seats of the 400-member National Assembly<sup>83</sup>—then it was guaranteed to have a member of the party appointed as Executive Deputy President.<sup>84</sup> The Executive Deputy President had many powers, including working with the President of South Africa regarding “the development and execution of the policies of the national government,”<sup>85</sup> making decisions about cabinet appointments,<sup>86</sup> and even presiding over Cabinet meetings if the President so directed.<sup>87</sup>

During the first election held after the interim constitution went into force, two parties won at least eighty seats—the African National Congress (ANC), led by Nelson Mandela, and the National Party (NP), led by F.W. de Klerk (the ANC won 252 seats in the National Assembly,<sup>88</sup> and the National Party captured 82 seats<sup>89</sup>). This meant that the government of South Africa featured one Executive Deputy President put forward by the ANC (Thabo Mbeki) and one Executive Deputy President put forward by the National Party (F.W. de Klerk). While Mbeki followed the policies of his fellow ANC member Mandela, de Klerk used his powers as Executive Deputy President to push policies contrary to what Mandela and his overwhelming ANC majority wanted,<sup>90</sup> in particular, policies related to questions about “language rights, education and affirmative action in the civil service and elsewhere.”<sup>91</sup> Beyond South Africa’s regime under the 1993 Interim Constitution, other countries—including most notably Austria, Colombia, Great Britain, and Italy—have at various times required, either by law or by informal norm, that members of

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83. See S. AFR. (Interim) CONST. 1993 art. 40(1).

84. *Id.* art. 84 (“Every party holding at least 80 seats in the National Assembly shall be entitled to designate an Executive Deputy President from among the members of the National Assembly.”).

85. *Id.* art. 82(2).

86. *Id.* art. 88.

87. *Id.* art. 89.

88. See Bill Keller, *The Overview; South Africans Hail President Mandela; First Black Leader Pledges Racial Unity*, N.Y. TIMES, May 11, 1994, at 1.

89. Alexander Johnston, *South Africa: The Election and the Emerging Party System*, 70 INT’L AFF. 721, 729 (1994).

90. The interim South African Constitution also provided that the heads of cabinet departments were to be allocated in proportion to the number of seats held by a particular political party in the National Assembly, the South African legislature. See S. AFR. (Interim) CONST. 1993 art. 88(2).

91. J.E. Spence, *Opposition in South Africa*, 32 GOV’T & OPPOSITION 522, 534 (1997).

losing political coalitions exercise executive government in opposition winners' powers.

These examples of executive government in opposition are highly consequential, because cabinet ministers in parliamentary and presidential systems exercise substantial authority. In parliamentary systems, "only the minister in charge of the relevant department is in a position to present [a] policy proposal at cabinet, giving him or her a privileged position in the policy area in question."<sup>92</sup> In presidential or semipresidential systems, as well as in parliamentary systems, members of the winning coalition are often too busy or otherwise disinclined to overrule or interrupt the actions of the losing political coalition exercising winners' powers. Simply put, "a high workload, coupled with the relatively small size of the cabinet and policy specialization by ministers, means that the precise content and wording of a bill are usually decided by the cabinet minister under whose jurisdiction a bill falls."<sup>93</sup> If that cabinet minister is from the losing political coalition, then, that means that they do more than propose law to the chief executive; they actually make law, on their own and most of the time.

These systems of executive government in opposition need to be distinguished from coalition or nonpartisan forms of executive government, where there are political figures *originally* from losing political coalitions exercising executive winners' powers, but where these political figures have one way or another *forsaken* or at least *compromised* their identity as oppositional political leaders. For instance, there are many examples of previously oppositional partisan figures occupying executive positions as something which might be called a nonpartisan trustee. In Switzerland, for instance, the representatives from the four main political parties who hold executive positions pursuant to the *Zauberformel*, mentioned earlier, generally forsake their partisan identity while in office. It is a conventional norm in Switzerland, then, that "members of the Federal Council are expected on election to renounce all formal ties to their parties and any interest groups."<sup>94</sup> Things have

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92. See MICHAEL GALLAGHER, MICHAEL LAVER & PETER MAIR, *REPRESENTATIVE GOVERNMENT IN MODERN EUROPE* 56 (3d ed. 2001).

93. See Lanny W. Martin & Georg Vanberg, *Policing the Bargain: Coalition Government and Parliamentary Scrutiny*, 48 AM. J. POL. SCI. 13, 14 (2004); see also *id.* at 13 ("Coalition government ordinarily requires delegation of important policymaking powers to the ministers who control different portfolios. In other words, a collection of actors (the coalition partners, as represented in the cabinet) with preferences that diverge on at least some issues must delegate power to individuals (the ministers) who are associated with a particular party.").

94. Thomas A. Baylis, *Collegial Leadership in Advanced Industrial Societies: The Relevance of the Swiss Experience*, 13 POLITY 33, 42 (1980).

operated in a similar manner in the United States, where Republican American Secretary of Defense William Cohen abandoned partisan politics when he joined the cabinet of Democratic President Bill Clinton, and current Secretary of Defense Robert Gates (appointed by President Bush and retained by President Obama) is not a registered Republican in the first place.<sup>95</sup>

While members of the Swiss cabinet do not represent examples of government in opposition because they forsake their partisan identity, coalition governments are not examples of pure government in opposition because political leaders join the government in coalition governments by *compromising*—even if not completely forsaking—their partisan identities. Consider, for instance, the situation in parliamentary Israel after the last national election in 2006.<sup>96</sup> The party receiving the most votes was the Kadima Party, led by incumbent Israeli Prime Minister Ehud Olmert, which received 29 seats out of 120 seats in the Israel Knesset.<sup>97</sup> That meant that Prime Minister Olmert needed to find other parties to join his coalition so that he could achieve a working majority in the Israeli Knesset. Eventually, Olmert reached an agreement with his chief opponents in the 2006 election, the Labour Party, who received nineteen seats.<sup>98</sup> This meant that Labour Leaders Amir Peretz and now (former Labour Prime Minister) Ehud Barak occupied the important position of Defense Minister in the Kadima/Olmert Government.<sup>99</sup>

Barak, then, was both leader of the Labour Party and Defense Minister, and this would seemingly involve a check on Olmert by a member of a losing political coalition rather than by a member of a winning political coalition. But,

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95. See Robert Gates, TIME, <http://www.time.com/time/world/article/0,8599,1863939,00.html> (last visited Sep. 29, 2009).
96. Israel enacted a law in 1992 that provided that the Prime Minister was to be elected directly by the citizens, but that the Prime Minister could be removed by an absolute majority vote of the Knesset. See Gideon Rahat, *The Study of the Politics of Electoral Reform in the 1990s: Theoretical and Methodological Lessons*, 36 COMP. POL. 461, 462 (2004). In 2003, it changed the law back to give it a traditional parliamentary system, instead of a directly elected Prime Minister. See *id.*
97. See Greg Myre, *Premier-Elect in Israel Closer to a Coalition*, N.Y. TIMES, Apr. 28, 2006, at A8.
98. *Id.* Prime Minister Olmert also included within his coalition the Pensioners' Party (seven seats), and the Shas Party (thirteen seats). See Jonathan Ferziger, *Olmert Savvy Keeps Coalition Intact as He Seeks Peace*, BLOOMBERG.COM, Apr. 16, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&sid=atvaMmPk7ZtY&refer=home>.
99. See Isabel Kershner, *Ex-Premier of Israel Takes Helm of Labor Party*, N.Y. TIMES, June 14, 2007, at A19. There are other recent and prominent examples of chief figures from the political opposition occupying prominent positions in the cabinet of another party. In Germany, Joschka Fischer, leader of the Green Party, was (Social Democratic) Chancellor Gerhard Schroeder's Foreign Minister during the time when Germany had to decide about its policies toward American efforts in Afghanistan and Iraq.

by becoming Defense Minister *as part of the Olmert coalition*, Barak is not exercising government in opposition power. Even though Barak maintains his position as Labour Leader, he still sacrifices some of his opposition bona fides by joining Olmert and his government, and in many ways acts at the behest of Olmert and Kadima, since he is part of the Kadima Government. He was obliged to support the Kadima Government of Olmert, or otherwise resign his cabinet position – which Barak would be loath to do, given the importance of his cabinet position and given the risks presented by being out of government.

### 3. *Judicial Government in Opposition*

Government in opposition rules also exist for courts and the judicial branch. These judicial government in opposition rules extend not only to the appointment of individuals to the courts in the first place, but also to the operation of these courts. Some rules permit losing political coalitions the power to appoint judges to the bench. Other rules permit judges appointed by losing political coalitions the power to decide cases as majorities, or grant losing political coalitions special powers to compel and command the resources of the judicial branch.

About a dozen countries have adopted rules that guarantee members of losing political coalitions the ability to appoint judges to courts. In Germany, discussed briefly earlier, for instance, by informal agreement there is a “norm of reciprocity that has established de facto party seats held by the three major parties.”<sup>100</sup> A similar system exists in other countries, such as Portugal and Spain.<sup>101</sup> The blue slip procedure in the United States Senate also creates a system that permits senators from losing political coalitions informally to nominate judges, although the President formally has to nominate them.<sup>102</sup>

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100. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTION COURTS IN ASIAN CASES* 45 (2003).

101. See Sofia Amaral Garcia, Nuno Garoupa & Veronica Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal* 4-5 (Ill. L. & Econ. Research Paper Series, Research Paper No. LE 08-021, 2008).

102. The blue slip procedure occurs when a senator from the potential or actual nominee’s home state objects to the nomination. See Brannon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 76 (2001). This procedure can occur both *before* and *after* an actual nomination is submitted to the Senate. See Memorandum from Senate Judiciary Comm. Staff to Senator Edward M. Kennedy, Chairman, Senate Judiciary Comm. (Jan. 22, 1979), in *Selection and Confirmation of Federal Judges: Hearing Before the S. Comm. on the Judiciary, Part I*, 96th Cong. 131 (1979). If the blue slip procedure is utilized after the nomination is submitted, and the home state senator obstructs the nomination, we might see it more as the exercise of losers’ powers. If it



Losing political coalitions are not only sometimes given, informally, the power to appoint judges, but also sometimes given special power to command the resources of a court by being given standing to bring lawsuits through generally applicable rules that permit losing groups to bring lawsuits. In the United States, regardless of the winning or losing identity of a political figure or group bringing a lawsuit, they still must prove that they have suffered some sort of tangible, concrete harm.<sup>103</sup> In several countries, losing political coalitions are granted virtual automatic standing to challenge the constitutionality of statutes. In Austria, for instance, there is no need for a tangible harm to have occurred; one-third of the members of the House of Representatives or the Senate may file challenges against federal statutes, and one-third may file challenges against state statutes.<sup>104</sup> The percentages go even lower in some places; in Portugal, before the promulgation of a statute, one-fifth of the members of the Assembly can bring a challenge,<sup>105</sup> and after promulgation one-tenth of the members of the Assembly can.<sup>106</sup>

Once lawsuits make their way into court, judges appointed by or affiliated with losing political coalitions might sometimes not just be on the panel, but might actually constitute the *voting majority* on the court for certain matters, through rules that permit but do not encourage or mandate government in opposition results. In the United States, since a single district court judge usually decides a case at the federal district level, at some point in time that federal district court judge will have been appointed by a party different from the party in power, and indeed even a party different from the party that dominates the federal bench at the time.<sup>107</sup> At the federal appellate level, since

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transpires before the nomination is submitted, and as part of the decision to nominate, it seems more like the exercise of winners' powers by the home state senator (assuming, of course, that the home state senator is not a member of the winning coalition).

103. The Supreme Court has interpreted Article III of the American Constitution to mean that the plaintiff must demonstrate that there has been an "injury in fact," that this injury can be traced to the challenged action of the defendant, and that a judicial decision will remedy this injury. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
104. See Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, as last amended by Bundesgesetz [BG] BGBl I No. 100/2003, art. 140, ¶ 1 (Austria). See generally Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705 (2004) (discussing issues related to the structure of constitutional courts).
105. Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, as last amended by Bundesgesetz [BG] BGBl I No. 100/2003, art. 278 (Austria).
106. *Id.* art. 281.
107. One notable example of this happened, for instance, when Judge Anna Diggs Taylor of the United States District Court for the Eastern District of Michigan, appointed by President

three judges have always decided cases – and since 1911, three judges from the appellate court and not from the district court – there is the possibility that two or three judges of the minority party could be deciding the case.<sup>108</sup>

Of course, though, these accidental and random judicial government in opposition panels are merely defaults, and can be overturned in various ways. If a district court judge of one party issues a decision, it can be appealed to the federal court of appeals, where a three-judge panel possibly consisting of members of the majority party can overrule the decision. A decision by a three-judge panel of the federal appellate court can be overturned by an *en banc* panel of the whole court, which is much more likely to be composed by a majority of majority party members. Finally, of course, these decisions can all be appealed to the Supreme Court of the United States.

### III. THE NORMATIVE BENEFITS OF GOVERNMENT IN OPPOSITION RULES

As the previous Parts have discussed, government in opposition rules represent a distinctive approach to structuring the separation of powers in democratic systems. This Part will discuss the merits of government in opposition rules, which are substantial. Government in opposition rules can add much to all varieties of constitutional systems – from parliamentary to semipresidential and presidential regimes – and to countries at all different stages of maturity of their constitutional systems, from nascent, fragile democracies to secure, established democracies. The most notable benefit of government in opposition rules is that they provide the most effective – and permanent – constraint on power of any separation of powers regime that constitutions have ever contemplated. For all kinds of democracies, this means there are limitations on how much power can be granted to a particular political figure or political coalition. Government in opposition rules prevent excesses of power, because even if a political movement wins all different kinds of elections for all different kinds of positions, they still do not control all of the winners' powers.

But this logic of constraint and restraint on power is only part of what government in opposition rules can offer constitutional democracies. Permitting losing political coalitions to exercise the power to govern

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Jimmy Carter, decided that President George W. Bush's wiretapping program was unconstitutional. See *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

108. See THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 234 (1994).

encourages a broader range of perspectives to be aired in the political process, and in a more meaningful way, ensuring a more robust version of representative democracy. This role for losing political coalitions contributes to both the stability and the legitimacy of the constitutional order; with many voices being heard—and, more than that, many voices having their sentiments become binding law—members of many different political movements subscribe to some of the tenets of the democratic system. And, because of this perceived legitimacy and because this legitimacy stems from experience governing, more political movements are ready to lead if power switches hands; more political movements have experience exercising (winners’) power; and, as a result, campaigns themselves become more substantive, changing the nature of discourse in a democracy.

A. *The Benefits of Government in Opposition Rules*

1. *The Constructive Winner: The Illiberal Democrat and Permanent Constraint*

As mentioned earlier, one of the key questions that constitutional designers attempt to answer, as Bruce Ackerman has put it, is how many elections political movements need to win before assuming “full authority.”<sup>109</sup> In parliamentary systems, a political movement need only win one election before assuming full authority. In presidential and semipresidential systems, a political movement must succeed in several elections before assuming full authority, and these several elections are for different forms of political office. But all of these systems share the same feature: if a political movement is successful enough, and convinces enough voters over a long enough period of time, it can control *all or almost all* of the institutions exercising winners’ powers. There will be some slack, because there might still be winner-related institutions or even purely bureaucratic institutions using winners’ powers in contravention of how the political movement wants. But, at the end of the day, if the political movement is successful enough, it will achieve complete or at least hegemonic control of the all-valuable winners’ powers.

It might be the case that some political figures, even after achieving this amount of control of winners’ powers, would exercise this complete power in a positive fashion. If this political movement in control of this amount of winners’ powers uses its electoral or political mandates to assume excessive

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<sup>109</sup> Ackerman, *supra* note 5, at 648.

power, though, that movement's leader has become an "illiberal democrat."<sup>110</sup> In such a situation, decisions are made without a full range of information and perspectives being considered; so, for instance, after taking control of all winners' powers, Prime Minister Blair supported the American efforts in Iraq without considering the full range of concerns that other leaders—from the Conservative party primarily—had been voicing. The rights of minorities were suppressed by the American Franklin Delano Roosevelt (FDR) after he had taken control over all of the winners' powers available in the American federal system (so, for instance, FDR ordered the internment of Japanese-Americans). In a more fragile democracy like Russia, the menace of the illiberal democrat in control of all winners' powers like Putin poses a threat to the very existence of the democratic state, leading to a situation where major presidential candidates were not permitted on the ballot (like chess star Garry Kasparov<sup>111</sup>).

One system for preventing a hugely successful political coalition from going to excess, mentioned earlier, is the idea of creating multiple winners, each with control of their own institutions or parts of institutions, and thus their own sets of winners' powers. The first problem with this arrangement is that once a political movement becomes successful enough, any set of winners' powers that can be captured by democratic elections will be captured by the very successful political movement. A related problem arises as a result of the strategy of trying to constrain the illiberal democrat and their complete control of winners' powers by creating losers' powers. Simply put, the more powerful the illiberal democrat becomes, the more that leader can cut back and ignore losers' powers, because controlling all of the winners' powers means that the winning political coalition has complete control over the "purse and the sword"<sup>112</sup> that provide the hard power institutional support for the exercise of losers' powers. Losing political coalitions, without a coercive set of winners' powers behind them, do not have their own armies, their own courts, or their own legislative committees to provide the muscle to support their losers' powers and pose a real constraint on the exercise of winners' powers by an unconstrained illiberal democrat.

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110. As mentioned before, I borrow this phrase and concept from Fareed Zakaria, among others. See *supra* note 9.

111. See Andrew E. Kramer, *Kasparov Says He Was Forced To End Bid for Presidency*, N.Y. TIMES Dec. 13, 2007, at A18.

112. See THE FEDERALIST NO. 78, at 302 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("The executive not only dispenses the honours, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated . . .").

Another institutional strategy that has been used to attempt to constrain the illiberal democrat is not to create more elections resulting in the greater dispersion of winners' powers, but to immunize institutions exercising winners' powers from the ambit of democratic oversight. This is, to some degree, what constitutional courts were created to do, as James Madison argued in *The Federalist Papers*.<sup>113</sup> But even constitutional courts themselves are creatures of democratic politics, since their judges are appointed by elected figures, and so it is precisely a figure like an illiberal democrat who might try to exert greater influence over courts. FDR's court-packing plan is a failed example of this,<sup>114</sup> but there are even better examples of successful efforts to dominate courts through appointments from a political movement, such as President Carlos Menem's efforts to control the Supreme Court in Argentina.<sup>115</sup> Other institutions removed from the control of winning coalitions, such as civil service-dominated bureaucratic institutions, might temporarily constrain illiberal democrats, but even they can do only so much to constrain a hugely successful political coalition—without the hard power and political base that the illiberal democrat and his or her control of winners' powers has.

If all of the other institutional mechanisms of constraint fail to constrain the electorally successful—but illiberal—democratic leader, then government in opposition rules represent the best solution, because they always draw a line of constraint beyond which the illiberal democrat cannot operate. No matter how many elections the dominant political movement wins, and no matter how much the dominant political movement comes to control winners' powers, it does not exercise complete control over the entirety of winners' powers. In this way, government in opposition prevents unconstrained winners from overreaching, and from even overthrowing democratic systems entirely. Rather than creating the possibility of winners' powers being controlled by several

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113. See *id.* at 403. (“The complete independence of the courts of justice is peculiarly essential in a limited constitution.”).

114. See William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's “Court-Packing” Plan*, 1966 SUP. CT. REV. 347.

115. Menem succeeded where FDR failed and enlarged the size of the Supreme Court of Argentina from five to nine Justices—and when one remaining Justice resigned, he was able to appoint a majority of members of the Court. See HORACIO VERBITSKY, HACER LA CORTE: LA CONSTRUCCION DE UN PODER ABSOLUTO SIN JUSTICIA NI CONTROL 67 (1993). This was not the first time that the government of Argentina had decided to alter significantly the composition of the Court. See Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 292 (2002) (“[T]he Court was replaced *en masse* by the military following the coup in 1976 and again by the incoming democratic government of Raul Alfonsín in 1983.”).

different coalitions, at least some forms of government in opposition rules (mandatory rules) make this a requirement.

Government in opposition rules constrain the excess of the illiberal democrat in two ways. First, being in the minority when it comes to some decisions might especially sensitize majorities to the concerns of minorities.<sup>116</sup> We can call this rationale for government in opposition rules the “responsible winner” rationale.<sup>117</sup> In other words, government in opposition rules foster more responsive and responsible winning coalitions, and this is one way such rules remedy the problem of the unconstrained winner. The illiberal democrat will have incentives not to overstep, because even the illiberal democrat will have to be in the minority on occasion, and will want to be treated fairly.

In the context of government in opposition rules, imagine, for instance, if, while he was still in power, President Vladimir Putin of Russia was forced to deal with a Foreign Minister Garry Kasparov, from a leading opposition party. That would mean that Foreign Minister Kasparov would be making key foreign policy decisions. President Putin would have had to be careful about how dismissive he was of Kasparov’s United Civil Front political party, because even though President Putin could formally overrule Kasparov’s activities as Foreign Minister, Kasparov would most of the time be making final foreign policy decisions, and no matter what, it would be difficult and politically costly for Putin to constantly overrule Kasparov’s decisions.

The responsible winner scenario envisions that, because of the winning coalitions’ powers exercised by losing coalitions, winning coalitions will act more responsibly so that losing coalitions use their winners’ powers more responsibly as well. In other words, it assumes a certain longitudinal consciousness and assessment of interests on the parts of winners—knowing that they control most winners’ powers, but aware that if they use those powers equitably, at some hypothetical point down the line losing coalitions might also use their (fewer) winners’ powers more responsibly. But there will be many situations in which political coalitions might not keep this reciprocity concern in mind, and so might act to excess. This might be even truer in the

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116. See Gerken, *Second-Order Diversity*, *supra* note 2, at 1146 (noting how “second-order diversity” might have this characteristic).

117. The “responsible winner” rationale for government in opposition rules is similar to the situations that Eric Posner and Adrian Vermeule discussed when the President of the United States wants to indicate that he or she has the best of intentions. See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 867 (2007) (“[T]he [executive] credibility dilemma can be addressed by executive signaling. Without any new constitutional amendments, statutes, or legislative action, law and executive practice already contain resources to allow a well-motivated executive to send a credible signal of his motivations, committing to use increased discretion in public-spirited ways.”).

case of the illiberal democrat, a political figure who has achieved such electoral success that constraints on power might be fewer and farther between, and his assumptions about the scope of his power might be exaggerated. In this situation, government in opposition rules do not dissuade the illiberal democrat from acting to excess because of an enlightened, longitudinal sense of self-interest, but rather because these rules directly block the illiberal democrat from acting to excess when the illiberal democrat affirmatively and aggressively tries to act to excess. In these situations, rather than relying on the restraint of winning coalitions, government in opposition rules constrain by relying on the affirmative actions of losing coalitions blocking the actions of winning coalitions.

Of course, there is instability, or what Adrian Vermeule has called “reversibility”<sup>118</sup> problems with this situation – meaning that, since the illiberal democrat is the political majority, with some extra effort he can always overturn this exercise of winners’ powers by the losing political coalition. But the public will become accustomed to the status quo created by the exercise of winners’ powers by losing political coalitions.<sup>119</sup> Some exercises of winners’ powers by losing coalitions, such as those releasing damaging information to the public, are irreversible.<sup>120</sup> Simply by holding hearings and releasing documentary information into the public domain that sensationalized the British body politic,<sup>121</sup> MP Leigh and his Public Accounts Committee had done damage to the Blair Government that it could not undo, regardless of what committee it assigned its deportation bill to or what chair it might have replaced to appoint Leigh on the Public Accounts Committee. Norms might also develop that it is unfair to overrule the exercise of winners’ powers by losing coalitions.<sup>122</sup> So, when losing coalitions use winners’ powers to block winning coalitions, it is not perfectly stable, but it is largely stable.

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118. See Vermeule, *supra* note 2, at 89 (“[S]ubmajoritarian decisions are exposed to reversal by subsequent majorities, and might thus be chronically unstable.”).

119. See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003) (“[I]ndividuals tend to prefer the present state of the world to alternative states, all other things being equal.”).

120. Adrian Vermeule makes this point about transparency decisions that can be made by submajorities. See Vermeule, *supra* note 2, at 91 (“Once published, perhaps by a submajoritarian decision, the information circulates beyond the power of subsequent majorities to suppress, whether or not they possess legal authority to do so.”).

121. See *MP Dubs Home Office ‘Incompetent,’ supra* note 67.

122. For a good example of this, consider how a majority of five on the U.S. Supreme Court hardly ever votes to reject a petition that the Rule of Four permits four Justices on the Court to decide to hear. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 296 (8th ed. 2002).

One of the normative points of this Section—that government in opposition rules are normatively desirable because they constrain illiberal democrats better than other mechanisms of constraint—relates to a descriptive and explanatory point that I am working on in other projects. One of the main reasons why these rules were created in the first place was because of a particular historical dynamic where political figures feared they might be in the minority and were looking for rules to constrain those in the majority. MP Edward Short, the aforementioned Member of Parliament responsible for creating systematic government in opposition in Great Britain, proposed his system because “no other system will prevent a Prime Minister from going too far better than this.”<sup>123</sup> Short believed that government in opposition rules were *better*, if not at least as good, at protecting losing political coalitions as judicial review.

Given these explanations for the constraining role of government in opposition rules—and the fact that Short and others relied on these reasons in proposing these rules—it should not be surprising that several large-N studies have demonstrated that power-sharing regimes actually do promote regime stability in a range of countries because of the manner in which they restrain illiberal democrats.<sup>124</sup> There is good reason to believe that power-sharing regimes *limited to government in opposition rules*, though, in particular promote stability. For instance, the idea of the mutual veto, also included in Lijphart’s definition of consociationalism,<sup>125</sup> has created antagonism between rival political and other factions in many countries and created excessive stalemate. Government in opposition rules give losing political coalitions *some* winners’ powers, but, ultimately, the winning political coalition can push an initiative through if it so desires. The mutual veto, by contrast, essentially gives winning and losing political coalition *joint* winners’ powers related to major issues,<sup>126</sup> and therefore the mutual veto makes it almost impossible for the winning coalition to push through actions unless it changes the existing constitutional order. For instance, the presence of mutual vetoes, utilized related to important matters by both Turkish and Greek groups to cause paralysis and stalemate, is

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123. See 312 PARL. DEB., H.C. (5th ser.) (1964) 831-32.

124. See Pippa Norris, *Ballots Not Bullets: Testing Consociational Theories of Ethnic Conflict, Electoral Systems, and Democratization*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* 206 (Andrew Reynolds ed., 2002).

125. See LIJPHART, *supra* note 40, at 25.

126. These joint winners’ powers apply to particularly controversial areas of policy, such as foreign affairs and security policies. See H. IBRAHIM SALIH, *CYPRUS: ETHNIC POLITICAL COUNTERPOINTS* 3 (2004).



what ultimately destroyed the 1960 Constitution of Cyprus and its government in opposition – but also mutual veto – rules.<sup>127</sup>

Power-sharing regimes, in general, have simply worked much better when there was integration and not segregation. Government in opposition rules, on their own, do not give losing political coalitions fiefdoms where they can hide from winning political coalitions. But a mutual veto and segmental autonomy create precisely that situation, and give significant winners' powers to individuals and groups simply by their ability to join a group and not integrate with other coalitions. It is not surprising, then, that some studies show government in opposition rules joined together with politically and culturally isolationist devices like mutual vetoes have intensified political cleavages.<sup>128</sup> Nor is it surprising that systems that have integrated groups by using government in opposition rules, but not segregated them in other ways, have worked better.<sup>129</sup>

Likewise, another one of the modalities of power-sharing that Lijphart has grouped under the rubric of power-sharing regimes is the idea of segmental autonomy, which means that political minorities

rule . . . in the area of the minority's exclusive concern. While matters of mutual concern are to be resolved by joint agreement reached through the mechanisms of coalition, veto and proportionality, matters of particular concern are to be resolved by delegating authority to the individual segments. In this way, segmental autonomy removes sensitive and potentially destabilizing issues from the larger political arena.<sup>130</sup>

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127. See Philippos K. Savvides, *Cyprus: The Dynamics of Partition* 23-25 (Feb 9, 2000) (unpublished manuscript, on file with author), available at <http://www.hks.harvard.edu/kokkalis/GSW2/Savvides.PDF>.
128. For two studies making this point about power-sharing regimes in Northern Ireland, see Joanne Hughes & Caitlin Donnelly, *Community Relations in Northern Ireland: A Shift in Attitudes?*, 29 J. ETHNIC & MIGRATION STUD. 643 (2003); and James Tilley, Geoffrey Evans & Claire Mitchell, *Consociationalism and the Evolution of Political Cleavages in Northern Ireland, 1989-2004*, 38 BRIT. J. POL. SCI. 699, 704 (2008).
129. See Robert H. Dix, *Consociational Democracy: The Case of Colombia*, 12 COMP. POL. 303, 311 (1980) ("In most communities of any size, there tends to be a mix of Liberals and Conservatives, and partisan allegiances do not prevent regular interaction. Such interaction is especially notable at the elite level, where most elite clubs and interest associations are either by inadvertence or by design bipartisan in nature.") (internal citations omitted).
130. Edmund A. Aunger, *Dispersed Minorities and Segmental Autonomy: French-Language School Boards in Canada*, 2 NATIONALISM & ETHNIC POL. 191, 191 (1996).

But segmental autonomy creates precisely the same problems as mutual vetoes: by separating out power and creating separate enclaves for its exercise, there is again the potential for more conflict and stalemate. For these reasons, while power-sharing regimes make sense, limiting these regimes to government in opposition rules in particular makes sense.

## 2. *The Constructive Loser: Legitimacy and Readiness*

The previous Subsection discussed how government in opposition rules create more constrained—and hence more constructive—winning political coalitions, particularly when these winning political coalitions become massively successful in winning elections of all kinds at all levels. But government in opposition rules also have normative benefits because they result in a more attractive role for losing political coalitions. Government in opposition rules expand the genre of formal powers granted to losing political coalitions by also providing them with winners' powers. Granting these additional powers to losing political coalitions, though, does much more than add to their formal repertoire of powers; it completely reconceives what losing political parties do, and for the best.

First, government in opposition rules compensate for the increasing tendency in democratic countries to provide winning political coalitions with so much power that losing political coalitions are nearly powerless. It has long been true, as John Stuart Mill wrote, that it is an “essential part of democracy that minorities should be adequately represented. . . . [and that n]o real democracy, nothing but a false show of democracy, is possible without it.”<sup>131</sup> One means of doing this is to solidify the place of losing political coalitions qua losing political coalitions. In democratic systems without proportional representation, losing political coalitions are represented in democratic institutions, but not as many political parties are represented as in countries with proportional representation.<sup>132</sup> Regimes like proportional representation ensure that losing political coalitions are even more represented in political institutions; protecting losers' powers like the right to dissent ensures that these political coalitions can undertake certain activities as part of their representation of losing political coalitions.

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131. JOHN STUART MILL, *REPRESENTATIVE GOVERNMENT* 157 (New York, Harper & Bros. 1869).

132. For instance, in the United States House of Representatives, two political parties are represented, the Democratic and Republican Parties, while in the Indian Lok Sabha, thirty-nine political parties are represented. See GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 58-59 (2d ed. 1997).

In this way, then, traditional structures of constitutional democracy ensure that losing political coalitions are represented, in the more formal sense that losing political coalitions occupy elected positions and have at least some (albeit losers') powers that come along with these elected positions. But even though losing political coalitions are represented because they have a seat at the political table, their power is minimal—and not just because, without government in opposition rules, they only exercise losers' powers. The nature of winners exercising winners' powers has meant that losing political coalitions, in many democracies, are increasingly left with fewer and fewer opportunities for relevance. Losing political coalitions have a seat at the political table, but at best all they can do is listen to the discussion transpiring at that table.

In parliamentary regimes, for instance, it is virtually impossible for members of losing political coalitions—even though they are full members of legislative bodies—to propose pieces of legislation, and nearly impossible to have their proposed legislation enacted. The rules of parliamentary bodies ensure this. For example, legislation proposed by the winning political coalition in the House of Commons has a ninety-seven percent chance of being enacted; legislation proposed by losing political coalitions has a small chance of even being considered, and almost zero chance of being enacted.<sup>133</sup> This dynamic is not limited to Great Britain. In almost all parliamentary democracies, losing political coalitions have their initiatives debated and enacted a small percentage of the time.<sup>134</sup> In presidential or semipresidential democracies, the same is true.<sup>135</sup> The sum total means “that in more than 50 percent of all [democratic] countries, governments introduce [and enact] more than 90 percent of the bills.”<sup>136</sup>

In other words, government in opposition rules ensure a more robust version of representation in politics, and hence a more robust version of legitimacy for democratic institutions. Advances in institutional rules like proportional representation have created more ways for losing political coalitions to remain somewhat relevant, but they remain largely marginalized. A political coalition losing the parliamentary election in Germany by one vote,

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133. See Richard Rose, *British MPs: More Bark than Bite?*, in *PARLIAMENTS AND PARLIAMENTARIANS IN DEMOCRATIC POLITICS* 8, 11 (Ezra N. Suleiman ed., 1986).

134. See VALENTINE HERMAN, *INTER-PARLIAMINARY UNION, PARLIAMENTS OF THE WORLD: A REFERENCE COMPENDIUM* 630-37 (1976).

135. See Argelina Cheibub Figueiredo & Fernando Limongi, *Presidential Power, Legislative Organization, and Party Behavior in Brazil*, 32 *COMP. POL.* 151, 154-55 (2000).

136. See George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 *BRIT. J. POL. SCI.* 289, 304 (1995).

for instance, would have close to a zero percent chance of having its legislation enacted, while the political coalition that received one vote more would have close to a one hundred percent chance of its legislation being enacted. Government in opposition rules modify this reality by ensuring greater (actual winners') powers for losing political coalitions.

Indeed, government in opposition rules might be more than a welcome *addition* to the normative representational benefits that proportional representation regimes provide; they might be valuable *replacements* for proportional representation rules. Proportional representation rules have clear tendencies to foster gridlock and instability because there are so many parties exercising losers' powers and obstructing governance,<sup>137</sup> and also because they permit "the inclusion of extreme candidates"<sup>138</sup> who do not have to receive as many votes as they would without such rules in order to hold a seat in the legislature and can challenge the very nature of the constitutional regime. Government in opposition rules, depending on their precise design,<sup>139</sup> do permit a range of interests to be represented in government, but by giving these interests winners' powers as well as losers' powers, they change the incentives for gridlock and for extremism. Because those being represented through the exercise of government in opposition powers can be blamed for the gridlock in government, and have much to lose from the fall of

137. See Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong To Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 59-66 (2001); see also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) ("The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.").

138. See Issacharoff, *supra* note 8, at 1419.

139. It can be the case that there could be a high burden to meet to qualify to exercise government in opposition powers, such as the rule under the interim constitution of South Africa that a party had to receive at least twenty percent of the vote in order to be granted an executive deputy president position. See S. AFR. (Interim) CONST. 1993 art. 84(1) ("Every party holding at least 80 seats in the National Assembly shall be entitled to designate an Executive Deputy President from among the members of the National Assembly."). The 1998 settlement in Northern Ireland also featured some significant barriers that had to be satisfied before political parties could exercise government in opposition powers. See Brendan O'Leary, *Debating Consociational Politics: Normative and Explanatory Arguments*, in FROM POWER SHARING TO DEMOCRACY: POST-CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES 3, 14-15 (Sid Noel ed., 2005). These rules can be seen as the analogues to the aforementioned rules in some proportional representation systems that require that political parties receive a certain minimum percentage of the vote before they qualify for seats in the legislature. The contrast, of course, is that some government in opposition rules permit virtually any political coalition, no matter how few votes they received, to exercise government in opposition powers—think of the rules governing Short Money in the British Parliament.

government, there are fewer reasons to believe that government in opposition rules will cause the problems that proportional representation rules cause,<sup>140</sup> particularly in presidential systems.<sup>141</sup>

Not only is there reason to believe that government in opposition rules make constitutional systems more normatively desirable because they ensure that losing political coalitions occupy more than a hollow seat at the table, but this broader and more robust approach to political representation also leads to a more stable constitutional system. Constitutional democracies with government in opposition rules will be more stable because even losing political coalitions have a stake in the basic functionality of the regime. If the regime is not working, losing political coalitions can be at least partly to blame, and so will suffer political costs; and if the regime is not working, losing political coalitions might be willing to take the chance on new or subsequent elections (which might result in some continued winners' powers if they are in opposition, but more winners' powers if they triumph in the election), but not on an entirely new constitutional system (because that new system might feature dramatically fewer powers for whoever loses elections).

The role of government in opposition rules does create actual as opposed to just theoretical "sociological legitimacy,"<sup>142</sup> which should not be surprising given the general dynamics of public support for government. When citizens believe a political figure with similar positions and politics to their own is not just representing them in government but actually exercising winners' powers, their core support for the constitutional system increases. In the United States those associated with the Democratic Party are more likely to support the

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140. In Italy, for instance, between 1945 and 1996 the Italian Cabinet lasted an average of 1.28 years before being replaced by a new coalition of parties. See AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 132 tbl.7.1 (1999). But, as Bruce Ackerman has stated, many of the problems posed by proportional representation rules can be mitigated, if not eliminated, by "the necessary bits of constitutional engineering." Ackerman, *supra* note 5, at 654.

141. See Robert A. Dahl, *Thinking About Democratic Constitutions: Conclusions from Democratic Experience*, in POLITICAL ORDER: NOMOS XXXVIII, 175, 192 (Ian Shapiro & Russell Hardin eds., 1996) ("Of all the major alternatives, presidentialism with PR—the Latin American option—may be the most unstable.") (emphasis omitted).

142. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) ("When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.") (emphasis omitted).

government if the president is a Democrat.<sup>143</sup> Likewise, political support is highest in multiparty, proportional representation systems, because there are the most positions and opportunities for one's political party to win an election and hold the resultant winners' powers. As a recent article explained it:

[I]nstitutional mechanisms such as the electoral system and the number of parties . . . make losers less distrusting of government in proportional democracies. . . . [P]roportional democracies are associated not only to electoral rules and coalition and minority governments but also to committee parliamentary rules that facilitate the influence of the opposition in the policy-making process. This implies that even those citizens not ideologically close to any party of the coalition government have the capacity to influence the legislative process. Under such circumstances, a citizen ideologically far from the government coalition will probably consider that the government is unable to harm his or her interests and therefore [it] is less probable that he or she distrusts the government.<sup>144</sup>

Indeed, most of the information we have suggests the kind of support for government that increases when one's party exercises winners' powers is an increase in diffuse support, or support for the basic structural legitimacy of a constitutional system.<sup>145</sup> This means that government in opposition rules are particularly important for more fragile democracies, where an emphasis on stability might be warranted. But it also means that at least some parts or some amount of these rules might be warranted for more stable democracies, because even stable democracies should create institutions that promote their basic stability. Even beyond the basic support for the core of the constitutional system, other positive elements will be on the rise with this increased support for the system that comes with government in opposition rules – turnout and

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143. See John R. Alford, *We're All in this Together: The Decline of Trust in Government, 1958-1966*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 28 (John R. Hibbing & Elizabeth Theiss-Moore eds., 2001); Jack Citrin & Samantha Luks, *Political Trust Revisited: Déjà Vu All Over Again?*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?*, *supra*, at 9.

144. See Henar Criado & Francisco Herreros, *Political Support: Taking into Account the Institutional Context*, 40 *COMP. POL. STUD.* 1511, 1516 (2007).

145. See DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965) (describing diffuse support as a "reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants").

involvement in the political system is higher in parts of the United States,<sup>146</sup> for instance, that feature more parties and more viewpoints included among those exercising winners' powers.

Another question about how constructive of a role losing political coalitions can play in systems with government in opposition rules is what will happen to the more ideologically extreme members of the winning coalition. Some will join government, exercise winners' powers, and be happy with that. Others will continue their ideological efforts, believing these efforts best waged from outside government. But this fact—that members of the losing political coalition do not need to join the government to be relevant—is why many of the criticisms of Donald Horowitz about whether rules like government in opposition rules promote stability are misplaced.<sup>147</sup> There still is opposition to the government, coming primarily from the exercise of winners' powers by losing coalitions.

Another reason why losing political coalitions play a more constructive role in systems with government in opposition rules is that they help better prepare a range of political and bureaucratic officials to exercise winners' powers and to govern. Major elected political figures—and their political assistants and the technical bureaucratic officials associated with them—will have experience actually running a cabinet agency, a committee, or a court, regardless of which political party they identify with and whether that political party is a part of the winning or the losing political coalition. Tony Blair, as leader of the Labour Party when the Labour Party was in opposition, gained knowledge about how Parliament works by managing the seventeen days a year when his party controlled the operations of the House of Commons.<sup>148</sup> His assistants in the Labour Party then learned about the operations of the various cabinet ministries, and several of his deputies actually operated these cabinet ministries for several days a year, as mentioned earlier.<sup>149</sup>

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146. See Shaun Bowler, David Brockington & Todd Donovan, *Election Systems and Voter Turnout: Experiments in the United States*, 63 J. POL. 902 (2001).

147. Donald Horowitz says that “[t]he grand coalition implies that the model of government and opposition is rejected. Consensual democracy replaces majoritarian democracy, and opposition is necessarily located inside government.” Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213, 1216 (2008).

148. See AUTH. OF THE HOUSE OF COMMONS, STANDING ORDER OF THE HOUSE OF COMMONS 15 (2007), available at <http://www.publications.parliament.uk/pa/cm200708/cmstords/105/105.pdf>.

149. See Johnson, *supra* note 65, at 493-96.

The benefits of this experience are obvious. First, in the unlikely and unfortunate event of a terrorist attack or any other need to quickly reestablish the government, there would be a larger and broader group of trained professionals to take control.<sup>150</sup> Second, transitions between governments would not be so abrupt and inefficient. If the government needed to tackle an urgent issue—such as the financial crisis of 2007–2009, or a dangerous war or foreign policy crisis—there would not be as much difficulty in shifting from one elected government to another. This is because there would already be a ready supply of functionaries of the previously losing—and now winning—political coalition ready to take power from day one. Indeed, it is the fact that there are so many government in opposition rules in places like Great Britain that permit, right after an election, “a new prime minister [to] replace[] a defeated incumbent the very next day.”<sup>151</sup>

Finally, although this requires further empirical examination and elaboration, giving leaders of the losing political coalition actual experience using winners’ powers contributes to more substantive and less personal political campaigns. When political figures have a record in government, that record becomes the subject of political debate and discussion.

## *B. Concerns about Government in Opposition Rules*

### *1. The Stalemate Tradeoff?*

If government in opposition rules are normatively desirable because, in part, they constrain excessive uses of power, they do potentially pose a problem based on the flip side of the constraint coin: these rules may constrain government too much—and therefore constitutional designers must find the proper balance. Excessive constraint can be problematic from a policy and from a stability perspective. In both stable and fragile democracies, it might prevent important policies from being enacted. In more fragile democracies, the possibility of gridlock, stalemate, and inaction can threaten the basic

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150. See, e.g., Howard M. Wasserman, *The Trouble with Shadow Government*, 52 EMORY L.J. 281, 281 (2003) (“Presidential succession and government continuity suddenly is a hot topic. The September 11 terrorist attacks and the subsequent War Against Terrorism have brought to the fore the possibility of a catastrophic terrorist attack . . . killing the president and vice president, and destroying Congress and the federal government. This prospect in turn raises . . . questions about how to preserve the federal government . . . how to maintain governance in the federal system . . . who will . . . assume the executive power under the Constitution and how to repopulate the political branches.”).

151. Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 871 (2007).



constitutional order. An effective constitutional system will constrain excessive power, but will not prevent useful exercises of power. In other words, might government in opposition rules constrain too much and empower too little?

There are several responses to this concern. First, the number and importance of government in opposition rules can be adjusted, depending on the country and the situation. Constitutional systems can vary the *degree* to which they can be characterized as government in opposition systems. This might mean that government in opposition rules are warranted for systems where the concern is with government doing too much, and not too well, and where the concern is with an illiberal democrat rather than an already constrained winner. In drafting the Interim Constitution of South Africa, there were many government in opposition rules, because the constitution was created to manage the transition to democracy. In the final Constitution of South Africa, there are no obvious government in opposition rules; this is because South Africa survived the years when democracy was more at risk of being destabilized, and so the need for these rules has dissipated or disappeared.<sup>152</sup> In stable democracies, like the United States—as will be discussed in Part IV—it might make sense to adjust downward the number of government in opposition rules when there is divided government, because then there are already plenty of checks on power, while when there is unified government there will be fewer constraints on power.

Another manner to adjust government in opposition rules to ensure there is not excessive constraint is to limit the number of political coalitions that can utilize government in opposition rules. The Interim South African Constitution only guaranteed Executive Deputy President positions to political coalitions receiving twenty percent of the vote.<sup>153</sup> In Britain, political parties receive funding as opposition parties only if they have elected at least two members to Parliament in the preceding general election, or have elected at least one member and received at least 150,000 popular votes overall.<sup>154</sup> Just as some countries have minimum vote requirements to ensure that there are not too many parties represented in the legislature and causing chaos, so too might it make sense to limit the number of parties that can benefit from government in opposition rules.

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152. See HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 151-55 (2000).

153. See S. AFR. (Interim) CONST. 1993 art. 84(1) ("Every party holding at least 80 seats in the National Assembly shall be entitled to designate an Executive Deputy President from among the members of the National Assembly.").

154. RICHARD KELLY, HOUSE OF COMMONS LIBRARY, SN/PC/1663, at 2 (2009), available at <http://www.parliament.uk/commons/lib/research/briefings/snpc-01663.pdf>.

In other words, then, government in opposition rules need not be excessive sources of constraint because they can be altered or modified. And because government in opposition rules are, by definition, rules empowering political minorities, they can be changed by the actions of political majorities acting within the established rules of the constitutional system, without even repealing the government in opposition rule in the first place. If the winning coalition does not like what the losing political coalition did with its winners' powers, it can simply redirect a regulation or legislation to ensure that it is controlled by the winning coalition. Depending on the legal form that the government in opposition rules take, this repeal by simple majority can be done with more or less effort. If the government in opposition rule results from an informal understanding, then the majority can decide simply to ignore this informal understanding if it feels that this informal understanding is overly constraining. For example, Blair decided to do away with the informal understanding that led to two days of Prime Minister's Question Time, and minority-dominated legislative time, and condensed it into one day of minority-dominated Prime Minister's Question Time.

All of this, of course, is assuming that government in opposition rules stagnate energetic government in the first place, which is an empirically debatable assumption, similar to the debate in the political science literature about whether divided or unified governments produce more significant policies.<sup>155</sup> While it might be surprising that major initiatives are enacted in regimes with major government in opposition powers, the political dynamics of such systems make it less surprising that major legislation is enacted. Voters blame any party exercising winners' powers, even if that party is part of the losing coalition exercising fewer winners' powers, and so parties that are part of losing coalitions do have an interest in ensuring that government accomplishes something of significance.

G.B. Powell has found that proportional representation and other similar tools contribute to obscure responsibility in voter evaluations of governmental performance, and so voters are more willing to blame all parties rather than some political parties because all parties are seen as being part of

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155. David Mayhew, in a book that has attracted substantial agreement and disagreement, has argued that divided government does not decrease the enactment of major legislation. See DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990*, at 178 (1991). For agreement with his findings, see Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-96*, 93 AM. POL. SCI. REV. 519 (1999). Even after a wave of criticisms, there is at least some consensus that Mayhew's core finding has been empirically validated. See MORRIS FIORINA, *DIVIDED GOVERNMENT 162-66* (2d ed. 1996).

government.<sup>156</sup> Indeed, in parliamentary systems, the more complex the coalition constituting the government, the less able voters are to blame particular political parties and not others, and so the more they blame all political parties.<sup>157</sup> In other words, then, because they exercise at least some winners' powers, losing political coalitions will be held responsible for the failures of government—and so do not have an interest in obstructing government to such an extent that it causes the stalemate-driven nightmare of the impotent government. Not only do losing political coalitions have a greater interest in avoiding excessive gridlock in government in opposition systems because they will be held at least partly responsible for the failures of the government, but also because the destruction of such systems poses the threat of the losing political coalitions losing the winners' powers that they do have.

## 2. *Sowing the Seeds of Destruction: The Weimar Problem*

In countries with political parties that do not believe in the fundamental tenets of the democratic system, government in opposition rules might empower those parties by giving them winners' powers. A party that believes in the destruction of the government, rather than being forced to operate only with losers' powers, would instead be given winners' powers and a better ability to overthrow the government. As mentioned before, this is part of the structural explanation of how Adolf Hitler destroyed the constitution of Weimar Germany. Hitler's Nazi Party, when still a minority party (but a part of the majority coalition), used the powers granted to several ministries to eliminate opposition and eventually repeal the entire Weimar Constitution itself.<sup>158</sup>

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156. See G. BINGHAM POWELL JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* (2000). Others have helpfully elaborated on this argument:

First, in majoritarian systems, where governments have a majority in the parliament, power is concentrated and the outcomes are easily attributed to the incumbent. In proportional systems, power is dispersed among government, opposition parties, and a range of other political institutions, and the outcomes of policies are more difficult to attribute. . . . The second mechanism claims that in proportional democracies, where power is more dispersed among different political groups, the support for institutions by those citizens who are not ideologically identified with the incumbent will be higher than in majoritarian democracies.

Criado & Herreros, *supra* note 144, at 1516-17.

157. See MICHAEL S. LEWIS-BECK, *ECONOMICS AND ELECTIONS: THE MAJOR WESTERN DEMOCRACIES* 108-09 (1988).

158. A.J. NICHOLS, *WEIMAR AND THE RISE OF HITLER* 164, 168-69 (4th ed. 2000).

We might worry less about these destabilizing parties and this “Weimar Problem” in stable democracies. In the United States, antisystem parties never posed much of a threat to the constitutional order, and so when we discuss government in opposition rules we are really discussing the division of power between the Democratic and Republican parties, neither of which promises to overthrow the American Constitution. In stable democracies, we can talk about the “loyal” opposition.<sup>159</sup> In many other stable democracies, there are more fringe parties than in the United States—perhaps because of proportional representation—but even these fringe parties generally tend not to support goals at odds with the fundamental tenets of the democratic system.<sup>160</sup> Parties that might be seen as ideologically extreme are still sympathetic enough to the basic goals of democratic systems that they can be incorporated into governing coalitions. On the right, the Italian National Alliance and the Dutch Pim Fortuyn List have joined winning coalitions; on the left, the German Green Party has joined the coalition government of the Social Democrats.<sup>161</sup>

This, therefore, is more a concern about fragile democracies, and whether government in opposition rules undermine the core stability of these new democracies. If government in opposition rules do actually present the possibility of creating the “Weimar Problem,” there are institutional design responses. One common institutional design response to this problem of political parties abusing government in opposition rules in order to overthrow governments is simply to prevent such political parties from operating in the first place. This so-called “militant democracy” approach—which is used in many countries and was discussed very recently by Samuel Issacharoff in his *Harvard Law Review* article on the subject<sup>162</sup>—prevents political parties from operating if they do not believe in certain basic tenets of the democratic system.

This conditions approach is used in the government in opposition context as well. In Britain, the money allocated to support the activities of opposition parties requires the taking of an oath, which states as follows: “I . . . swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth, her heirs and successors, according to law. So help me God.”<sup>163</sup>

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159. See MARY DURKIN & OONAGH GAY, HOUSE OF COMMONS LIBRARY, HER MAJESTY’S OPPOSITION, SN/PC/3910, at 2 (Feb. 8, 2006).

160. See Peter Mair, *The Challenge to Party Government*, 31 W. EUR. POL. 211, 212-13 (2008).

161. *Id.*

162. See Issacharoff, *supra* note 8.

163. See CHRIS SEAR, PARLIAMENT & CONSTITUTION CTR, HOUSE OF COMMONS LIBRARY, THE PARLIAMENTARY OATH, (Research Paper 01/116, 2001), available at <http://www.parliament.uk/commons/lib/research/rp2001/rp01-116.pdf>.

Rather than just being a meaningless formality, this technique of constraining what sorts of parties could be seated (and therefore could receive Short Money) has been controversial over the years. The Irish nationalist party Sinn Fein has often elected members of Parliament, but its members of Parliament have refused to take this oath, and therefore have never received Short Money.<sup>164</sup> The House of Commons has appropriated special monies to fund opposition parties, like Sinn Fein, who do not take this oath but who would otherwise be entitled to funding.<sup>165</sup> This response to the problem presented by disloyal parties, of course, would present obvious constitutional problems for countries—like the United States—that have strong free speech protections.

But it is also possible that government in opposition rules will not increase the chances of the “Weimar Problem” transpiring. By including members of these destabilizing parties in the government and in the exercise of winners’ powers, government in opposition rules might actually moderate them. These destabilizing parties, once in power, might not want to give up the part of the total amount of winners’ powers they have and risk having fewer winners’ powers in an entirely new constitutional regime. Political parties desire power, and often will moderate to obtain and maintain this power.<sup>166</sup> In Northern Ireland, for instance, the government in opposition rules of the Sunningdale experiment induced destabilizing political figures to work with moderates in the government.<sup>167</sup> It is true, though, that there will be times when a political party will make the assessment that it is better to decline any winners’ powers, in the belief that it can destroy the constitutional system enough to possess more winners’ powers in another constitutional regime. This was the case in Colombia in the middle of the twentieth century, when the Liberal and Conservative governments alternated criticizing each other when the other was in power, always believing that they could cause the government—and the constitution—to collapse and then create a more favorable new constitution.<sup>168</sup> But rare will be the situation when any political party, whatever its political beliefs, decides to opt for losers’ powers over winners’ powers. And when an

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164. *Id.* at 3.

165. See KELLY, *supra* note 154, app. 5, at 19.

166. See Donald L. Horowitz, *Making Moderation Pay: The Comparative Politics of Ethnic Conflict Management*, in CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES 451, 451-75 (Joseph V. Montville ed., 1991).

167. See PEACE AT LAST? THE IMPACT OF THE GOOD FRIDAY AGREEMENT ON NORTHERN IRELAND (Jorg Neuheiser & Stefan Wolff eds., 2002).

168. See Robert H. Dix, *Consociational Democracy: The Case of Colombia*, 12 COMP. POL. 303, 314 (1980).

antisystem party does make the calculation that holding losers' powers is a preferable choice to holding winners' powers because the constitutional order is likely to soon be overturned, there might not be much that institutional rules can do anyway.

#### IV. CONSTITUTIONAL DESIGN FOR THE AMERICAN SCENE

The last Part discussed how government in opposition rules could benefit all constitutional systems, stable and fragile, presidential, semipresidential, or parliamentary. This Part will focus in greater detail on some of the benefits from government in opposition rules for one particular constitutional system, the current American constitutional system. This Part is not meant to be an exhaustive, complete examination of the ways in which government in opposition rules would benefit the current American separation of powers regime. Certainly, some of the questions of the desirability and constitutionality of such a system require their own separate article. Therefore, this Part is a general sketch of some of the main virtues—and issues—related to incorporating some of the main structural components of government in opposition rules elsewhere into the American system.

As this Part will discuss, several problems have emerged that could be at least partially remedied by creating a more elaborate and consequential series of American government in opposition rules. The United States, of course, does already have some government in opposition rules. The Seven Member Rule, mentioned earlier, permits minorities on certain committees in Congress to compel information from the executive branch. Part III also mentioned the possibility of federal judges appointed by parties then not part of the electoral majority making decisions at a time when the party that appointed them was no longer in power. This Part will discuss how expanding the number and prominence of rules such as these would have many positive effects for the current American constitutional regime. It argues that, only during times of unified government (when one party controls all winners' powers) a series of statutory or constitutional provisions should require that members of the political party out of power negotiate with the winning political party. The result must be, *at minimum*, some significant (if perhaps not precisely specified) number of important cabinet positions, chairmanships of important congressional committees, and the ability to nominate a certain number of federal judges to be controlled by the leadership of the losing political coalition.

The increasingly partisan nature of current American politics calls for an increasingly partisan constraint on the operation of government. When political parties were more fragmented, or political figures voted less based on partisan identity, then other constraints worked better—parties had their own

internal debates and divides that operated as a form of self-constraint when they were in power, and their ideological heterogeneity meant they tolerated and cooperated more with parties out of power. But now, when parties are more coherent and party voting is central, government in opposition rules provide a check on power that accounts for the reality of contemporary partisan politics.

Government in opposition rules would also create a more equitable distribution of political power, ensuring that political minorities—whose power has been decreasing under both Democratic and Republican-dominated governments in Washington—still have a real voice. In other words, government in opposition rules are not just necessary to constrain power, but also to create the conditions for real democratic politics again. Finally, government in opposition rules would create a more efficient administrative state, ensuring that an administrative state increasingly dominated by partisan politics would have a steady and constant corps of qualified bureaucratic officials—and these bureaucratic officials would have less of an incentive to cater to political officials.

#### *A. Problems with the American Separation of Powers*

##### *1. Unified Government*

Separation of powers in the United States works well—perhaps too well—when winners’ powers are divided among the two major parties, with each party controlling at least some bundle of winners’ powers. During those times, winners’ powers clash with winners’ powers, and neither political party is able to assert hegemonic control over government. But when one political party captures all of the levers of power, then the American system of separation of powers fails. This is because the result is unified government, or the American equivalent of the illiberal democrat: a political leader (George W. Bush in the past decade and now Barack Obama) who stands in control of all winners’ powers and so poses a real risk of overreach and excess.

The problem with the American Constitution’s treatment of separation of powers during periods of unified government has been explained most recently by Daryl Levinson and Richard Pildes.<sup>169</sup> The creation of multiple bundles of winners’ powers, and the allocation of these winners’ powers to different branches of government, operated under the assumption that political figures would vote and operate out of some degree of loyalty to the branch of

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<sup>169</sup>. See Levinson & Pildes, *supra* note 3.

government in which they operate, rather than the political party that helped get them to that branch of government. In other words, with winners' powers divided among several branches of government, it would not matter who controlled each branch of government if political figures voted and acted based on their branch identity—if they acted based on what *part* of the government they belonged to rather than the *party* that created them. The mere fact that a political figure was a member of a branch of government meant that their voting and loyalties would be determined by that membership. If you were a Republican member of the House from Alabama, then the fact that you were a Republican or from Alabama did not matter; what did matter is that you were a member of the House, and you would be sure to exercise winners' powers to maximize the prerogatives of the House of Representatives.

This vision of branch loyalty has collapsed, and so with it has the American originalist vision of a separation of powers based on branch identity. We transitioned from a world where politics involved “affairs of honor”<sup>170</sup> to a world where politics were characterized by the fact that “party lines predict political behavior better than branch ones.”<sup>171</sup> Party-line voting was only around forty percent about forty years ago; now it is close to three-quarters of the time.<sup>172</sup> Not only do members of Congress and the President<sup>173</sup> vote and act according to the positions of their political party, but the two main political parties now represent increasingly distinct, coherent, and opposed policy platforms,<sup>174</sup> and so not only do they strongly oppose and disagree with one

170. See JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* (2001). Freeman argues that a key notion during the early years of the Republic—and the core animating idea behind the original constitutional design—was that politics was about “the establishment and defense of personal honor and reputation, and with offering leadership based on . . . personal and social standing.” Robert F. Bauer, *Thoughts on the Democratic Basis for Restrictions on Judicial Campaign Speech*, 35 *IND. L. REV.* 747, 751 n.13 (2002).

171. Levinson & Pildes, *supra* note 3, at 2326.

172. JAMES Q. WILSON & JOHN J. DI IULIO, JR., *AMERICAN GOVERNMENT* 339 tbl.13.4 (10th ed. 2006); *see also id.* at 340 (“[P]arty affiliation is still the most important thing to know about a member of Congress. Knowing whether a member is a Democrat or a Republican will not tell you everything about the member, but it will tell you more than any other single fact.”).

173. This partisan behavior is not just a feature of congressional action, but also of the actions of the President. During President Bill Clinton’s second term, when he faced a Republican Congress, he opposed about two-thirds of the actions of the Congress. *See* RICHARD S. CONLEY, *THE PRESIDENCY, CONGRESS, AND DIVIDED GOVERNMENT: A POSTWAR ASSESSMENT: THE ESSENTIALS* 29-31 (2003).

174. Elena Kagan has noted that the most conservative Democrat is now, according to most studies, still more liberal than the most liberal Republican. Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2312 (2001).



another, but their internal agreement and unity is also much greater. When not one party controls all winners' powers – during periods of divided government, in other words – then there is constraint on winning political coalitions. If anything, we might be concerned during periods of divided government that there are too many brakes on the political gas pedal, and that not enough is done.

By contrast, during periods of unified government, political constraints do not operate as well, if at all. The formal constitutional structure still creates multiple bundles of winners' powers and allocates these to different winners, but since these "different" winners are all members of the same political party, winners' powers are combined rather than conflicted. During periods of unified government, the President rarely threatens to veto legislation or actually vetoes legislation, and there is overwhelming agreement on policy issues between the President and Congress, now approaching near ninety-five percent of the time. With the President and Congress of the same party, they can work together to find federal judges in greater agreement with them, federal judges who are thus less likely to prevent them from pursuing their agenda and the agenda of their party;<sup>175</sup> the same is true of other cabinet officials and political appointees of the federal government. In other words, government does a lot during periods of unified government, because there are no winners' powers to be used to constrain other winners' powers.

If members of the opposing political party were granted a certain basic core of winners' powers during periods of unified government, then there would always be a check on the operation of a unified government. With political

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175. Nancy Scherer found, in her study, "that there is no difference in voting behavior between judges appointed during united and divided government." Nancy Scherer, *Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?*, 35 LAW & SOC'Y REV. 191, 191 (2001). But her findings are based on an examination of three areas that, during the time period she studied, were not major sources of legal cleavages between the Democratic and Republican Parties. See *id.* at 191 (describing how her study focused on "search and seizure cases, race discrimination cases, and federalism cases"). Scherer's findings have also been questioned by other research. See, e.g., MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS*, at xxv (2003) ("[There are] problems with Scherer's analysis [that] are noteworthy"); Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 239 (2003) ("[U]nified government is highly correlated with the ability of presidents to name judges who match their policy views on a consistent basis in a set of cases. And this result is intuitive. When the President's party controls the Senate, the Administration may meet privately with Senate leaders to negotiate over nominees thereby ensuring the selection of judges who most closely match the ruling party's perspectives as well as their rapid confirmation. Moreover, unified government limits the role of opposing interest groups in judicial selection by denying them access to key decisionmakers and curtailing the public portion of the Article II process.").

figures operating according to the best interests of their party, this would ensure that, no matter what, a political figure with the opposite interests of the party occupying all of the rest of the winners' powers would have some winners' powers of their own. It would be as if there were always some divided government, even in the midst of unified government. Of course, as mentioned in the previous Part, the amount of government in opposition rules could be varied—perhaps in periods where one party not just controls all winners' powers, but controls them by wide margins, there could be even more government in opposition rules—perhaps giving losing political coalitions some cabinet positions, a few more deputy cabinet positions, and so on.

An example of how government in opposition rules might operate—and might better constrain unified government—comes from the situation that led to the torture memoranda produced by the Office of Legal Counsel (OLC) in the Department of Justice (DOJ) several years ago. In early 2002, the OLC authored two memos on legal protections afforded to Al Qaeda and Taliban captives.<sup>176</sup> On February 7, 2002, President Bush issued a memorandum agreeing with this conclusion, and stating that prisoners would be treated in a manner “appropriate and consistent with military necessity.”<sup>177</sup> Later that same year, OLC issued another memorandum about whether interrogation tactics that might seem extreme violated certain legal obligations. This memorandum concluded that only pain reaching the level of “death, organ failure, or the permanent impairment of significant body function”<sup>178</sup> might pose legal problems, and that even then it could be unconstitutional to apply certain laws prohibiting torture to executive exercises of authority in the war on terror.<sup>179</sup> In January of 2003, when Secretary of Defense Donald Rumsfeld was producing a report on proper interrogation techniques, he relied substantially on these

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176. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't. of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 22, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 81 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *TORTURE PAPERS*]; Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen., U.S. Dep't. of Justice, Office of Legal Counsel, and Robert J. Delabunty, Special Counsel, U.S. Dep't. of Justice, Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't. of Def. (Jan. 9, 2002), in *TORTURE PAPERS*, *supra*, at 38.

177. Memorandum from President George W. Bush to the Vice President et al. (Feb. 7, 2002), in *TORTURE PAPERS*, *supra* note 176, at 134, 135.

178. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't. of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *TORTURE PAPERS*, *supra* note 176, at 176.

179. *Id.* at 173.

memoranda.<sup>180</sup> And the Rumsfeld report had major influences on American policy towards prisoners, detainees, and the torture of detainees that resulted – and in many ways led to – the appalling and offensive disaster and consequence of the excess of winners’ powers that was Abu Ghraib.

It is interesting to think how things might have been at least more constrained, and potentially even forestalled, if there had been government in opposition rules. In actuality, the OLC memos were produced by two OLC lawyers, John Yoo and Jay Bybee, with clear Republican credentials and affiliations.<sup>181</sup> The memoranda were reviewed by a range of officials, all Republican-appointed or at least Republican-affiliated officials,<sup>182</sup> including by then-White House Counsel Alberto Gonzales.<sup>183</sup> While the Senate was controlled by the Democrats for a portion of early 2002 when the torture memos were first constructed, the Republicans controlled the Senate starting in January 2003, the House of Representatives during this entire time, and then of course the executive branch during this entire time, when the torture memos were being reviewed and implemented. So, of course, there was no one exercising winners’ powers to do anything about the torture memoranda.

It might be that the Democratic Party, as the party in opposition, could have or would have done nothing about these memoranda if they did possess winners’ powers (by having a Democratic Attorney General, a Democratic head of the Office of Legal Counsel, and/or ensuring a sufficient number of Democratic chairs of major congressional committees). Perhaps the Democratic

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180. WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY AND OPERATIONAL CONSIDERATIONS (2003), in *TORTURE PAPERS*, *supra* note 176, at 286.

181. John Yoo clerked for two of the more conservative judges on the federal bench, first Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit, and then Justice Clarence Thomas of the Supreme Court. He also served as the general counsel to the Republican majority on the U.S. Senate Judiciary Committee during the 1990s. See Berkeley Law: University of California: Faculty Profiles, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235> (last visited June 26, 2009). Bybee was appointed a federal judge by the Bush Administration. See David Luban, *Liberalism, Torture, and the Ticking Time Bomb*, 91 VA. L. REV. 1425, 1452 (2005) (“The irony is that Jay S. Bybee, who signed the Justice Department’s highly permissive torture memo, is now a federal judge.”).

182. See Dana Priest, *CIA Puts Harsh Tactics on Hold*, WASH. POST, June 27, 2004, at A1 (noting that the latter Bybee Memorandum “was vetted by a larger number of officials, including lawyers at the National Security Council, the White House counsel’s office and Vice President Cheney’s office”).

183. See David Johnston & Neil A. Lewis, *Bush’s Counsel Sought Ruling About Torture*, N.Y. TIMES, Jan. 5, 2005, at A1; R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees*, WASH. POST, Jan. 5, 2005, at A1.

Party, reeling from its losses on the Iraq issue in the 2002 midterm elections, would never have constrained the Bush Administration's policies on torture. But when the Democrats regained control of Congress in the 2006 elections, they did hold hearings about the torture memoranda and requested information as a means of shining light on these problematic documents.<sup>184</sup> It is true that the Republicans did as well, but with so much more to gain by pointing out the foibles of the Republican Bush Administration, this might have happened even earlier if the Democrats controlled Congress. Democrats might not have cared about torture, but they would have cared about political gains, and a niche might have existed for them to expose the torture memos. With only losers' powers as their disposal, they could not do that. But with some winners' powers years later, they could—and if they had some winners' powers years earlier even in the minority—then the torture memos might have been revealed earlier, and their disastrous consequences avoided.

## 2. Majoritarian Domination

As mentioned earlier, one global trend in constitutional democracies is to reduce the power of losing coalitions—to reduce the importance of and protection for the losers' powers that these losing coalitions traditionally exercise. Arend Lijphart has argued that this majoritarian domination is even more pronounced in presidential democracies like the United States.<sup>185</sup> Several structural changes in American politics validate his claim. In the past generation, winning coalitions have become more powerful—and losing coalitions less powerful. This has meant a gradual suppression of losing political coalitions by whichever of the two major political parties constitutes the winning political coalition. Government in opposition rules are necessary, then, not just to ensure that winning coalitions do not exceed proper democratic boundaries, but also to ensure that losing coalitions remain relevant when they are in the minority.

Barbara Sinclair has documented the decrease in the power of minority parties in the United States Congress,<sup>186</sup> via what the newest and most

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184. See Scott Shane, *Two Testify on Memo Spelling Out Interrogation*, N.Y. TIMES, June 27, 2008, at A15.

185. See, e.g., LIJPHART, *supra* note 140, at 161 (noting the ways that the presidential system of the United States tends to give winners of elections disproportionate lawmaking and other powers).

186. See BARBARA SINCLAIR, *LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA* (1995) [hereinafter SINCLAIR, *LEGISLATORS*];

comprehensive book about this trend has called the “procedural polarization” of Congress.<sup>187</sup> Because of changes in the rules and norms of the House and the Senate—although less so in the Senate<sup>188</sup>—individual members and committees in the House and the Senate have much less power than they did thirty or forty years ago. Party leaders exercise greater power to select committee chairs, to decide which committee will consider legislation, and to structure the procedure on the floor of the House or Senate by which the collective body will debate and vote on legislation.<sup>189</sup> The leaders of the majority parties decide who attends summit meetings when the Congress meets with the President to resolve disputes, and also raise money through special leadership political action committees (PACs) which they use to support the campaign efforts of individual members.<sup>190</sup> With power centralized like this in the hands of the leaders of the winning coalition—rather than dispersed among committees and members—the winning coalition has become more powerful and more in control of the operations of both houses of Congress. And, with parties more coherent and ideological, this has meant greater attempts—and ability—to suppress the actions of losing political coalitions by the more polarizing and ideological leaders of the winning coalition.

The results for the losers’ powers possessed by losing political coalitions have been disastrous. The number of legislative initiatives that were subject to open rules that permitted all germane amendments declined from eighty-five percent in the 1977-1978 session of the House to about thirty-four percent in

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BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (1997) [hereinafter SINCLAIR, UNORTHODOX].

187. See SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 218 (2008).

188. John Ferejohn, *A Tale of Two Congresses: Social Policy in the Clinton Years*, in *THE SOCIAL DIVIDE: POLITICAL PARTIES AND THE FUTURE OF THE ACTIVIST GOVERNMENT* 49, 68 (Margaret Weir ed., 1998). (“Everyone agrees that Congress has gradually changed from a loosely structured locus of committees and subcommittees operating fairly independently, with party leaders serving largely as “traffic cops,” to a more coherent, collegial, partisan, and sometimes even centralized institution, where significant policymaking activity sometimes takes place in the offices of party leaders, in party caucuses, and on the chamber floors. These changes have gone farther and happened faster in the House of Representatives than in the Senate . . . but they have been visible in both chambers to varying extents.”).

189. See John H. Aldrich & David W. Rohde, *The Transition to Republican Rule in the House: Implications for Theories of Congressional Politics*, 112 POL. SCI. Q. 541 (1997).

190. See Gerald M. Pomper, *Parliamentary Government in the United States*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 251 (John C. Green & Daniel M. Shea eds., 1999).

the 1991-1992 session of the House.<sup>191</sup> Committee chairs are increasingly loyal and responsive to the majority party in Congress rather than to a range of political coalitions.<sup>192</sup> Committee members from the losing political coalition are given less time to speak.<sup>193</sup>

This is the state of affairs for losing political coalitions in Congress, but things are not much better when we consider the changing nature of presidential power. The President is, after all, the only national majoritarian official, the only political figure exercising winners' powers because of an election by a national majority, a national winning coalition. And so the rise in presidential power compared to congressional power—the rise in the only branch of government constituted almost entirely of members only from the winning political coalition—is consequential (there are no losing political coalitions exercising losers' powers in the executive branch). During presidencies of both parties, the power of the executive branch has increased. The President now submits his own budget request to Congress.<sup>194</sup> Presidents since FDR have issued a staggeringly greater number of executive orders than presidents before them and have centralized control over the regulatory state.<sup>195</sup> The greater number of foreign military commitments—commitments supervised by the executive branch—have increased the power of the President because of his unilateral control over the main issue of the day.<sup>196</sup> The most majoritarian person in the American government is now all the more powerful.

What can be done to ensure that losing political coalitions remain relevant? The Democratic or the Republican Party in the United States almost never controls more than a bare majority of the seats in the House or Senate, and even presidential elections are essentially always decided by a few percentage points. Losing political coalitions in the United States have a great share of the vote, and so the fact that they have an increasingly small part of the power is problematic. This majoritarian domination problem is less severe in the United States during periods of divided government. In those situations, the losing political coalition still has access to some winners' powers since they control some parts of the federal government.

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191. See SINCLAIR, *LEGISLATORS*, *supra* note 186, at 140.

192. See SINCLAIR, *UNORTHODOX*, *supra* note 186, at 105.

193. *Id.* at 6.

194. A compelling recent book on the rise of presidential power highlights this and other growing manifestations of increased executive power, regardless of which party occupies the White House. See MATTHEW CRENSON & BENJAMIN GINSBERG, *PRESIDENTIAL POWER: UNCHECKED AND UNBALANCED 19-24* (2007).

195. See *id.* at 24-27.

196. *Id.* at 24-25.

But what about during periods of unified government? Assigning these losing political coalitions more losers' powers would not resolve this majoritarian domination of American democracy. It would result in the same suppression or degradation of losers' powers that has already transpired in regards to existing losers' powers. Granting losing political coalitions winners' powers during periods of unified government, then, ensures that these coalitions and the citizens they represent have their voice heard at least somewhat in proportion to their electoral relevance.

### 3. *Bureaucratic Competence*

One of the goals of a successful system of separation of powers, in addition to constraint and how that promotes rights and democratic self-government, is governmental competence. And the current American separation of powers system hinders excellence in technical administration. The American administrative state has always been—and has become even more—political than many of its counterparts.<sup>197</sup> American bureaucrats understand their role as much more political and much less technical than their counterparts in nonpresidential systems.<sup>198</sup> A substantial number of high-level American bureaucratic positions are occupied by political appointees.<sup>199</sup>

The consequences of such a political bureaucratic regime are serious. Because bureaucratic positions are so political, and the support enjoyed by certain officials will vary based on the political climate, tenure in these positions is relatively short. The median time served for political appointees is about two years.<sup>200</sup> Once they complete their service as high-ranking political appointees, these bureaucratic officials then often leave government service

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197. Cf. Ackerman, *supra* note 5, at 702 (“There are, then, some pretty fundamental reasons for associating an American-style separation of powers with unattractive forms of bureaucratic governance. Worse yet, these theoretical connections are abundantly confirmed in practice.”).

198. See JOELD D. ABERACH, ROBERT D. PUTNAM & BERT A. ROCKMAN, *BUREAUCRATS & POLITICIANS IN WESTERN DEMOCRACIES* 94-95 (1981); Renate Mayntz & Hans-Ulrich Derlien, *Party Patronage and Politicization of the West German Administrative Elite 1970-1987—Toward Hybridization?*, 2 *GOVERNANCE* 384, 394 (1989) (“[C]ivil servants today distinguish their role from that of politicians even more than they did in 1970 . . . .”) (emphasis omitted).

199. See PAUL C. LIGHT, *THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY* 7-13 (1995).

200. See GEN. ACCOUNTING OFFICE, *FACT SHEET, POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE SCHEDULE POSITIONS REQUIRING SENATE CONFIRMATION*, GAO/GGD-94-115FS, at 2-3 (1994).

altogether, with less than ten percent of political appointees by one count remaining in the public sector after their initial appointment.<sup>201</sup> Not only do these officials not spend time learning their particular job, they do not spend time learning how government in general operates.

With such dramatic and constant turnover, bureaucratic officials cannot form working relationships with their colleagues, and do not learn the idiosyncrasies of their policy portfolios, or the individuals working on the same or related portfolios. This short-term horizon is worsened even more during presidential transitions, when, because so many positions are politically appointed, there will be so many new officials in control. As the Volcker Commission on Public Service put it, “excessive numbers of political appointees serving relatively brief periods may undermine the President’s ability to govern, insulating the Administration from needed dispassionate advice and institutional memory.”<sup>202</sup>

But no one believes that bureaucrats, even in a perfectly designed system, either can or should be purely technical creatures implementing objectively neutral commands with the best available evidence. The days of James Landis<sup>203</sup> are over, and the pretense of rationality and rationality alone justifying bureaucratic actions is gone. In other words, even if we could create a separation of powers that promoted pure rationality and was apolitical, no one believes in pure politically neutral rationality anymore—and so we need political accountability. Creating a European-style civil service for the entire federal bureaucracy<sup>204</sup> is not a choice for a country that recognizes the need for political accountability over bureaucrats.<sup>205</sup>

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201. See Linda L. Fisher, *Fifty Years of Presidential Appointments*, in *THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON* 1, 27 (G. Calvin Mackenzie ed., 1987).

202. NAT’L COMM’N ON THE PUB. SERV., *LEADERSHIP FOR AMERICA: REBUILDING THE PUBLIC SERVICE* 7 (1989).

203. See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 10-16, 46-50 (1938).

204. See Neil Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2328 (2006) (discussing the “European model . . . that . . . attracts excellent college graduates and retains them”).

205. For arguments about the importance of accountability in the administrative state see, for instance, Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 *YALE L.J.* 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1153 (1992); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231 (1994); and Geoffrey P. Miller, *Independent Agencies*, 1986 *SUP. CT. REV.* 41.



An increase in government in opposition rules would likely raise skepticism among those attached to the idea of an American “unitary executive”<sup>206</sup> and the belief that having all of those exercising executive winners’ powers be accountable to the President means that there is greater political accountability—after all, a clear, singular person can be blamed for any failures in the executive branch—and regulatory coherence and dispatch (again, since one figure has ultimate control over executive winners’ powers). It might be the case that, as an informal matter, providing members of losing political coalitions with executive winners’ powers could reduce some of these benefits of the unitary executive, in favor of some of the benefits of a more constrained and politically divided executive. But many of the benefits of a unitary executive remain.

After all, while there is little discussion about constitutional constraints on requiring the appointment of members of losing political coalitions to cabinet positions, as discussed below, we know that there would be major constitutional problems with limiting the President’s power to remove these cabinet officials from opposing parties,<sup>207</sup> and so these government in opposition rules would still not undermine the President’s authority to terminate cabinet members (from his party or from another party). And “there is consensus that the power to remove subordinates who do not follow the President’s directives, or in whom he no longer has confidence, is vital to his supervisory ability and authorized by the Constitution.”<sup>208</sup> Because the President could remove members of losing political coalitions, it means that if they are interfering too much with the President’s regulatory agenda, he can remove them—and if he does not, we know that we can blame the President and vote the President out of office. Also, because these government in opposition rules are structured whereby members of clearly identifiable political parties are appointed, and appointed *because* of their membership in those parties, we know who beyond the President to blame for policy failures. For instance, if President Obama were required to appoint Republican Senator Orrin Hatch as Attorney General, and the Justice Department made some

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206. For an underappreciated article in this discussion about the unitary executive which makes these arguments most clearly, see Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

207. See, e.g., Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1780 (2006) (“Conventional wisdom supposes that the President enjoys a power to remove all presidentially appointed officers, save for judges. A corollary of this belief is that neither Congress nor the judiciary may remove such officers, for when the Constitution grants the President a power, it often follows that no one else can enjoy that power.”).

208. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1156 (2000).

embarrassing errors, we might blame Obama—after all, Obama would not have fired Attorney General Hatch, although he could have—but we also and perhaps even more so could blame the Republican Party, because it would be Hatch’s status as a member and leader of that party that would have led to Hatch’s appointment in the first place.

Even beyond that, the manner in which members of losing political coalitions are appointed can also assist with presidential control and with regulatory coherence. In many systems with government in opposition rules—and so potentially for the United States—the head of the winning political coalition must appoint a member of the losing political coalition, but gets to choose *which* member of the losing political coalition to appoint. That was the case, for instance, with Nelson Mandela’s appointment of F.W. de Klerk under the 1994 interim constitution; Mandela had to appoint a member of de Klerk’s party, and decided de Klerk was the most tolerable. This means that a President Obama would not have to appoint a Sarah Palin or a Ron Paul to his cabinet; he could instead appoint a more moderate and ideologically similar Republican like Richard Lugar, who is more likely to pursue the same policy goals that the President desires.

### *B. Design Fundamentals*

Even if government in opposition rules would be a welcome addition to the American constitutional system, the incredible variety of such rules discussed in Part II make it clear that there are still some major issues of institutional design that need to be resolved first. As Part II mentioned, government in opposition rules vary really along three axes: (1) How mandatory are these rules; (2) How often are these rules reviewed and what is the exact amount of these rules present; and (3) May members of winning *and* losing coalitions exercise powers afforded by these rules. This Part already has mentioned how it would be wise to have these rules triggered only when Congress and the Presidency are controlled by the same party. This Section elaborates slightly more on the specifics of an American government in opposition regime by arguing that these rules, when in place, should be mandatory, negotiated, and available only to losing coalitions. A central theme of the argument for these specific parts of an American government in opposition regime has to deal with one of the constitutional evils that this regime is designed to fight, which was identified earlier: the absence of constraint in unified government. By removing many of these rules from the vagaries of politics—from the vagaries that a unified government could take advantage of—these rules would guarantee losing political coalitions a degree of power and capacity to constrain winning political coalitions.

The first major design question is how coercive to make government in opposition rules. As we have seen, there are really three potential different answers to this question: (1) mandatory government in opposition rules, of the genre in South Africa, where if the losing political party achieves a certain degree of success then they are guaranteed winners' powers—and of course the guarantee can arise from constitutional provision, statutory requirement, or an informal norm rising to the level of coerciveness of a legal norm; (2) encouraged government in opposition rules, of the genre related to the judicial appointments process in Germany, where the rules create certain strong incentives that could lead to losing political parties exercising winners' powers; and (3) permitted government in opposition rules, where no rules or norms prevent losing political parties from exercising winners' powers, but nor are there any requirements or incentives either.

Because many countries have experimented with rules from each of these three categories, we have much information about the consequences of these different genres of government in opposition rules. And the evidence suggests that, since government in opposition rules are meant to counteract the problem of the illiberal democrat that can arise from unified government, the more coercive the rules the more they are likely to have their intended effect. The more government in opposition rules can be manipulated by the normal political process, the less they will constrain the illiberal democrat that the President of the United States can become during periods of unified government. Where there is no sense of obligation to make government in opposition rules practically meaningful, then leaders of winning coalitions will only honor these rules when it is in their political interests to do so—which defeats the entire purpose of having these rules in the first place. This means that if these rules follow from informal understandings, they are easier to be ignored by a particularly powerful winning political coalition; while they still might be ignored by that same coalition if they are more coercive, there at least will be more of a political and potentially even legal cost for doing so.

Consider the experience with government in opposition rules in stable democratic countries similar to the United States. In Great Britain, some of the government in opposition rules result from statutory obligations, such as Short Money provided to opposition parties.<sup>209</sup> These rules have remained relatively

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209. See, e.g., Ministerial and Other Salaries Order, 1994, S.I. 1994/3206 (increasing salaries); Ministerial and Other Salaries Order, 1991, S.I. 1991/2886 (increasing salaries); Ministerial and Other Salaries Order, 1987, S.I. 1987/1836 (increasing salaries). The foundational statute is really the Ministerial and Other Salaries Act, 1975, c. 27 (Eng.). The Act superseded the structure established by the Opposition by the Ministers of the Crown Act

stable and permanent, and if anything have only been expanded in the direction of granting more power to losing political coalitions. By contrast, Prime Minister's Questions, which are merely the product of an informal understanding, were altered when a very popular political figure, Tony Blair, became Prime Minister. In 1961, Parliament established a twice-weekly event called "Prime Minister's Questions," with each session lasting forty-five minutes—but this was established simply as a matter of parliamentary norm, not because of any statutory or other formal change.<sup>210</sup> Once Blair came into office, he limited Prime Minister's Questions to once a week, and limited the number of questions that his Cabinet would respond to as part of the customary (and not compelled) Question Days procedure,<sup>211</sup> the elite "FOIA" I referenced earlier in this Article. Blair was criticized for changing the Prime Minister's Questions and Question Days procedures, but because he was not repealing a statutory or constitutional command, the criticisms he faced were minimal and largely inconsequential.

Without any compulsion to ensure that losing political coalitions exercise winners' powers, members of winning political coalitions will give power to losing political coalitions only when winning political coalitions are weak and in need of a political boost—in other words, at the very moment when winning political coalitions are so weak that winning political coalitions do not need to be constrained in the first place. Prime Minister Gordon Brown expressed an interest in having a "government of all the talents,"<sup>212</sup> but that was when his Labour Party was essentially tied with the opposition Conservatives despite having triumphed overwhelmingly in the past few elections.<sup>213</sup> Likewise, President Bill Clinton, under no obligation to appoint Republicans to his cabinet, appointed Republican Senator William Cohen to be his Secretary of

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1937. See SIR THOMAS ERSKINE MAY, *THE LAW, PRIVILEGES, PROCEEDINGS, AND USAGES OF PARLIAMENT* 252 n.19 (20th ed. Butterworths 1983).

210. See Sudha Setty, *The President's Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL J.L. & PUB. POL'Y 247, 264 (2008).
211. See HOUSE OF COMMONS INFO. OFFICE, FACTSHEET P1 PROCEDURE SERIES: PARLIAMENTARY QUESTIONS (JUNE 2009), available at <http://www.parliament.uk/documents/upload/Po1.pdf>.
212. See Colin Brown & Nigel Morris, *Brown Completes Government of "All Talents" with Team of Outsiders*, INDEP. (U.K.), June 30, 2007, <http://www.independent.co.uk/news/uk/politics/brown-completes-government-of-all-talents-with-team-of-outsiders-455341.html>.
213. See Poll Watch: June 2007, BBC NEWS, [http://news.bbc.co.uk/1/hi/uk\\_politics/6264488.stm](http://news.bbc.co.uk/1/hi/uk_politics/6264488.stm) (last visited Nov. 11, 2009).

Defense only when he had the political need to shore up his defense credentials.<sup>214</sup>

It is true, of course, that any rule, no matter how legally or informally binding, can still be repealed by a broad and bold enough winning political coalition. But, as mentioned earlier, there are all sorts of reasons related to time and resource constraints that would prevent a winning political coalition from repealing or ignoring a mandatory government in opposition rule. In particular, in a stable democratic system like the United States, foundational parts of public law—what William Eskridge and John Ferejohn have called “super-statutes,”<sup>215</sup> such as the Civil Rights Act of 1964<sup>216</sup>—remain in effect many years after their enactment and after enduring unified government of both parties. Even some of the American government in opposition rules, such as the Seven Member Rule or the blue slip process, go back a long time and have survived government by Democrats and Republicans.<sup>217</sup>

The second major design question to resolve about an American government in opposition regime is *how* to go about determining the precise amount of government in opposition rules; is the amount to be fixed or negotiated, and is it to be proportionate or ascertained through some other mechanism? Again, there is a range of experience to draw from, from the negotiated rules that exist for much of the British government in opposition regime to the constitutionally fixed and proportionate system of the Interim South African Constitution.

However important it is for government in opposition rules to be mandatory—so they are not repealed or substantially undermined by a unified government—it is also the case that making these rules too mandatory and removed from the normal democratic updating process makes these rules as susceptible to countermajoritarian attacks as the courts. Removing these rules too much from the democratic process makes them reflective of an outdated reality, and also makes them seem less legitimate. In Lebanon, for instance, the

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214. See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 901 (2007).

215. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001). If the government in opposition rules were to be made binding as part of statutory law, they would probably be considered super-statutes.

216. *Id.* at 1237–42 (discussing the Civil Rights Act of 1964 as a super-statute).

217. The Seven Member Rule goes back to 1966. See 5 U.S.C.A. § 2954 (2006). The blue slip process goes as far back as 1954. See Memorandum from Senate Judiciary Comm. Staff to Senator Edward M. Kennedy, Chair, Senate Judiciary Comm. (Jan. 22, 1979), reprinted in *Selection and Confirmation of Federal Judges: Hearing Before the S. Comm. on the Judiciary*, 96th Cong. 118, 119 (1979) (“The blue slip has been used for over 25 years, according to former committee staff members . . .”).

government in opposition rules created by the National Pact of 1943 were initially very popular and broadly effective. With time, though, Muslim leaders began to criticize these rules as unrepresentative of the new demographics of the country.<sup>218</sup> Likewise, demographics had shifted, so that the initial six to five Christian to Muslim ratio for parliamentary elections was outdated and the size of the Muslim population had probably surpassed the size of the Christian population.<sup>219</sup> So, to ensure that government in opposition rules remain legitimate and current, they should be negotiated with some frequency.

Finally, one other design question related to government in opposition rules is whether to make them available to losing as well as winning political coalitions; using the terminology of this Article, then, the question is whether these rules should be generally applicable. The experience with generally applicable government in opposition rules is similar to the experience with government in opposition rules that are optional or encouraged; powerful winning coalitions are able to minimize the degree to which losing political coalitions actually benefit from these rules. When government in opposition rules are made broadly available to winning and to losing political coalitions, winning political coalitions—with their greater resources and political appeal—are able to prevent losing political coalitions from benefiting from these rules.

Again, the experience with the Blair Government once it first came into power is instructive. Not only did the Blair Government reduce the time permitted for Prime Minister's Questions and the amount of questions that it would answer as part of its Question Days procedure, but it also dominated the Question Days procedure. With more members of Parliament, and therefore more assistants working for those members of Parliament, Blair's Labour Party had a greater capacity to use the Question Days procedure, even though it was formally available to the Labour Party and all other parties in Parliament.<sup>220</sup>

If losing coalitions and only losing political coalitions can use government in opposition rules, though, there are some other concerns. As a political matter, these rules—protecting only the interests of political minorities—might be seen as “quotas” in the way that certain political forces derailed the nomination of Lani Guinier to be Assistant Attorney General for Civil Rights for supporting proportionate representation.<sup>221</sup> Likewise, if winning political

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218. See Richard Hrair Dekmejian, *Consociational Democracy in Crisis: The Case of Lebanon*, 10 COMP. POL. 251, 254 (1978).

219. See Brenda M. Seaver, *The Regional Sources of Power-Sharing Failure: The Case of Lebanon*, 115 POL. SCI. Q. 247, 255-59 (2000).

220. See DURKIN & GAY, *supra* note 159, at 1.

221. One day after Guinier was nominated, the conservative press labeled her a “quota queen.” See Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12. This is what she

coalitions are entirely excluded from exercising certain powers or holding certain positions, it might bring us back to Adrian Vermeule's concern that submajority rules like government in opposition rules could be chronically unstable because they can always be reserved by the winning political coalition.<sup>222</sup> This is the flip side of Heather Gerken's arguments about how "dissenting by deciding" creates more responsible winners by sensitizing winners to the needs and concerns of losers.<sup>223</sup> If political losers exercise unilateral winners' powers—even if those exercises of winners' powers can be overturned by winning coalitions—then they might be less inclined to consider the interests of winning political coalitions, and so might not negotiate a compromise solution with winning coalitions that will prevent their actions from being constantly overturned.

### C. *The Constitutional Considerations*

As the previous several Sections discussed, the experience with government in opposition rules around the world, and the nature of the current American political scene—suggest that an American government in opposition regime should apply when there is divided government, and should require that, after negotiation, there be a certain minimum number of high-ranking government officials from the opposing political party. But could Congress do this by statute, the kind of framework statute that other recent pieces of legal scholarship have proposed as reforms to the American separation of powers regimes?<sup>224</sup> This is an interesting constitutional question, and one deserving of its own article. For now, I will offer some general thoughts about some of the constitutional considerations involved in such a framework statute.

Congress could almost certainly pass a statute requiring that, after negotiations after each congressional election, the losing political coalition be awarded a certain number of committee chair positions and be given other powers in Congress. Congress has passed other major pieces of legislation that

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was called going forward, even though she actually *opposed* quotas. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 19, 189 (1994).

222. See Vermeule, *supra* note 2, at 88 (“[S]ubmajoritarian decisions are exposed to reversal by subsequent majorities, and might thus be chronically unstable.”).

223. See Gerken, *Dissenting by Deciding*, *supra* note 2.

224. Bruce Ackerman has proposed that Congress could exercise broad executive emergency powers by increasing supermajorities through a framework statute. See Ackerman, *supra* note 3, at 1077 (“Throughout the twentieth century, Congress has enacted ‘framework statutes’ that have sought to impose constitutional order on new and unruly realities that were unforeseen by the Founders. The same technique will serve us well here.”).

regulate internal congressional procedures, such as the Legislative Reorganization Act of 1946 about congressional committee jurisdiction and chair powers.<sup>225</sup> The weightier constitutional questions arise when we discuss whether Congress could pass a statute commanding the President to appoint members of losing political coalitions to executive and judicial positions.

Since government in opposition rules are meant to give members of losing political coalitions substantial winners' powers, we are talking more about what the Constitution says about the appointment of "principal officers."<sup>226</sup> To the extent that Congress can control whom the President may appoint as principal officers, much depends on the amount of executive power to be exercised by these principal officers.<sup>227</sup> The framework government in opposition statute discussed in this Article would require the President to appoint as cabinet officials certain members of the opposing political party, so presumably he would be appointing these officials to positions in which they would exercise executive power.

There are no cases directly addressing the constitutionality of the forms of statutory limitations on the President's appointment of principal officers imagined by a government in opposition framework statute. There is a long historical practice of Congress placing some statutory limitations on the President's power to appoint, and *Myers v. United States*<sup>228</sup> seems to indicate these limitations are constitutionally acceptable since "[b]oth the majority and dissent in *Myers v. United States* agreed that statutory qualifications for officeholders were generally constitutional."<sup>229</sup> Going as far back as the

225. Ch. 753, 60 Stat. 812 (1946); see George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 AM. POL. SCI. REV. 41, 59-62 (1951) (discussing the importance of this statute for congressional organization).

226. For the constitutional text supporting the distinction between "inferior" and "principal" officers, see U.S. CONST. art. II, § 2.

227. *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986) ("To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws . . . is constitutionally impermissible.").

228. 272 U.S. 52 (1926).

229. Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 772 (2008); see *Myers*, 272 U.S. at 128-29 (deciding that limitations on the President's Appointments Power are constitutional); *id.* at 265 (Brandeis, J., dissenting) ("Every President has consistently observed [statutory qualifications for officeholders]. This is true of those offices to which he makes appointments without the advice and consent of the Senate as well as of those for which its consent is required."); see also *Bowsher*, 478 U.S. at 740 (Stevens, J., concurring) ("[I]t is entirely proper for Congress to specify the qualifications for an office that it has created . . .").



Judiciary Act of 1789, Congress has placed limitations on whom the President could appoint even to cabinet positions such as Attorney General.<sup>230</sup> Congress has also placed many statutory limitations on who could hold other positions that, while perhaps still executive in nature, are certainly less executive in nature than the power exercised by an official like the Attorney General.<sup>231</sup> There are those who are critical of this practice,<sup>232</sup> but this practice is certainly long and substantial.

Congressionally imposed constraints on the President's power of appointment become more constitutionally problematic, though, when they remove entirely the President's power to choose whom he or she desires to become a "principal officer." In the statutory regimes discussed above, the President still ultimately decides whom to appoint, and Congress only limits what types of people qualify for positions—but still ultimately leaves it to the President to choose among many thousands or even millions of options of whom to appoint to a principal officer position. Even when the President faces limitations on the power to appoint based on partisan identity—such as in the case of the Federal Communications Commission and other independent agencies, where "agency statutes require political balance, i.e., no more than a bare majority of members of multi-member agencies may come from the same political party, but there are exceptions"<sup>233</sup>—the President still ultimately decides whom precisely to appoint.

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230. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93 (1789) (requiring that the Attorney General be "learned in the law"); see, e.g., *Myers*, 272 U.S. at 265-74 (Brandeis, J., dissenting) (collecting a large number of statutes prescribing qualifications for officeholders between 1789 and 1926).
231. See, e.g., 2 U.S.C. § 437c(a)(1) (2006) (giving political party requirements for members of FEC); 6 U.S.C. § 313(c)(2) (listing professional experience requirements for the Administrator of FEMA); 29 U.S.C. § 12 (requiring that the Director of the Women's Bureau at the Department of Labor must be a woman); 31 U.S.C. § 703(a) (establishing appointment of the Comptroller General and Deputy Comptroller General by the President, by and with the advice and consent of the Senate, from a list of three or more individuals prepared by a nominating commission); An Act To Provide a Government for the Territory of Hawaii, ch. 339, § 66, 31 Stat. 141, 153 (1900) (noting citizenship and age requirements for the territorial governor of Hawaii); An Act To Remodel the Diplomatic and Consular Systems of the United States, ch. 133, § 9, 10 Stat. 619, 623 (1855) (establishing a citizenship requirement for diplomatic officials, some of whom have confirmation appointments).
232. See, e.g., 13 Op. Off. Legal Counsel 248, 250 (1989) (arguing that statutory qualifications for principle officers are unconstitutional, but not stating an opinion about statutory qualifications for inferior officers); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y. 467, 534-35 (1998).
233. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1139 (2000).

The framework statute suggested by this Part, though, envisions the opposition party in the United States unilaterally identifying whom to appoint to a principal officer position, similar to the predominant government in opposition model in use around the world. The American statute is structured this way precisely to constrain presidential authority during times of unified government; to ensure that the President cannot pick a moderate member of the opposing party, who could very easily become another presidential supplicant. In the government in opposition regime suggested for the United States in this Article, for instance, President-elect Obama would not have the chance to appoint any Republican to be his Secretary of Defense, thereby giving him the chance to appoint a more bipartisan or left-leaning Republican (perhaps someone such as Secretary of Defense Robert Gates). Instead, the Republican Party would themselves nominate precisely whom they want to serve as Obama's Secretary of Defense (perhaps obliging Obama to accept someone such as John McCain).

This element of the framework statute is what might make the statute unconstitutional under constitutional doctrine, particularly after *Buckley v. Valeo*,<sup>234</sup> and therefore permissible only after a constitutional amendment. Alternatively, the framework statute could be modified still to constrain the President, but giving the President more power than simply forcing him or her to accept whomever the opposition party deems desirable for an appointment. For instance, the opposition party might provide the President with a list of names, and the President would have complete discretion to choose from that list of names. In this way, the threat of an omnipotent President during times of unified government is somewhat constrained (since the President cannot appoint anyone), but the President still holds the ultimate power to appoint (since the President chooses whom to appoint from the list provided by the opposite party).

Regardless of the constitutional issues, could a framework statute—or, for that matter, a constitutional amendment creating government in opposition rules—ever really happen? Both John McCain<sup>235</sup> and Barack Obama<sup>236</sup>

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234. 424 U.S. 1, 127 (1976) (noting that the constitutional problems with the statute for the Federal Election Commission include that “with respect to four of the six voting members of the [Federal Election] Commission, neither the President, the head of any department, nor the Judiciary has any voice in their selection”).

235. See, e.g., *McCain: I Will Appoint Democrats to My Cabinet*, FOX NEWS, Sept. 7, 2008, available at [http://right-mind.us/blogs/blog\\_o/archive/2008/09/09/62962.aspx](http://right-mind.us/blogs/blog_o/archive/2008/09/09/62962.aspx) (“Republican John McCain said Sunday if he’s elected president, he will appoint Democrats to his Cabinet.”).

236. See, e.g., Sarah Baxter, *Brainstorming Obama Plans To Pick Republicans For Cabinet*, TIMES OF LONDON, Mar. 2, 2008, available at <http://www.timesonline.co.uk/tol/news/world/>

mentioned during their campaigns their desire to appoint members of the opposing party to their cabinet. More broadly, the political scene in the United States features the same elements that led to the creation of government in opposition rules in other countries: a close division of popularity between a finite number of political parties and an increasing polarization and intensity of preferences divided among this finite number of parties. In these situations, political parties and their leaders in other countries have jointly agreed to create government in opposition rules, to protect their parties and their interests in case they do end up in the minority after certain elections.<sup>237</sup>

## CONCLUSION

At a time when British politics has been dominated by exceptionally large figures—titans with names like Blair and Thatcher—Edward Short is a relatively simple figure. He does not come from great wealth, and he has served rather inconsequentially in a few leadership positions in British politics. Short might best be known as the oldest current living member of the Parliament of Great Britain at ninety-six years old. But Short's revolution in separation of powers will outlast him and all of us. Short might not have the brilliance of a Madison or a Montesquieu, but his innovations in separation of powers have been almost as consequential. Short triggered much of the current government in opposition system in Britain, which in turn has inspired the similar regimes around the world that have been the subject of this Article. And these changes have been as revolutionary and consequential as any other constitutional modifications of the past several decades.

The system that Short helped create, which this Article calls government in opposition, has changed the relationship between majorities and minorities, and between electoral winners and electoral losers. Elections are not zero-sum games, with the winners controlling all of the levers of power. Now, those who lose an election will maintain some control, some capacity to influence power. This otherwise simple idea has become complicated, because it has manifested

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us\_and\_americas/us\_elections/article3466823.ece ("Obama is hoping to appoint cross-party figures to his cabinet such as Chuck Hagel, the Republican senator for Nebraska and an opponent of the Iraq war, and Richard Lugar, leader of the Republicans on the Senate foreign relations committee.").

237. See Shannon Roesler, *Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority*, 32 LAW & SOC. INQUIRY 545, 555 (2007) (discussing new scholarship that argues that the "configuration that makes future electoral victory uncertain for the constitutional drafters favors a constitution delegating substantial authority to a constitutional court").

itself in many forms in many countries around the world, and in constitutional systems of all varieties and ages.

An idea like this spreads because it works, and because it has much to offer the constitutions of the countries that have adopted it. Fragile democracies concerned about coups and revolutions can ensure that perpetual and permanent constraints on majorities will prevent that from happening. Stable democracies concerned about the more stable yet still potent hubris of electoral majorities can temper that hubris with the power granted to electoral minorities in government in opposition systems. All voices are represented in government, not just in dissent but in governing. And bureaucracies can use their expertise to pursue good policy, without letting good politics interfere.

These are generalities for all constitutions, but the specifics are just as compelling. Constitutions around the world might benefit from Short's insights, but the United States in particular can learn from Short as well. The past eight years placed debates about separation of powers at the heart of the meaning of our Constitution, as central to the American constitutional debate as questions about abortion and affirmative action. Discussions in the Supreme Court about the War on Terror, in cases like *Hamdi* and *Hamdan*, have been mostly about the optimal division of power between our branches of government. And, at the end of the day, while our centuries of experience have much to offer us, Short's ideas about the separation of powers, and their manifestations around the globe, can show the way for an American and a global separation of powers for the future.

