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## Separation of Parties, Not Powers

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## SEPARATION OF PARTIES, NOT POWERS

*Daryl J. Levinson\** & *Richard H. Pildes\*\**

*American political institutions were founded upon the Madisonian assumption of vigorous, self-sustaining political competition between the legislative and executive branches. Congress and the President would check and balance each other; officeholders would defend the distinct interests of their distinct institutions, and ambition would counteract ambition. To this day, the idea of building self-sustaining political competition into the structure of government is frequently portrayed as the unique genius of the U.S. Constitution and largely credited for the success of American democracy. Yet the truth is closer to the opposite. The success of American democracy overwhelmed the branch-based design of separation of powers almost from the outset, preempting the political dynamics that were supposed to provide each branch with a will of its own. What the Framers did not count on was the emergence of robust democratic competition, in government and in the electorate. Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties. Parties came to serve as the primary organizational vehicle for mobilizing, motivating, and defining the terms of democratic political competition, creating alliances among constituents and officeholders that cut across the boundaries between the branches and undermined Madisonian assumptions of branch-based competition. Few aspects of the Founding generation's political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers. Nevertheless, few of the Framers' ideas continue to be taken as literally or sanctified as deeply by courts and constitutional scholars as the passages about interbranch relations in Madison's *Federalist* 51. This Article reenvision the law and theory of separation of powers by viewing it through the lens of party competition. In particular, it points out that during periods — like the present — of cohesive and polarized political parties, the degree and kind of competition between the legislative and executive branches will vary significantly and may all but disappear, depending on whether party control of the House, Senate, and presidency is divided or unified. The practical distinction between party-divided and party-unified government thus rivals, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics. Recognizing that these dynamics will shift from competitive when government is divided to cooperative when it is unified calls into question basic assumptions of separation of powers law and theory. More constructively, refocusing the separation of powers on parties casts numerous aspects of constitutional structure, doctrine, and institutional design in a new and more realistic light.*

### INTRODUCTION

Describing a set of “wholly new discoveries” in the “science of politics” that might enable democratic self-government to succeed in the

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American republic, Alexander Hamilton listed first the “balances and checks” that distinctively characterize the American system of separation of powers.<sup>1</sup> In Madison’s ingenious scheme of separated powers, “the interior structure of the government” would be “so contriv[ed]” “as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>2</sup> By institutionalizing a differentiation between executive and legislative powers (as well as by dividing the legislature into two chambers), the separation of powers would harness political competition into a system of government that would effectively organize, check, balance, and diffuse power. What is more, the system would be self-enforcing, relying on interbranch competition to police institutional boundaries and prevent tyrannical collusion. In the Framers’ Newtonian vision, the separation of powers was to be “a machine that would go of itself.”<sup>3</sup>

To this day, the idea of self-sustaining political competition built into the structure of government is frequently portrayed as the unique genius of the U.S. Constitution, the very basis for the success of American democracy.<sup>4</sup> Yet the truth is closer to the opposite. The success of American democracy overwhelmed the Madisonian conception of separation of powers almost from the outset, preempting the political dynamics that were supposed to provide each branch with a “will of its own” that would propel departmental “[a]mbition . . . to counteract ambition.”<sup>5</sup> The Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate. Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties. As competition between the legislative and executive branches was displaced by competition be-

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<sup>1</sup> THE FEDERALIST NO. 9, at 72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>2</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 320.

<sup>3</sup> MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 17–18 (1986) (summarizing the use of the “machine” metaphor in constitutional rhetoric of the late eighteenth century). Led by Woodrow Wilson, Progressives later turned this rhetoric back on itself. See WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54–55 (Transaction Publishers 2002) (1908) (“The government of the United States was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy of the Newtonian theory of the universe. In our own day, whenever we discuss the structure or development of anything, whether in nature or in society, we consciously or unconsciously follow Mr. Darwin; but before Mr. Darwin, they followed Newton.”).

<sup>4</sup> See, e.g., Hugh Heclo, *What Has Happened to the Separation of Powers?*, in SEPARATION OF POWERS AND GOOD GOVERNMENT 131, 134 (Bradford P. Wilson & Peter W. Schramm eds., 1994) (“[T]he framework of 1787 has proven durable because the dynamics set up in its allocations of power have usually operated more or less as intended.”); Arthur M. Schlesinger, Jr., *The Constitution and Presidential Leadership*, 47 MD. L. REV. 54, 65 (1987) (“The separation of powers is the vital means of self-correction in our system. . . . It is the ultimate guarantee of the system of accountability.”).

<sup>5</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 321–22.

tween two major parties, the machine that was supposed to go of itself stopped running.

Few aspects of the founding generation's political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers. Nevertheless, few of the Framers' ideas continue to be taken as literally or sanctified as deeply by courts and constitutional scholars as the passages about interbranch relations in Madison's *Federalist 51*. To this day, Madison's account of rivalrous, self-interested branches is embraced as an accurate depiction of political reality and a firm foundation for the constitutional law of separation of powers. In the Madisonian simulacrum of democratic politics embraced by constitutional doctrine and theory, the branches of government are personified as political actors with interests and wills of their own, entirely disconnected from the interests and wills of the officials who populate them or the citizens who elect those officials. Acting on these interests, the branches purportedly are locked in a perpetual struggle to aggrandize their own power and encroach upon their rivals. The kinds of partisan political competition that structure real-world democracy and dominate political discourse, however, are almost entirely missing from this picture.<sup>6</sup>

As this Article describes, the invisibility of political parties has left constitutional discourse about separation of powers with no conceptual resources to understand basic features of the American political system. It has also generated judicial decisions and theoretical rationalizations that float entirely free of any functional justification grounded in the actual workings of separation of powers. Ignoring the reality of parties and fixating on the paper partitions between the branches, the law and theory of separation of powers are a perfect fit for the government the Framers designed. Unfortunately, they miss much of the government we actually have.

Ironically, one of the few places in constitutional law where parties do appear is in the most celebrated judicial opinion of the separation of powers canon, Justice Jackson's concurrence in the *Youngstown* case.<sup>7</sup> After laying out his now-familiar tripartite categorization of executive action, Justice Jackson went on to emphasize that modern separation of powers analysis must understand the powers and motivations of the branches of government in light of their relation to political parties:

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<sup>6</sup> There have been a handful of important, recent exceptions. See, e.g., MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003) (basing analysis of constitutional structures on the assumption that American government will be divided for years to come); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000). Note the "new" in these titles. In an insightful essay, Professor James Gardner makes similar points to some we raise here about the effects of party competition on Madison's vision of separation of powers. See James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN'S L. REV. 293, 308 (2005).

<sup>7</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.<sup>8</sup>

Justice Jackson astutely recognized that the separation of powers no longer works as originally envisioned because interbranch dynamics have changed with the rise of political parties, which by the time of *Youngstown*, had long diminished the incentives of Congress to monitor and check the President. Yet this part of Justice Jackson's opinion has been ignored entirely. Even after decades of dissecting Justice Jackson's *Youngstown* opinion, neither the Supreme Court nor any other federal court has ever quoted this critical insight, nor has it received much notice by legal scholars.<sup>9</sup> Justice Jackson's sophisticated realism about the workings of government is widely admired by constitutional lawyers, but his most penetrating realist insight — recognizing party competition as a central mechanism driving the institutional behavior that separation of powers law aims to regulate — has been missed.

This Article seeks to recover and build upon Justice Jackson's insight, reenvisioning the law and theory of separation of powers by viewing them through the lens of party competition. We emphasize that the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party. The practical distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics. 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. It also allows us to see numerous aspects of legal doctrine, constitutional structure, comparative constitutionalism, and institutional design in a new and more realistic light.

The Article proceeds as follows. Part I lays out the conceptual case for switching the focus of separation of powers from branches to parties, arguing that political competition in government often tracks party lines more than branch ones. Recognizing that party competition can either create or dissolve interbranch competition, depending on whether government is

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<sup>8</sup> *Id.* at 654 (Jackson, J., concurring).

<sup>9</sup> It is cited, in passing, in two law review articles. See Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 345 (2005); Linda S. Greene, *After the Imperial Presidency*, 47 MD. L. REV. 99, 106 (1987).

unified or divided by party, suggests that the United States has not one system of separation of powers but (at least) two. Part II looks more closely at these dual — party-divided and party-unified — models of separation of powers and traces the history of divided and unified government in this country, including the historical variation in the coherence and polarization of the two major parties, which has significantly affected how the models work in practice. In particular, Part II emphasizes that the emergence of exceptionally strong and polarized parties in recent decades has exaggerated the functional differences between divided and unified government, with important implications for the normative aspirations of separation of powers.

Part III turns to implications for both constitutional law and democratic institutional design. With respect to constitutional law, Part III shows where conventional separation of powers analysis — based on the Madisonian model of inherently competitive branches checking and balancing one another — goes astray. The greatest threat to constitutional law’s conventional understanding of, and normative goals for, separation of powers comes when government is unified and interbranch political dynamics shift from competitive to cooperative. Part III then also takes up the challenge of imagining how law and political institutions might be reformed to restore the checks and balances that party unification undermines. In part, it does so by pursuing a strategy of institutional design, borrowing the idea of “opposition rights” from European parliamentary democracies to suggest avenues for recreating party competition within government institutions and revisiting the Progressive vision of a depoliticized bureaucracy as the “fourth branch” of government. Part III also explores the possibility of a more direct approach to the problem of strongly unified government: fragmenting, or moderating, the political parties themselves. In doing so, it brings us full circle, back to the Article’s animating recognition that the law and politics of separation of powers are continuous with, and inseparable from, the law and politics of democracy.

## I. FROM BRANCHES TO PARTIES

### A. *Madison and the Mechanisms of Political Competition*

According to the political theory of the Framers, “the great problem to be solved” was to design governance institutions that would afford “practical security” against the excessive concentration of political power.<sup>10</sup> Constitutional provisions specifying limited domains of legitimate authority were of minimal utility, for, as Madison explained, “a mere demarcation on parchment of the constitutional limits of the several departments is

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<sup>10</sup> THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 308.

not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”<sup>11</sup> The solution to this great problem was, instead, to link the power-seeking motives of public officials to the interests of their branches. By giving “those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others,” the Framers hoped to create a system in which competition for power among the branches would constrain each safely within its bounds.<sup>12</sup> With multiple government departments pitted against each other in a competition for power, an invisible-hand dynamic might prevail in which “[a]mbition [would] be made to counteract ambition.”<sup>13</sup>

Madison’s vision of competitive branches balancing and checking one another has dominated constitutional thought about the separation of powers through the present. Yet it has never been clear exactly how the Madisonian machine was supposed to operate.<sup>14</sup> Particularly puzzling is Madison’s personification of political institutions, his hope that each branch might come to possess “a will of its own.”<sup>15</sup> If branches of government pursued their own interests, and if these interests were similar to the power-mongering interests that the Framers attributed to individual political actors, then branches might indeed compete with one another for power. But of course, government institutions do not have wills or interests of their own; their behavior is a product of the wills or interests that motivate the individual officials who comprise them. Madison saw the need for a linkage between “the interest of the man” and “the constitutional rights of the place,”<sup>16</sup> but he never provided a mechanism by which the interests of actual public officials would be channeled into maintaining the proper role for their respective branches.<sup>17</sup>

From the modern perspective of consolidated democracy, it is hard to see how such a mechanism would arise. Even assuming, with the founding generation, that officeholders are driven by a “lust for self-aggrandizement,”<sup>18</sup> the structure of democratic politics effectively channels those ambitions into a different set of activities that has nothing to do with

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<sup>11</sup> *Id.* at 313.

<sup>12</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 321–22.

<sup>13</sup> *Id.* at 322.

<sup>14</sup> See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1158 (2000) (“Just how tension and competition [between the branches] are created and maintained is never clearly spelled out by courts or commentators.”).

<sup>15</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 321.

<sup>16</sup> *Id.* at 322.

<sup>17</sup> See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 282 (1996) (“Yet *Federalist 51* does not so much explain how these ambitions will work as assume that differences in election and tenure among the branches will foster the desired attachment . . .”).

<sup>18</sup> BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 59 (1967); see also *id.* at 56–59.

aggrandizing their departments or defending them against encroachments. Individual politicians gain and exercise power by winning competitive elections and effectuating political or ideological goals. Neither of these objectives correlates in any obvious way with the interests or power of branches of government as such. Madison's will-based theory of separation of powers would seem to require government officials who care more about the intrinsic interests of their departments than their personal interests or the interests of the citizens they represent. Democratic politics is unlikely to generate such officials.<sup>19</sup>

The founding generation's assumptions about the workings of representative democracy may help account for Madison's optimism. First, elections were not then conceived as the competitive contests they soon became. Instead, they were understood and practiced largely as matters of acclamation, focusing on personal qualities more than issues and interests and primarily serving to ratify existing social and political hierarchies.<sup>20</sup> George Washington's assumption of the presidency is a paradigmatic example. Second, to the extent political issues were discussed, it was in the civic republican vocabulary of disinterested concern for the common good, shunning explicit appeals to interest.<sup>21</sup> With large election districts for the House and indirect election of the Senate and President providing further insulation from the self-interested demands of constituents, it was possible to envision officeholders who would "refine and enlarge the public views" and whose "wisdom [might] best discern the true interest of their country."<sup>22</sup> In this kind of political, or apolitical, world, it was possible to imagine that, once elected, officeholders would not be tempted by constituent pressures and competing ideological or policy goals to sacrifice the constitutionally assigned duties and powers of their branches — simply because constituent pressures and divergent interests were kept to a minimum.

Less optimistically, the founding generation also had good reason to doubt whether representative democracy would work at all, and consequently, good reason to fear that government officials would pursue inter-

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<sup>19</sup> For a fuller explanation, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

<sup>20</sup> See ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 29 (1995). For a social and political history of transformations in the meaning and significance of elections, focused on the gradual emergence of competitive elections in England, see MARK A. KISHLANSKY, *PARLIAMENTARY SELECTION: SOCIAL AND POLITICAL CHOICE IN EARLY MODERN ENGLAND* (1986). For a theoretical account of the social and political significance of this shift in the way elections were understood and practiced, see DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 197–98 (1989).

<sup>21</sup> See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 294 (1991) (describing the transformation from a democracy of civic virtue in the late eighteenth century to the Jacksonian democracy of the 1820s, in which pursuit of more particularistic interests, expressed through partisanship and organized by parties, became widely accepted and legitimated).

<sup>22</sup> THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 82.

ests entirely disconnected not just from those of their nominal constituents, but from the public good as well. Madison's scheme for pitting competing branches against one another may have been meant only as a fail-safe, in case Antifederalist fears of radical democratic failure came to pass. If one branch fell under the control of a would-be monarch or tyrannical cabal, the other branches might provide a check by using their constitutional powers to block oppressive measures or, as the founding generation vividly recalled from the English Civil War, by leading an opposing army to fight for control of the state.<sup>23</sup> In the worst-case scenario, better to be ruled by several warring tyrants than a single omnipotent one. For the Federalist Framers, however, this kind of figurative and literal interbranch warfare was meant only as an "auxiliary precaution[]." <sup>24</sup> The "primary control on the government" would be its "dependence on the people,"<sup>25</sup> which would link the political self-interest of legislators to the interests of the voters who determined their professional fates.<sup>26</sup> If representative democracy worked as the Framers hoped, in other words, competition for power among the branches would be replaced by competition for power among politicians and groups of constituents.

In fact, this is just what happened: Madison's design was eclipsed almost from the outset by the emergence of robust democratic political competition. Rather than tying their ambitions to the constitutional duties or power base of their departments, officials responded to the material incentives of democratic politics in ways that now seem natural and inevitable: by forming incipient organizations that took sides on contested policy and ideological issues and by competing to marshal support for their agendas. These efforts led inexorably, though haltingly, to the organization of enduring parties that would facilitate alliances among groups of like-minded elected officials and politically mobilized citizens on a national scale.

The idea of political parties, representing institutionalized divisions of interest, was famously anathema to the Framers, as it had long been in Western political thought.<sup>27</sup> Equating parties with nefarious "factions," the Framers had attempted to design a "Constitution Against Parties."<sup>28</sup> But the futility of this effort quickly became apparent. By the end of the first Congress it had become clear that political competition organized around

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<sup>23</sup> See Gardner, *supra* note 6, at 300–02 (presenting and elaborating on this understanding of separation of powers as a constitutional "backup" system in case democracy failed).

<sup>24</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 322.

<sup>25</sup> *Id.*

<sup>26</sup> See THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 1, at 437 (arguing that representatives' hopes of "obtaining, by meriting, a continuance" in office would "make their interest coincide with their duty" to represent the best interests of their constituents).

<sup>27</sup> For a superb summary of the antiparty tradition that undergirded the Constitution, see GERALD LEONARD, *THE INVENTION OF PARTY POLITICS* 18–50 (2002).

<sup>28</sup> See RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840*, at 40 (1969).

issues and programs had the potential to divide coalitions of officeholders and cut through the constitutional boundaries between the branches. The earliest efforts toward alliance formation were initiated by Treasury Secretary Hamilton, who in 1790 began to recruit members of Congress to forge a coalition in favor of his economic development program. His leading congressional opponent, James Madison, joined with Thomas Jefferson to organize opposition. As the political battle in Congress intensified, both sides recognized the need to cultivate public support. By the 1796 elections, Federalists and Republicans had coalesced into competing groupings, with party leaders controlling nominations and, at least in some states, rudimentary party machinery organizing campaigns focused more on issues and platforms than on the local stature of the candidates.<sup>29</sup> When Congress convened in 1797, its members were clearly identified as Federalist or Republican and regularly voted along those lines. The precursors of the modern political party had taken root, planted by the very Framers who had authored a Constitution against them.<sup>30</sup>

To be sure, the early organizations, caucuses, and proto-parties were organized with regret and regarded as temporary expediences that would fade when the urgent need to defeat a treasonous enemy had passed<sup>31</sup> — as they did, to some extent, after the collapse of the Federalist Party inaugurated the “Era of Good Feelings.”<sup>32</sup> The Jacksonian period, however, brought lasting recognition and acceptance of a “party system” of democratic politics: an ongoing competition, as Professor Richard Hofstadter later defined it, between stable, organized parties, alternating power and control within shared acceptance of a constitutional framework.<sup>33</sup> Acceptance of this idea has rightly been called a “revolution in political structure [that] lies at the foundation of modernity.”<sup>34</sup>

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<sup>29</sup> This story is told in more detail in Larry D. Kramer, *After the Founding: Political Parties and the Constitution 82–181* (May 2003) (unpublished manuscript, on file with the Harvard Law School Library).

<sup>30</sup> This is an oft-noted irony in American history. See, e.g., BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 16–26 (2005).

<sup>31</sup> See RICHARD BUEL, JR., *AMERICA ON THE BRINK: HOW THE POLITICAL STRUGGLE OVER THE WAR OF 1812 ALMOST DESTROYED THE YOUNG REPUBLIC* 4 (2005) (“[N]ational politics in the early Republic was a gentry preserve dominated by men schooled in factional instead of party politics.”); RON CHERNOW, *ALEXANDER HAMILTON* 392 (2004) (“[T]he inchoate party system [was] [o]nly loosely united by ideology and sectional loyalties . . . [and] can seem to modern eyes more like amorphous personality cults.”); LEONARD, *supra* note 27, at 30–31.

<sup>32</sup> Cf. Theodore J. Lowi, *President v. Congress: What the Two-Party Duopoly Has Done to the American Separation of Powers*, 47 *CASE W. RES. L. REV.* 1219, 1221–22 (1997) (“The so-called Era of Good Feelings (1808–1828) . . . gave America its first experience with genuine party government — which means one-party government with occasional alternation of which party governs.”).

<sup>33</sup> HOFSTADTER, *supra* note 28, at 4–5. For a portrayal of the interrelated development of the practices and ideas that eventually produced widespread acceptance of political party competition as the natural, appropriate condition of democracy, see LEONARD, *supra* note 27.

<sup>34</sup> LEONARD, *supra* note 27, at 1. By the Jacksonian period, even Madison’s views about the desirability, as opposed to mere necessity, of parties seemed to have softened. Madison had famously

Certainly, the rise of partisan politics worked a revolution in the American system of separation of powers, radically realigning the incentives of politicians and officeholders. As an initial example, consider the role of parties in transforming the presidency into a genuinely independent counterweight to Congress. During the country's first forty years or so, a chasm emerged between the predicted and actual effects of the constitutional design on the President's capacity to stand apart from Congress. The Framers had specifically rejected congressional appointment of the President on the ground that making the President reliant on congressional support would deny him the requisite independence.<sup>35</sup> Yet after Washington's presidency, party caucuses in Congress quickly became the mechanism for identifying and selecting credible presidential candidates. The rise of legislative parties as gatekeepers for the presidency, together with the expectation that elections would often be decided in the House of Representatives (as they were in two of the four open-seat presidential elections from 1800 to 1824), meant that Congress played a major role in selecting the President.<sup>36</sup> As a result, the American government effectively operated for much of its first forty years with a congressionally dominated fusion of legislative and executive powers.<sup>37</sup> So much for Madison's prediction that separated powers would create checks and balances by joining "the interest of the man" with "the constitutional rights of the place."<sup>38</sup> The political interests of the man who held the presidency, it turned out, had little to do with furthering some abstract conception of the presi-

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equated political parties with factions, not just in writing *Federalist No. 10*, but throughout the early battles between Federalists and Republicans. Yet by 1821 he had seemingly come to the view that parties were "a natural offspring of Freedom." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 452 (Max Farrand ed., rev. ed. 1966).

<sup>35</sup> RAKOVE, *supra* note 17, at 259. Both the Virginia and New Jersey plans had provided for election of the President by Congress, and the Constitutional Convention initially endorsed such a system. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 12-13 (4th rev. ed. 1957).

<sup>36</sup> See CORWIN, *supra* note 35, at 19.

<sup>37</sup> See Lowi, *supra* note 32, at 1221-22 ("Little of this bore any resemblance to the Constitution's design, except perhaps the separate names for the three separate Branches."). The Presidents holding office between Washington and Jackson vetoed only eight bills, and Madison vetoed seven of them. See Office of the Clerk, U.S. House of Representatives, *Presidential Vetoes*, [http://clerk.house.gov/histHigh/Congressional\\_History/vetoes.html](http://clerk.house.gov/histHigh/Congressional_History/vetoes.html) (last visited May 14, 2006) [hereinafter *Presidential Vetoes*]. During this period the President was not even powerful enough to fully name his own Cabinet; after Jefferson's presidency, Presidents felt obligated to keep in office much of their predecessor's Cabinet, and when the Cabinet convened, the President considered each of his Cabinet members' votes equal to his own. As a result, a leading presidential historian comments that during this period, "the presidency was in commission." CORWIN, *supra* note 35, at 19; see also MARSHALL SMELSER, *THE DEMOCRATIC REPUBLIC, 1801-1815*, at 318 (1968) ("The rise of the congressional nominating caucus was a principal cause of the decline of presidential power and made the President, in a sense, the creation of Congress."). For a summary of congressional debate on whether the caucus system made the President too dependent on Congress, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS, THE JEFFERSONIANS, 1801-1829*, at 341 n.158 (2001).

<sup>38</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 322.

gency's proper role, but were instead rooted in the necessity of winning and keeping office. Presidents maximized their political prospects not by creating an independent "will" for the executive branch or competing with Congress for power, but instead by acquiescing in congressionally dominated government.

Not until the presidency of Andrew Jackson did American government begin to resemble in practice the Madisonian system of separation of powers that existed on paper. Jackson was the first President to circumvent Congress by appealing directly to the people, claiming that his office embodied the American people as a whole. His revolutionary use of the veto was a telling manifestation of this claim.<sup>39</sup> As a leading historian of the presidency puts it, for the first time the presidency "was thrust forward as one of three *equal* departments of government, and to each and every of its powers was imparted new scope, new vitality."<sup>40</sup>

The inauguration of the independent presidency under Jackson was made possible by two institutional changes, both emerging from the invention of political parties. First, Martin Van Buren's creation of the mass-scale political party generated pressure for popular control over presidential nominations, leading to the replacement of the congressional caucus system by national nominating conventions as of 1832.<sup>41</sup> Second, the Democratic Party's novel practice of running presidential electors pledged in advance to vote for particular candidates undermined the electoral college by turning it into a mere tabulating device, one likely to yield a majority winner; this all but eliminated the role of the House of Representatives in resolving presidential elections.<sup>42</sup> Taken together, these two institutional changes wrested control of the presidency away from Congress by forging an independent, popular electoral base for the President.<sup>43</sup>

Thus, it took the mass-scale Democratic Party of Van Buren and Jackson to create the possibility of Madisonian competition between Congress and the President that the original constitutional design had promised but

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<sup>39</sup> Jackson vetoed more bills than all previous Presidents combined, *Presidential Vetoes*, *supra* note 37, including his famous veto of the Second Bank of the United States, which was accompanied by the strongest statement of the presidency's independent role that had thus far been issued in American history. See ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR 177-78* (1967). Even the course of his vetoes reflected the increasing functional separation of the Presidency from Congress: Jackson's early vetoes were based on constitutional objections, traditionally a more widely accepted basis for exercise of the veto, while his later ones rested on mere policy disagreement with Congress. See *id.*

<sup>40</sup> CORWIN, *supra* note 35, at 21.

<sup>41</sup> JAMES S. CHASE, *EMERGENCE OF THE PRESIDENTIAL NOMINATING CONVENTION, 1789-1832*, at 294-95 (1973).

<sup>42</sup> See LEONARD, *supra* note 27, at 13-14.

<sup>43</sup> See, e.g., Lowi, *supra* note 32, at 1222-23.

failed to deliver.<sup>44</sup> For all of the Framers' aversion to parties, credit for the belated birth of genuinely separated powers must go to the mass political party — the embodiment of the factionalized politics the Framers most loathed. One failure of constitutional design was corrected, ironically, by another.

The correction, however, was neither permanent nor complete. Just as parties can create the conditions necessary for interbranch competition to emerge, they can also submerge competition by effectively reuniting the branches. As we elaborate below, if government officials are motivated primarily by policy and partisan goals, then single-party control of multiple branches of government will tend to create cross-branch cooperation among like-minded officeholders.<sup>45</sup> Once again, parties can — and often do — change the relationship between Congress and the President from competitive to cooperative.

For present purposes, however, it is enough to see that from the outset of government under the Constitution, practical politics undermined the Madisonian vision of rivalrous branches pitted against one another in a competition for power. The emergence of a robust system of democratic politics tied the power and political fortunes of government officials to issues and elections. This, in turn, created a set of incentives that rendered these officials largely indifferent to the powers and interests of the branches *per se*.<sup>46</sup> In Madison's terms, "the interests of the man" have become quite disconnected from the interests of "the place."

Instead, the electoral and policy interests of politicians have become intimately connected to political parties. Since the early conflicts between Federalists and Republicans, politicians have affiliated themselves with the party whose platform comes closest to their own policy preferences, and parties, in turn, have exerted influence over members' policy goals and their ability to achieve them in office. The result has been a strong correlation between party affiliation and political behavior. Even the most casual observer of Washington politics understands that congressional opposition to a President's initiatives and nominees will come predominantly, if not entirely, from members of the opposite party.

To observe that the political interests of elected officials generally correlate more strongly with party than with branch is not to assert that political interests perfectly track party affiliation. They obviously do not. For well-understood structural reasons, American parties have never achieved the near-perfect unity of political parties in European parliamentary systems. In the American system, policy agreement and disagreement on

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<sup>44</sup> See, e.g., LEONARD, *supra* note 27, at 117–55 (documenting that conventions and "party organization [were viewed as] necessary to effect an informal amendment of the Constitution, to take presidential elections permanently out of the House and put them reliably in the hands of the people").

<sup>45</sup> See *infra* notes 54–57 and accompanying text.

<sup>46</sup> For an analysis of these incentives, see Levinson, *supra* note 19, at 923–37.

some issues has been, and continues to be, structured along lines that cross-cut party affiliations. On certain aspects of trade and environmental policy, for example, the relevant cleavages may correspond more closely to geography and interest group support than to party.<sup>47</sup> And sometimes the lines of policy disagreement actually do correspond to the branches, reflecting the divergent preferences of the different temporal and geographical majorities that the House, Senate, and President represent (as opposed to the institutional interests of the branches as such). Conventional wisdom has it, for example, that the President tends to focus more on national-scale problems and is generally inclined to resist the persistent efforts of Congress to dole out local pork.<sup>48</sup> This creates the possibility, and occasionally the reality, of political battles between the branches — not because anyone has any intrinsic interest in the power of the branches qua branches, but simply because, on some issues, branch affiliation will correlate with policy preferences (and party affiliation will not). When it comes to highway bills, party labels may fall by the wayside.

Nevertheless, the bottom line remains that in the broad run of cases — which is, after all, the relevant perspective for constitutional law — party is likely to be the single best predictor of political agreement and disagreement.<sup>49</sup> As E.E. Schattschneider noticed more than half a century ago:

The parties are able to compel public officers to behave in ways that the law does not contemplate, by methods of which the law is ignorant, without in any way affecting the validity of their official acts. . . . Since the parties operate in a legal no man's land they are able to produce startling effects: in effect they may empty an office of its contents, transfer the authority of one magistrate to another magistrate or to persons unknown to the constitution and laws of the land.<sup>50</sup>

It is impossible to grasp how the American system of government works in practice without taking account of how partisan political competition has reshaped the constitutional structure of government in ways the Framers

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<sup>47</sup> DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 215–16 (2d ed. 2005).

<sup>48</sup> See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 34–36 (1995); see also DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 127–28 (1974). But see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. REV.* (forthcoming June 2006).

<sup>49</sup> See, e.g., Samuel C. Patterson & Gregory A. Caldeira, *Party Voting in the United States Congress*, 18 *BRIT. J. POL. SCI.* 111, 111 (1988) (“Despite the fact that the congressional parties are weak by European standards, research on congressional decision making has repeatedly shown that ‘party’ remains the chief and most pervasive influence in Congress.”). The leading college textbook on American government concludes, “[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.” JAMES Q. WILSON & JOHN J. DI IULIO, JR., *AMERICAN GOVERNMENT: INSTITUTIONS AND POLICIES* 340 (10th ed. 2006).

<sup>50</sup> E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 12 (1942).

would find unrecognizable. Yet the constitutional law and theory of separation of powers has proceeded, for the most part, as if parties did not exist and the branches behaved in just the way Madison imagined.<sup>51</sup>

*B. Presidential, Parliamentary, and Party Government*

In contrast to courts and constitutional scholars, political scientists have long appreciated political parties' leading role in enforcing the separation of powers, though from the opposite normative perspective. Their focus on parties emerges from a traditional line of political thought juxtaposing the American "presidential" system of separation of powers with the classic British system of parliamentary government. In contrast to the Madisonian model, in which democratic legitimacy and lawmaking authority are formally divided between the independently elected President and Congress, the Westminster executive is formed by the legislative majority and essentially wields plenary control over governance. Power in the Westminster system is unified, not separated.

For admirers of the British system, the Madisonian design was critically flawed in its inception. The parliamentary critique of the American separation of powers dates back at least to the early Woodrow Wilson, who, writing in the late nineteenth century, saw the Framers' decision to divide powers between Congress and the Executive as a "grievous mistake."<sup>52</sup> Wilson argued that Madisonian government was dramatically ineffective and vulnerable to paralysis and stalemate because significant policymaking could not be accomplished without somehow inducing cooperation between the inherently competitive political branches. He also argued that, because voters had no single government institution on which to focus political credit or blame, the constitutional separation of powers sacrificed democratic accountability. Wilson judged the parliamentary system's unification of authority and responsibility in the prime minister and his cabinet to be clearly superior along both of these dimensions.

Wilson's parliamentary critique of presidential government became the conventional wisdom of the field he founded and has been reiterated and elaborated by political scientists through the present.<sup>53</sup> But political

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<sup>51</sup> We hasten to recognize that there are a number of important exceptions, which we build upon in this Article. For recognition of the role of parties, see sources cited *supra* note 6. For skepticism about unitary branch interests, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1518 (1991) and M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 605 (2001).

<sup>52</sup> WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 187 (Johns Hopkins Univ. Press 1981) (1885); see also Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 684–706 (1993) (describing the intellectual history of this critique).

<sup>53</sup> See Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1531 n.170 (1994) (describing the view that "there are systematic failures in our constitutional system" as "an article of faith in the political science profession for at least forty years").

scientists have also appreciated the ironic possibility that political parties could redeem American government from its inherently flawed constitutional structure. As the standard argument goes, “the institutions that the framers had so deliberately separated had to be brought together in some degree of unity for the government to function — and the instrument for that purpose was the political party.”<sup>54</sup> By uniting the interests of government officials across branch lines, the hope is that parties might defeat the Framers’ design and, in practice, fuse the formally separated legislature and Executive into a second-best approximation of Westminster. This view, which has both descriptive and normative components, has been known as the doctrine of “(responsible) party government.”<sup>55</sup>

The party government view is premised on the widespread belief among political scientists that party lines predict political behavior better than branch ones. If instead the political interests of members of Congress and the President correspond predominantly to branch membership, then regardless of party we would expect to see competition rather than cooperation between the branches — just as Madison envisioned, the early Wilson feared, and courts and constitutional theorists continue to take for granted. This would make parties at best peripheral features of the political system — which, again, is exactly how they have generally been regarded by constitutional scholars.<sup>56</sup> If parties are to link “the executive and legislative branches in a bond of common interest,”<sup>57</sup> then party identification must dominate branch identification. Generations of political scientists have proceeded from this well-grounded assumption, putting them precisely at odds with generations of constitutional lawyers.

But another necessary condition for successful party government, of course, is that the *same* party control both the legislative and executive branches. When control is divided between parties, we should expect party competition to be channeled through the branches, resulting in inter-branch political competition resembling the Madisonian dynamic of rivalrous branches (perhaps even fueling more extreme competition than the Framers envisioned). True, the underlying mechanism would be entirely different: branches would continue to lack wills of their own, and politicians would continue to lack any interest in the power of branches qua

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<sup>54</sup> JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 90 (rev. ed. 1992).

<sup>55</sup> See AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE* (1954).

<sup>56</sup> Among public law scholars who specialize in the law of democracy and election law, of course, political parties have long occupied a central place in legal scholarship. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 345–448 (2d rev. ed. 2002) (summarizing case law and scholarship related to political parties).

<sup>57</sup> James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 *POL. SCI. Q.* 613, 614 (1988).

branches. The branches would simply serve a politically contingent role as vehicles for party competition.

Writing in the midst of a quarter century of mostly divided government, the early Wilson had witnessed exactly that. His mistake was to overgeneralize features of the political system he was observing at that moment, assuming them to be inevitable features of the Madisonian design.<sup>58</sup> Later generations of political scientists, writing against the background norm of unified government that had prevailed for the first half of the twentieth century, replicated Wilson's mistake in the opposite direction. By the 1950s, Wilsonian criticism of the Madisonian design had been displaced by calls for stronger and more programmatic political parties of the European variety.<sup>59</sup> This made perfect sense on the assumption that government would usually be unified: strengthening parties might then be all that stood between Washington and a system of responsible party government that would closely approximate the Westminster ideal. Under conditions of divided party control, however, strong parties would only exacerbate the inefficiency and unaccountability of separated powers by making interbranch cooperation all the more difficult.

As fate would have it, the responsible party government movement coincided with the beginning of a prolonged period of divided government. Once again, political scientists rallied around the Wilsonian lamentation that the Madisonian system was living down to its defective design. The peak of despair was marked by the 1987 report of the Committee on the Constitutional System.<sup>60</sup> Representing the consensus view among political scientists and Washington insiders, the Committee bemoaned the deleterious consequences of divided party control — precisely the same problems of gridlock and diminished accountability that Wilson had (mis)identified as essential features of the Madisonian design. Short of rewriting the structural constitution from scratch, the country's best hope, according to the Committee and its fellow travelers, lay in a set of constitutional and statutory reforms designed to reunify government (some similar to reforms suggested by Wilson a century earlier). These included requiring or encouraging straight-ticket voting, allowing sitting members of Congress to serve in the President's cabinet, and altering the electoral timing and term

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<sup>58</sup> Wilson himself acknowledged this mistake in later editions of his book, written in the aftermath of U.S. expansionism and on the eve of Theodore Roosevelt's presidency. See WILSON, *supra* note 52, at 19–23 (Preface to Fifteenth Printing, first published in 1900).

<sup>59</sup> See RANNEY, *supra* note 55, at 8–22; Am. Political Sci. Ass'n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. (SUPPLEMENT) 1, 1–2 (1950). Wilson himself had called for stronger parties, as part of a package of reforms that would have effectively done away with divided government. See RANNEY, *supra* note 55, at 25–47 (describing Wilson's views).

<sup>60</sup> See SUNDQUIST, *supra* note 54, at 11–12.

lengths for the President and members of Congress.<sup>61</sup> Not surprisingly, none of these measures has proven politically feasible.

Most constitutional lawyers would bid them good riddance. The pseudo-parliamentarian, responsible party government project of fusing the branches under the control of a single, strong party takes Wilson's critique of Madisonian separation of powers as its normative touchstone. Yet each of the features of Madisonian separationism that parliamentarians criticize is, in fact, celebrated in American constitutional discourse. Thus, the inefficiency of requiring the agreement of multiple, mutually antagonistic institutions to make laws becomes, in the view of constitutional lawyers, the great virtue of preserving "liberty" and preventing "tyranny."<sup>62</sup> And while separated powers may blur the lines of political accountability, constitutional lawyers emphasize that creating multiple channels of democratic responsiveness helps keep government accountable to the popular will by encouraging interbranch deliberation, defeating demagoguery, and impeding capture by narrow interests.<sup>63</sup>

From the Madisonian perspective that undergirds much of constitutional law and theory, therefore, the primary threat posed by political parties to the separation of powers comes not from party division of government but from party unification. Far from dreading divided government, Madisonians in a modern democracy must count on party division to recreate a competitive dynamic between the branches. And far from encouraging unified party control of the House, Senate, and presidency, Madisonians will view the prospect of unchecked and unbalanced governance by a cohesive majority party as cause for constitutional alarm.

### C. Conclusion: Separation of Parties

Whether it is party unification or party division of government that is cause for the most concern, any understanding of the American system of separation of powers should start from the recognition that it encompasses both. Contrary to the foundational assumption of constitutional law and

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<sup>61</sup> See *id.* at 124–43 (proposing these and many other dramatic reform strategies).

<sup>62</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) ("The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.").

<sup>63</sup> See, e.g., Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1246 (2002) ("The Constitution promotes a particular kind of governmental accountability and a particular kind of democratic deliberation by distributing legislative authority over designated officials in the legislative and executive branches who are accountable to different political constituencies."). On "deliberation," see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45–48 (1985). On "accountability," see Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998), 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, 56–59 (2001), and Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1821–25 (1996).

theory since Madison, the United States has not one system of separation of powers but (at least) two.<sup>64</sup> When government is divided, party lines track branch lines, and we should expect to see party competition channeled through the branches. The resulting interbranch political competition will look, for better or worse, something like the Madisonian dynamic of rivalrous branches. On the other hand, when government is unified and the engine of party competition is removed from the internal structure of government, we should expect interbranch competition to dissipate. Intraparty cooperation (as a strategy of interparty competition) smoothes over branch boundaries and suppresses the central dynamic assumed in the Madisonian model.

The functional differences between these two systems of separation of powers — party separated and party *unseparated* — are described in more detail in the next Part, but the challenge to the constitutional law and theory of separation of powers should already be clear. The Madisonian model of inherently competitive branches checking and balancing one another, around which the constitutional law of separation of powers has been designed, has existed only in a few passages of Federalist 51 and the imagination of courts and constitutional theorists ever since. To the extent constitutional law is concerned with the real as opposed to the parchment government, it would do well to shift focus from the static existence of separate branches to the dynamic interactions of the political parties that animate those branches.

## II. PARTY UNIFICATION AND DIVISION OF GOVERNMENT

We have seen that a critical dimension of the way formally separated political institutions actually work is whether the same political party controls the House, the Senate, and the presidency — that is, whether government is unified or divided. This Part describes the history, causes, and functional consequences of that distinction as they bear on the constitutional separation of powers.

### A. *The Past, Present, and Future of Unified and Divided Government*

1. *Unified and Divided Governments.* — If the de facto Madisonianism of divided party government had prevailed for all or most of American history, the constitutional law and theory of separation of powers might have been right for the wrong reasons. (One is tempted to say, close enough for

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<sup>64</sup> If we took into account every factor that bears on intragovernmental political competition at least as heavily as branch affiliation, the number of “systems” might hit double digits. Beyond whether government is unified or divided, the one additional factor emphasized in this Article is the coherence of the two major parties. Another way of multiplying systems, of course, would be to distinguish the different patterns of party division: House and Senate versus President, House and President versus Senate, and so on. This Article attends to these distinctions in the sections where they make important differences.

government work.) But it has not. Since 1832, government has more often been unified.<sup>65</sup>

From 1832 to 1952, an incoming President assumed office with his party also in control of both the House and Senate in all but three elections.<sup>66</sup> Periods of divided government cropped up mostly during the turbulent years leading up to the Civil War (1840–1860) and during the period of fractious politics in the aftermath of Reconstruction (1874–1896).<sup>67</sup> Then, during the first half of the twentieth century, divided government all but disappeared. In only four midterm elections from 1900 until 1952, two of them at the end of wars, did the President's party temporarily lose control of one house of Congress (1910, 1918, 1930, 1946), and in each case unified party control was restored in the next set of elections.<sup>68</sup> During that period, twenty-two out of twenty-six national elections (85%) produced unified party control, with the Republicans dominating in the first quarter of the century (with an interlude during the Wilson Administration) and the Democrats in the second quarter.<sup>69</sup>

Sustained periods of divided government are a relatively recent phenomenon.<sup>70</sup> When Eisenhower assumed office for his second term and was confronted by a Democratic House and Senate, it was the first time since Grover Cleveland's election seventy-two years earlier that a President took office with either chamber controlled by the opposite party.<sup>71</sup> After an interregnum of strongly unified Democratic governments under Presidents Kennedy and Johnson, divided government solidified as the norm for the second half of the twentieth century. From 1955 through 2000, government was divided for thirty-two of the forty-six years; and from 1969 to 2000, government was divided for twenty-six of thirty-two

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<sup>65</sup> MORRIS FIORINA, *DIVIDED GOVERNMENT* 6–14 (2d ed. 1996). Fiorina notes that the national government has been unified sixty percent of the time between 1832 and 1992. *See id.* at 6–7.

<sup>66</sup> *See id.* at 11. The three instances of nonunity were the three-way presidential contest of 1848, the disputed presidential election of 1876, and the election of 1884. The 1880 election produced a Republican presidency and House, but the Senate initially was deadlocked by a 37–37–2 split. After lengthy internal turmoil, the Republicans eventually gained control of the Senate committee chairs. U.S. Senate, *The Great Senate Deadlock of 1881*, [http://www.senate.gov/artandhistory/history/common/briefing/Senate\\_Deadlock\\_1881.htm](http://www.senate.gov/artandhistory/history/common/briefing/Senate_Deadlock_1881.htm) (last visited May 14, 2006).

<sup>67</sup> *See* FIORINA, *supra* note 65, at 9 tbl.2-2.

<sup>68</sup> *See* Nat'l Archives and Records Admin., *Historical Election Results: Electoral College Box Scores 1789–1996*, <http://www.archives.gov/federal-register/electoral-college/scores.html> (last visited May 14, 2006) (presidential election results); Office of the Clerk, U.S. House of Representatives, *Political Divisions of the House of Representatives (1789 to Present)*, [http://clerk.house.gov/histHigh/Congressional\\_History/partyDiv.html](http://clerk.house.gov/histHigh/Congressional_History/partyDiv.html) (last visited May 14, 2006) (House of Representatives election results); U.S. Senate, *Party Division in the Senate, 1789–Present*, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited May 14, 2006) (Senate election results).

<sup>69</sup> *See* FIORINA, *supra* note 65, at 7 & tbl.2-1.

<sup>70</sup> *See id.* at 7 tbl.2-1.

<sup>71</sup> SUNDQUIST, *supra* note 54, at 93.

years, or 81% of the time (all but Carter's presidency and the first two years of Clinton's).<sup>72</sup>

Even as political scientists struggle to explain the tectonic shift to divided government in the 1950s<sup>73</sup> and to come to grips with its implications, the political world, once again, seems to be changing underneath them. The turn of this century inaugurated a return of unified government.<sup>74</sup> Some pundits now speculate that this is the beginning of a new Republican ascendancy, one that might be strong enough to keep the branches unified under Republican control for some years to come. Given how little we know about what accounts for patterns of unified and divided government, however, these kinds of predictions seem futile. We are left only with the recognition that neither divided nor unified government is a historical inevitability; from the long-term perspective of constitutional law and design, we should expect to see some of both.

2. *Fragmented and Cohesive Parties.* — We might expect, though, that the unified and divided governments of the foreseeable future will be different from those of the past, and more different from each other. The consequences of whether government is unified or divided depend crucially on the internal ideological coherence of and political distance between the two major parties. Significantly, as this section explains, the

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<sup>72</sup> These figures are based on Sundquist's data, *id.*, and are updated to reflect Clinton's presidency. Presidents were elected to office without their party in control of at least one chamber of Congress in seven of the eleven elections between 1956 and 2000. *Id.*

<sup>73</sup> What we know is that ticket-splitting dramatically increased starting in the 1950s and did so in a pattern favoring Republican Presidents and Democratic representatives to the House. *See* FIORINA, *supra* note 65, at 12–13. What we do not know is why. Possible explanations fall into two categories. "Accidental" explanations focus on structural changes in electoral politics that may have contributed to divided voting patterns. *See id.* at 143. For example, the incumbency advantages, and hence reelection rates, of House members increased for various reasons starting in the 1960s — a time when Democrats happened to hold more seats. *See id.* at 18–23 (discussing this explanation and its limitations). "Intentional" explanations hypothesize that a critical mass of split-ticket voters are actually aiming to produce divided government. *See id.* at 143. Opinion polls reveal that Americans prefer divided over unified government, *see id.* at 64–65, perhaps because they want to "balance" the ideologies of the two parties in government, *see id.* at 72–81, 151–53. (This is especially plausible during periods like the present, when, as discussed in the next section, the parties are ideologically polarized.) At least in midterm elections with incumbent unified government, it is easy to imagine voters reacting against what they view as extremism by the ruling party by voting for House members of the opposite party. Intentionally dividing government in presidential election years is more difficult, since it requires voters to coordinate on a President of one party and a House of the other, but combined with reasons why one party-branch match might be more salient or appealing, that voting strategy, too, may be an important part of the story. *See id.* at 77–79.

<sup>74</sup> The timing of Mark Tushnet's argument that the country has entered a new constitutional order characterized by, among other things, divided government, is a cautionary reminder of the unpredictability of patterns of party control. *See* MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 8 (2003). The book went to press shortly after the transformation to unified Republican government. *See id.* at 111–12 (entertaining the possibility that a yet newer constitutional order, "centered on a highly ideological unified government," might now be emerging).

two major parties today are as coherent and polarized as they have been in perhaps a century, and for reasons that are likely to endure.

Historically, party government has entailed functional unity on certain central policy issues but fragmentation on others. For example, the Democratic Party was fractured between Northerners and Southerners on certain critical issues for much of the twentieth century, until the last generation or so. The New Deal Democratic Party from 1933 through 1938 was united on New Deal economic legislation, and with respect to that agenda, government during the transformative FDR era was functionally as well as nominally unified.<sup>75</sup> Even then, however, latent conflicts between Democrats from the South and other regions surfaced any time legislation substantially intersected with racial issues. Consequently, despite unified government, the Democratic Congress had to structure legislation to minimize benefits to African Americans in order to hold the party together.<sup>76</sup> The Fair Labor Standards Act of 1938,<sup>77</sup> for instance, benefited factory workers but excluded domestic and agricultural workers, who comprised much of the black labor force.<sup>78</sup>

Once civil rights legislation was forced onto the national policymaking agenda after World War II, Democratic unified governments under Kennedy and Johnson functioned without strong party coherence on issues involving race. Much of the major legislation of this period<sup>79</sup> required bipartisan support from majorities of Republicans and Northern Democrats to defeat a “conservative coalition” dominated by Southern Democrats.<sup>80</sup> Even the push for Alaskan and Hawaiian statehood (1958 and 1959) required bipartisan coalitions to overcome the opposition of Southern Democrats who feared the new states would elect pro-civil rights representatives.<sup>81</sup>

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<sup>75</sup> See, e.g., BARBARA SINCLAIR, CONGRESSIONAL REALIGNMENT, 1925–1978, at 31–36 (1982).

<sup>76</sup> See IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 18–23 (2005) (“The South used its legislative powers to transfer its priorities about race to Washington. . . . Even at the height of the New Deal, the Democratic Party required southern acquiescence to the national program.”).

<sup>77</sup> 29 U.S.C. §§ 201–219 (2000).

<sup>78</sup> See DAVID BERNSTEIN, ONLY ONE PLACE OF REDRESS 99–102 (2001); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).

<sup>79</sup> See, e.g., Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)); Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2000)); Higher Education Facilities Act of 1963, Pub. L. No. 88-204, 77 Stat. 363 (codified as amended in scattered sections of 20 U.S.C.); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18, 20, and 42 U.S.C.).

<sup>80</sup> See MAYHEW, *supra* note 47, at 127–28 & tbl.5.6.

<sup>81</sup> *Id.* at 128. The first civil rights legislation of the modern era, the 1957 Civil Rights Act, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 and 42 U.S.C.), enacted during the Eisenhower years, similarly required a bipartisan coalition, given the fragmentation of the De-

Shared party affiliation, then, does not necessarily mean shared policy preferences. In some historical periods, and on certain issues in every historical period, intraparty cleavages have rivaled interparty ones. But American political parties today are both more internally ideologically coherent and more sharply polarized than at any time since the turn of the twentieth century.<sup>82</sup> From the late 1950s through 1992, the President's own party in Congress voted in favor of legislation he supported almost three-quarters of the time; the opposing party supported him half of the time or less.<sup>83</sup> The ideological coherence and polarization of the two parties has increased to the point where the most conservative Democrats in the Senate are now more liberal than the most liberal Republicans.<sup>84</sup> Party-line voting in both the House and Senate has become the norm.<sup>85</sup> During the second term of the Clinton presidency, congressional Republicans supported less than 25% of his positions; Clinton reciprocated by opposing two-thirds of the votes taken by Congress.<sup>86</sup>

The revival of strong, unified parties has dramatic implications for presidential power and executive-legislative relations. Indeed, two of the most important studies of presidential power were written before the renewal of strong parties.<sup>87</sup> Both studies expressly hinged their assessments of presidential power on the weakened state of parties;<sup>88</sup> neither study considered it likely that strong parties would soon re-emerge.<sup>89</sup> Thus, for Professor Richard Neustadt, the presidency was weak in part because parties were so fragmented;<sup>90</sup> for Professor Arthur Schlesinger, as the parties "wasted away,"<sup>91</sup> the imperial presidency grew, at least during divided government. By their own terms, both studies signal that executive-

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mocratic Party. *Id.* at 127 tbl.5.6. For an account of how that coalition was orchestrated, see ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 685-1012* (2002).

<sup>82</sup> See generally POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA (Jon R. Bond & Richard Fleisher eds., 2000); KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 58-85* (1997); Melissa P. Collie & John Lyman Mason, *The Electoral Connection Between Party and Constituency Reconsidered: Evidence from the U.S. House of Representatives, 1972-1994*, in CONTINUITY AND CHANGE IN HOUSE ELECTIONS 211 (David W. Brady et al. eds., 2000).

<sup>83</sup> JOHN H. ALDRICH, *WHY PARTIES? THE ORIGINS AND TRANSFORMATIONS OF POLITICAL PARTIES IN AMERICA* 197 (1995).

<sup>84</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2312 (2001) (citing Richard E. Cohen, *A Congress Divided*, 32 NAT'L J. 382, 382 (2000) (describing the 1999 Senate)).

<sup>85</sup> See WILSON & DILULIO, *supra* note 49, at 338. The percentage of party-line votes in both houses rose from around 40% in the early 1970s to more than 70% in 1995. See *id.* at 339 tbl. 13.4.

<sup>86</sup> RICHARD S. CONLEY, *THE PRESIDENCY, CONGRESS, AND DIVIDED GOVERNMENT 29-31* (2003).

<sup>87</sup> See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* (The Free Press 1990) (1960); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (2004) (1973).

<sup>88</sup> See NEUSTADT, *supra* note 87, at 6, 157-60; SCHLESINGER, *supra* note 87, at 209-10.

<sup>89</sup> See NEUSTADT, *supra* note 87, at 157-58; SCHLESINGER, *supra* note 87, at 464.

<sup>90</sup> See NEUSTADT, *supra* note 87, at ix.

<sup>91</sup> SCHLESINGER, *supra* note 87, at 210.

legislative relations would have to be reassessed should strong parties re-emerge, as they now have.

If revival of more disciplined, ideologically purer parties requires such a reassessment, understanding the causes of this revival and whether they are likely to endure becomes essential. The most important of these causes is a deep, structural one likely to last. The fragmented, New Deal version of the Democratic Party was an artificial creation stemming from the Party's monopoly on the South. This monopoly was created and sustained by the elaborate system of electoral laws and representative institutions designed, at the end of Reconstruction, to drastically disenfranchise a substantial portion of the electorate (as much as one-half in some states<sup>92</sup>), with the aim of eliminating partisan competition. From the 1890s on, this system of Southern disenfranchisement artificially cemented one-party Democratic control. Only national intervention, in the form of the 1965 Voting Rights Act<sup>93</sup> and the constitutional decisions of the Warren Court, began to dismantle this collusive regime. As access to the vote was made widely available and fair ground rules for political competition became legally enshrined, a normal system of two-party competition began to emerge in Southern states. Owing to the partisan inertia of candidates and voters and the time it takes for partisan realignments to affect national parties and elections, a strong Republican alternative emerged only in the 1980s. Robust two-party competition, for the first time in the twentieth century, finally became widespread throughout the South in the 1990s.<sup>94</sup> As conservative Southerners shifted to the Republican Party, a much smaller residual Democratic Party in the South, purified of these voters, came into ideological alignment with Democratic voters in the rest of the country through a mutually reinforcing feedback process. This is likely to be the normal, steady state of American two-party political competition for the foreseeable future.

A number of more localized and perhaps contingent factors have exacerbated the ideological divide between the parties. One is the recent rise of gerrymandered "safe" election districts, created by incumbents of both parties who agree to stock districts with large majorities of either Republicans or Democrats in order to make general elections noncompetitive.<sup>95</sup> A

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<sup>92</sup> Some of the data is summarized in Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 303–04 (2000). The best study of the disenfranchisement process remains J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (1974).

<sup>93</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

<sup>94</sup> For a comprehensive account of the process through which the Republican Party revitalized itself in the South, see EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002).

<sup>95</sup> See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 612–30 (2002); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. (forthcoming Spring 2006); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 55–64 (2004) [hereinafter Pildes, 2003 Foreword].

byproduct of these safe districts is the election of more partisan and more polarized officeholders. The absence of a general election threat enables party activists, who turn out in disproportionate numbers in primary elections and whose views typically reflect the extremes of the party's support, to select more partisan primary winners. Although Senate seats cannot be gerrymandered by party, the career trajectory of politicians frequently moves them from lower to higher office; indeed, a greater number of former House members now sit in the Senate than at any time in American history.<sup>96</sup> House members elected from safe districts who forge their political identity as strong partisans might carry that identity with them to the Senate.<sup>97</sup>

For these and other reasons, partisan officeholders in recent decades have converged on relatively homogenous preferences correlating with their party affiliations.<sup>98</sup> But parties are not just correlates of policy agreement; they are also, to some extent, causes.<sup>99</sup> As long as politicians rely on parties to win elections and exercise meaningful power while in office, parties will be able to exercise some degree of discipline over officeholders, inducing them to vote the party line even when their individual policy preferences are different. There is some evidence that party discipline, as well, has increased in recent decades, on account of parties' greater efficacy in electoral politics and greater control over the internal structure of the House and Senate.

The "decline of parties" story is a familiar one.<sup>100</sup> From the Jacksonian era until perhaps the mid-twentieth century, political parties had almost complete control over the labor and resources needed to run effective electoral campaigns. As a result, "[f]or ambitious politicians, a political career was a party-centered one rather than an individual, office-centered career as in today's incumbency-oriented Congress."<sup>101</sup> Progressive and then New Deal reforms eviscerated the power of state and local party organizations by substituting primary elections for party selection of candidates and by undermining the patronage system that allowed party officials to mobilize electoral support. The emergence of the candidate-centered campaign, enabled primarily by television and other nationalized media, as well as

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<sup>96</sup> See JULIET EILPERIN, *FIGHT CLUB POLITICS* 87 (2006).

<sup>97</sup> See *id.*

<sup>98</sup> For an analysis of the situation in which party members share homogenous preferences even without institutional pressures to do so, see ALDRICH, *supra* note 83, at 222–25.

<sup>99</sup> For a clear statement of the distinction in the direction of causation, see Keith Krehbiel, *Where's the Party?*, 23 BRIT. J. POL. SCI. 235 (1993).

<sup>100</sup> See MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952–1996* (1998). For a summary and critical analysis of the party-in-decline literature, see Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35 (2000).

<sup>101</sup> ALDRICH, *supra* note 83, at 267. Before the secret ballot, split-ticket voting was far more difficult, given party-provided ballots and public voting. Even after the introduction of the secret ballot, split-ticket voting in national elections remained low — 10–15%, until 1960. Since then, split-ticket voting in national elections has increased to 20–25%. *Id.*

high-speed travel and communication, gave candidates independent access to capital and labor outside of parties. By the 1970s, many observers were declaring the parties, in their capacity as organizations with the ability to control the behavior of politicians, all but dead.<sup>102</sup> But predictions of parties' demise turned out to be greatly exaggerated. Party organizations not only survived, but over the past couple decades also have managed to recreate an increasingly important role for themselves by providing campaign consulting and capital to their preferred candidates.<sup>103</sup> Few candidates can now afford to turn down the fundraising, advertising, and polling assistance of parties, though accepting assistance means sacrificing some political independence.<sup>104</sup>

Recent changes in the internal rules and practices of the House and Senate also may have reinforced the partisan incentives of members of Congress (MCs). The strength of legislative parties historically has depended to some extent on the internal governance structures of the House and Senate, which are always subject to renegotiation. For example, the Congress that Woodrow Wilson criticized in 1885 as a "committee government"<sup>105</sup> run by "petty barons"<sup>106</sup> committee chairs (as opposed to a coherent policymaking body reflective of strong party control) transformed itself just a few years later. Under "Czars" Thomas B. Reed in 1889 and Joseph G. Cannon in 1903, House rules were dramatically recast to centralize power in the Speaker, who at that time also headed his political party.<sup>107</sup> The result of powerful leadership and internal rule changes was disciplined party unity that lasted until World War I.<sup>108</sup>

A similar, though less dramatic, transformation has occurred in recent decades. Under Democratic control in the 1970s and, even more aggressively, under Republican control in the 1990s, major reforms in the internal structure of the House reduced the powers of committee chairs to deviate from the median preferences of party members and increased the ability of party leaders to control legislative outcomes.<sup>109</sup> Parties also have taken

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<sup>102</sup> See Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, DAEDALUS, Summer 1980, at 25.

<sup>103</sup> See ALDRICH, *supra* note 83, at 14–18, 237–40, 253–60.

<sup>104</sup> See Kramer, *supra* note 29, at 282; see also EILPERIN, *supra* note 96 (documenting changes in fundraising, in particular the rise of leadership political action committees and the effects of these changes on the power of party leaders to keep party members in line).

<sup>105</sup> WILSON, *supra* note 52, at 62.

<sup>106</sup> *Id.* at 76.

<sup>107</sup> See ALDRICH, *supra* note 83, at 227–28; DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 4–5 (1991); Joseph Cooper & David W. Brady, *Institutional Context and Leadership Style: The House from Cannon to Rayburn*, 75 AM. POL. SCI. REV. 411, 413 (1981).

<sup>108</sup> See Cooper & Brady, *supra* note 107, at 413–15. For more on the decline of strong party unity through this period, see ALDRICH, *supra* note 83, at 228.

<sup>109</sup> For the changes made during Democratic control, see ROHDE, *supra* note 107, at 82–119. See also ERIC SCHICKLER, DISJOINTED PLURALISM 189–249 (2001). For the changes made since 1994,

advantage of modern campaign fundraising techniques, specifically leadership political action committees, to leverage financial assistance to candidates into greater control over their behavior in office.<sup>110</sup> As the political fates of both senior and junior members have become more dependent on their adherence to the party line, we have seen a renaissance of party discipline.<sup>111</sup>

In sum, the rise of a mature system of two-party competition nationwide, gerrymandered “safe” election districts, and more powerful party organizations, among other factors, has led to the resurgence of more internally unified, ideologically coherent, and polarized parties than we have seen in many decades. And there is reason to expect that the parties will remain internally cohesive and ideologically distant for the foreseeable future.

### *B. The Functional Differences Parties Make*

Cohesive and polarized parties amplify the functional differences between divided and unified government. Partisan competition in government now means a Democratic Party dominated by liberals, with few moderates and no conservatives, pitted against a Republican party dominated by conservatives, with few moderates and no liberals. Under divided governments, the absence of a bloc of centrist legislators willing to cross party lines will make policy agreement more difficult and interbranch disagreement more intense. Under unified governments, smaller partisan majorities will be able to effect major policy change without the full range of checks and balances that are supposed to divide and diffuse power in the Madisonian system. These differences are immediately relevant to the goals and mechanisms of the constitutional separation of powers.

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see EILPERIN, *supra* note 96. As one of the principal architects of the Republican centralization of control, Newt Gingrich said:

Prior to us power was centered in the chairmen and you had a relatively permissive leadership on the Democratic side that could only maneuver to the degree the chairmen would tolerate . . . . We had exactly the opposite model: a very strong leadership that operated as a single team — a single team that had lots of tension inside obviously — but nonetheless operated as a single team. And then you had the chairmen who operated within the framework of that leadership.

*Id.* at 16. The current House leadership has taken this approach even further, through the use of fundraising and control over committee chairs, to enforce party discipline. *See id.*

<sup>110</sup> *See* EILPERIN, *supra* note 96, at 16–28; *see also id.* at 24 (“Party bosses no longer determine which candidate can run for office in a district, but senior House leaders on either side of the aisle can decide whether a given lobbyist cuts a check for a little-known member, or whether these same lobbyists troop to a swing district just before an election to drive voter turnout.”); *id.* at 28 (“[S]ome [House member] unity stems from the fact that rank-and-file members pay a heavy price for challenging their leaders.”).

<sup>111</sup> The central work developing this argument is ROHDE, *supra* note 107. Professor Rohde offers explanations for the timelag. *See id.* at 34–39. He dates the resurgence in partisan voting patterns to 1983. *See id.* at 16.

*I. Legislative Efficacy.* — The cardinal virtue of the Madisonian separation of powers is supposed to be that, by raising the transaction costs of governance, it preserves liberty and prevents tyranny.<sup>112</sup> Yet constitutional theorists also assert that a well-functioning system of separated powers promotes government “efficiency.”<sup>113</sup> As much as the Framers feared tyranny, they also recognized the shortcomings of the weak national government under the Articles of Confederation and appreciated the need for an “energetic” Executive to act with “decision” and “dispatch.”<sup>114</sup> Yet an efficient government — one that has the capacity to effect quick and dramatic changes from the status quo — also poses the greatest threat to (negative) liberty.

Whatever the optimal balance between the competing risks of tyrannically efficient and ineffectually weak government,<sup>115</sup> we should expect the magnitude of these respective risks to differ depending on whether government is unified or divided. As party government theorists have long emphasized, divided party government tends to increase the likelihood of interbranch “confrontation, indecision and deadlock.”<sup>116</sup> To the extent things do get done, ineffectual compromises tend to take the place of programmatic, ideologically coherent initiatives.<sup>117</sup> Under unified party control, the risk is the inverse: government may become *too* efficacious and ideologically aggressive. There is reason to fear that unified governments will do too much too quickly, too extremely, and with too little deliberation or compromise.<sup>118</sup> Each of these vices, of course, can be recast as a virtue.

We should recognize that this picture of gridlocked divided governments versus steamrolling unified ones is something of a caricature. As discussed above, during periods of ideologically heterogeneous parties, relatively stable cross-partisan coalitions have constituted a government

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<sup>112</sup> As Justice Brandeis put it in language the Court has often repeated, “The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

<sup>113</sup> See, e.g., GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 359 (5th ed. 2005); Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 92 (1995).

<sup>114</sup> See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 423–24.

<sup>115</sup> See Kagan, *supra* note 84, at 2341–44 (discussing the tension and tradeoff between government efficiency and inefficiency).

<sup>116</sup> SUNDQUIST, *supra* note 54, at 96–97.

<sup>117</sup> See TUSHNET, *supra* note 6, at 22–25.

<sup>118</sup> See MAYHEW, *supra* note 47, at 181–82 (noting that President Johnson’s Great Society legislative program, enacted by a strongly unified Democratic government, was an example of a “‘politics of haste’ in which ‘solutions were often devised and rushed into law before the problems were understood’” (quoting DORIS KEARNS, *LYNDON JOHNSON AND THE AMERICAN DREAM* 216, 218 (1976))); Ackerman, *supra* note 6, at 650–53.

majority along certain policy dimensions.<sup>119</sup> And even when the parties are ideologically cohesive, the specific constituency interests of individual MCs are sufficiently fragmented, and MCs sufficiently independent, that Presidents can sometimes cobble together issue-specific majority coalitions across party lines.<sup>120</sup> Supermajority requirements in the lawmaking process (including veto overrides and Senate filibuster cloture votes) often necessitate some degree of bipartisanship even when government is unified.<sup>121</sup> And of course the parties will sometimes find that the imperatives of events or public demands for government action make compromise across divided government the winning play.<sup>122</sup> These factors all tend to dampen the productivity differences between divided and unified governments.

We should not be too surprised, then, that divided governments have sometimes accomplished a great deal and not every unified government has produced the equivalent of the New Deal. Somewhat more surprising is Professor David Mayhew's well-known study of the legislative record from World War II through 1990, finding that divided governments enacted about the same volume of "significant" legislation as unified ones.<sup>123</sup> But it hardly follows from Professor Mayhew's findings that the distinction has been without a difference. Professor Mayhew does not assess the *content* of legislation. Perhaps politicians in Washington usually prefer to do *something* about the salient issues of the day rather than suffer the political consequences of perceived partisan gridlock, but what unified governments accomplish may be considerably more ideologically ambitious and extreme.<sup>124</sup>

In fact, studies that raise the standard for what counts as "significant" legislation find that unified governments do produce more of it than divided ones.<sup>125</sup> Raising the bar still higher, political historians speculate

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<sup>119</sup> See Paul Frymer, *Ideological Consensus Within Divided Party Government*, 109 POL. SCI. Q. 287, 310–11 (1994). For a familiar example, consider the sectional cleavages on labor and civil rights that united "conservative coalitions" of Southern Democrats and Republicans during some periods and rendered nominally unified Democratic governments de facto divided. See MAYHEW, *supra* note 47, at 140.

<sup>120</sup> See GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 89–91 (2d ed. 1997).

<sup>121</sup> See generally KEITH KREHBIEL, *PIVOTAL POLITICS* (1998) (developing a theory of legislative-executive gridlock based on, among other variables, the need for legislative supermajorities to move from the status quo).

<sup>122</sup> See CHARLES O. JONES, *THE PRESIDENCY IN A SEPARATED SYSTEM* 27–30 (2d ed. 2005) (describing patterns of cooperative interaction between parties during divided government); MAYHEW, *supra* note 47, at 130–31, 142–74 (attributing bipartisan supermajorities, and surges in lawmaking generally, to "mindset[s] of problem-solving" in Washington and activist "public moods" in the populace).

<sup>123</sup> MAYHEW, *supra* note 47, at 51–99.

<sup>124</sup> See TUSHNET, *supra* note 6, at 25.

<sup>125</sup> See John J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821, 832–33 (1999); Sean Q. Kelly, *Divided We Govern?: A Reassessment*, 25 POLITY 475, 482–83 (1993).

that unified government may offer the prevailing party an opportunity to build an enduring political consensus or movement of the sort that generates historically dramatic change.<sup>126</sup> Certainly it is hard to imagine the New Deal or Great Society legislative programs getting off the ground under divided government. And more generally, it is hard to believe that unifying party control does not lower the transaction costs of assembling legislative coalitions in support of the majority's agenda, since solving collection action problems is a major reason why legislative parties exist in the first place.<sup>127</sup> Empirical studies confirm, for instance, that presidential vetoes all but disappear during periods of unified government.<sup>128</sup> And several subsequent studies have found, predictably, that divided governments more frequently *fail* to pass potentially significant measures that make it onto the legislative agenda.<sup>129</sup> We should expect that lowering the transaction costs of coalition formation will both increase the ability of the majority party to implement its agenda and decrease its need to compromise.

This is especially so during periods, like the present, of relatively high intraparty unity and interparty polarization. With the cross-partisan coalitions of previous decades no longer available and bipartisan compromise increasingly difficult, divided governments will be more prone to gridlock. And when one of these ideologically polarized parties manages to win unified control over the government after a long period of frustrating stalemate and partisan conflict, we should not expect moderation or restraint.<sup>130</sup> Updating his research, Professor Mayhew finds that post-1990 lawmaking has become more partisan than in any period since World War II, with virtually all significant enactments during periods of unified Democratic or Republican control passing by narrow, party-line votes.<sup>131</sup> This is consistent with qualitative assessments of recent Washington politics.<sup>132</sup>

The discussion thus far has focused on the direct difficulty of passing legislation, but the consequences of party alignment are also manifested in the administration of enacted statutes — which in turn feeds back on the

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<sup>126</sup> See FIORINA, *supra* note 65, at 176–77.

<sup>127</sup> See ALDRICH, *supra* note 83, at 29–37.

<sup>128</sup> See CHARLES M. CAMERON, VETO BARGAINING 65–68, 218 (2000).

<sup>129</sup> See SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 40–44 (2003); George C. Edwards III et al., *The Legislative Impact of Divided Government*, 41 AM. J. POL. SCI. 545, 561–62 (1997). One explanation for Professor Mayhew's findings, then, is that they speak only to the supply of legislation by government, not the demand, and therefore miss the possibility that, even if the same volume of legislation passes under divided government as under unified government, a greater volume fails. If divided government correlates with high demand for legislation — as it might if both party division and demand for government action are caused by troubled times — then supplying the same volume as unified government is a sign of failure, not success. See FIORINA, *supra* note 65, at 89.

<sup>130</sup> See Ackerman, *supra* note 6, at 651.

<sup>131</sup> See MAYHEW, *supra* note 47, at 221–22.

<sup>132</sup> See TUSHNET, *supra* note 6, at 8–32; Kagan, *supra* note 84, at 2344 & n.376.

difficulty of legislating. We should expect Congress to be considerably less willing to delegate policymaking discretion to the executive branch when the policy preferences of the two branches diverge. Empirical studies confirm that Congress not only delegates significantly less authority to the executive branch during periods of divided government, but also further limits the discretion of executive agencies by binding them with more restrictive procedural constraints.<sup>133</sup> Congress's reluctance to delegate to an opposition-controlled executive branch means that agreement on statutory details must be hammered out up front, which should make it all the more difficult to pass ambitious, controversial legislation.<sup>134</sup> And the agencies charged with administering the enacted statutes are less able to regulate ambitiously or effectively and are more prone to "procedural gridlock."<sup>135</sup> Immodest legislative programs like the New Deal and Great Society cannot exist without a Congress willing to delegate to a bureaucracy with broad policymaking discretion.<sup>136</sup>

Professor Mayhew is right to remind us that "[t]o suppose that an American party winning Congress and the presidency thereby wins the leeway of a British parliamentary party is to be deluded by the election returns."<sup>137</sup> Nevertheless, there is widespread agreement that an American party winning unified control over government is likely to have considerably more leeway than one that must share power with the opposition.<sup>138</sup> Especially in an era of cohesive and polarized parties, this difference must affect how courts and constitutional scholars think about legislative activism and extremism.

2. *Executive Accountability.* — As we have seen, parliamentary critics of the American system of separation of powers point to the unhealthy diffusion of political accountability. They emphasize that the executive and legislative branches will jockey to claim credit and shift blame, leaving the voters with no clear target for retribution or reward. Moreover, voters have no hope of apportioning responsibility for major national decisions among the hundreds of MCs, each of whom stands for reelection based largely on what she accomplished for her district and disclaims personal blame for broader government failures. In practice, this has left virtually all responsibility for important issues — and therefore motivation to do

<sup>133</sup> See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* 121–62 (1999).

<sup>134</sup> See TUSHNET, *supra* note 6, at 24.

<sup>135</sup> EPSTEIN & O'HALLORAN, *supra* note 133, at 129, 162.

<sup>136</sup> See TUSHNET, *supra* note 6, at 24.

<sup>137</sup> MAYHEW, *supra* note 47, at 135.

<sup>138</sup> As Professor Fiorina explains:

It seems perfectly logical to suppose that divided control would make it more difficult for presidents to work with Congress. Congressional majorities will disagree with the president's policy goals, and this policy and partisan disagreement will reinforce institutional rivalries rooted in the Constitution. The policy-making process will be more conflictual, and the president will be less successful in getting what he wants . . . .

FIORINA, *supra* note 65, at 95.

something about them — on the President, who in the face of congressional abdication has, many believe, become increasingly imperial and omnipotent over the course of the twentieth century.<sup>139</sup> Arguably, then, the Madisonian system presents the antidemocratic dilemma of rule by an unaccountable legislature or monarchical president.

As we have also seen, the solution offered by political scientists has been “responsible party government.”<sup>140</sup> Were American parties well-disciplined and ideologically coherent — and, of course, were Congress and the Executive unified by party — Westminster-style accountability could be recreated in Washington. American voters would be able to hold politicians collectively responsible by focusing political rewards and punishments on political parties.<sup>141</sup> Divided government, in contrast, encourages the two parties to point fingers and pass bucks, and thus “exacerbates the already serious problems of responsibility that are inherent in American politics.”<sup>142</sup> As Lloyd Cutler argued at the height of the modern era of divided government and in the context of the budget crisis of the late 1980s, “[i]f one party was responsible for all three power centers and produced deficits of the magnitude in which they have been produced in recent years, there would be no question of the accountability and the responsibility of that party and its elected public officials for what had happened.”<sup>143</sup>

Against this background, it is odd to hear courts and constitutional scholars celebrating government “accountability” as a particular virtue, or even a potential virtue, of the Madisonian design. But of course it is a different type of accountability that they have in mind.<sup>144</sup> The existence of checks and balances between rivalrous branches, each with an incentive to monitor and prevent the other’s misbehavior, might be regarded as a systemic form of accountability in its own right.<sup>145</sup> In particular, in the mod-

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<sup>139</sup> See Kagan, *supra* note 84, at 2310–12; Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 138 (1999).

<sup>140</sup> See *supra* note 55 and accompanying text.

<sup>141</sup> See Fiorina, *supra* note 102, at 25–28. The 1994 congressional elections may be a recent case in point. The usual ability of (in this case) Democratic incumbents to shrug off blame for national policies may have been undermined by their party connection to the Clinton administration — a reverse coat-tails effect. See FIORINA, *supra* note 65, at 171–72.

<sup>142</sup> FIORINA, *supra* note 65, at 109.

<sup>143</sup> Lloyd N. Cutler, *Some Reflections About Divided Government*, 18 PRESIDENTIAL STUD. Q. 485, 489 (1988).

<sup>144</sup> It is sometimes difficult to discern what courts and constitutional theorists mean by “accountability.” Sometimes they are simply making the intramural point that the transparency and electoral responsiveness of the system could be improved by bringing the sprawling executive branch bureaucracy more firmly and hierarchically under the President’s control — in separation of powers parlance, creating a more “unitary” executive. See Magill, *supra* note 14, at 1180–81 & n.163 (citing invocations of accountability and discussing possible meanings).

<sup>145</sup> See Sargentich, *supra* note 52, at 718 (“After all, ongoing checks and balances between the legislative and executive branches are themselves a source of political accountability.”). Professor W.B. Gwyn describes the “accountability” function of separation of powers in terms of the legislature’s abil-

ern system of American government, in which the greatest fears of unchecked exercises of power center on the imperial presidency, a crucial part of Congress's job is keeping the Executive accountable.<sup>146</sup> Thus, the *electoral* accountability of the Westminster system might be contrasted with a Madisonian, *intergovernmental* form of accountability that operates during the intervals between elections and allows government officials not just to report each other's bad behavior to the electorate, but also to preempt it through the exercise of constitutional powers.

Conceived in this way, intergovernmental accountability would encompass congressional resistance to a President's legislative initiatives in the ordinary lawmaking process. More commonly, though, discussions of interbranch accountability focus on congressional monitoring and control of the executive branch through means other than resisting its legislative initiatives. So: Congress investigates misbehavior in the executive branch and in extreme cases impeaches the President. Congress also oversees the exercise of presidential powers in foreign affairs by exercising control over the scope of executive authority through (limited) authorizations of the use of force and budgetary allocations. The Senate advises on and consents (or not) to the President's appointments. And Congress limits the discretion of administrative agencies by narrowing the scope of its delegations and by monitoring and overseeing administrative policymaking. All of these forms of monitoring and checking supplement, and to some extent substitute for, the electoral form of accountability. Neither a second-term President nor a high-level bureaucrat will ever stand for reelection, but both can be thwarted by a Congress that has reason to be vigilant.

Moreover, and more to the point, we should expect these forms of intergovernmental accountability to be at their most effective precisely when electoral accountability is at its least: when party control of government is divided. Especially during periods of ideologically polarized, internally cohesive parties, divided government should create the kind of conflict between the branches that motivates aggressive monitoring and checking. During periods of unified government, in contrast, single party control of the legislative and executive branches may well give voters good reason to hold the dominant party accountable for the government's overall performance. It will not, however, give them reason to rely on the kind of checks and balances driven by political "ambition . . . counteract[ing] ambition."<sup>147</sup>

In this context as well, it is important to recognize that party affiliation does not explain all political behavior. Individual MCs always have their own constituencies and political careers to look after, and attacking or op-

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ity to "call to account the non-legislative personnel of the government should they misuse their authority." W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 16 (1965).

<sup>146</sup> See DAVID R. MAYHEW, *AMERICA'S CONGRESS* 107 (2000).

<sup>147</sup> *THE FEDERALIST* NO. 51 (James Madison), *supra* note 1, at 322.

posing a President or his top officials in a variety of ways — ranging from taking a hostile stand in public to opposing legislation or appointments — is often a winning political play, even at the cost of party loyalty.<sup>148</sup> Particularly tempting are high-profile investigations by congressional committees of alleged executive branch misconduct, which have become a fact of political life and seem to occur regardless of party alignment.<sup>149</sup> In the opposite direction, the post–World War II political equilibrium in certain contexts, especially foreign affairs, has been for Congress to abdicate responsibility to Presidents regardless of party.<sup>150</sup> These patterns yield some level of constancy in interbranch accountability, diminishing the differences between unified and divided governments.

Nevertheless, especially as the parties have become more cohesive and polarized, divisive electoral and policy competition should translate into greater congressional scrutiny and institutionalized resistance to executive actions during periods of divided government. This prediction will resonate with observers of relatively recent Washington history. The Watergate investigations of President Nixon were, of course, carried out by an opposition-controlled Congress. So was the impeachment of President Clinton, which, like that of his historical predecessor Andrew Johnson, proceeded strictly along party lines and would have been unimaginable but for divided government.<sup>151</sup> Conflicts between Congress and the President over “executive privilege” also track divided party control. Indeed, the first official use of the term “executive privilege” was made by the Eisenhower Administration, just as divided government emerged to become the late twentieth century norm.<sup>152</sup> The Eisenhower presidency “ushered in the greatest orgy of executive denial in American history”;<sup>153</sup> the executive branch refused more congressional requests for information in five years than in the first century of American government.<sup>154</sup> Whether Congress was more aggressive in demanding information or the President more resistant to disclosure, conflicts over executive privilege are a predictable result of divided government.

Similarly, the War Powers Resolution,<sup>155</sup> Congress’s most significant post–World War II attempt to stand up for itself in the foreign affairs con-

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<sup>148</sup> See MAYHEW, *supra* note 146, at 106–22.

<sup>149</sup> Professor Mayhew finds that highly publicized probes of the executive branch by congressional committees occurred just as frequently under unified governments as under divided governments during the period from World War II to 1990. See MAYHEW, *supra* note 47, at 31–32. Professor Mayhew also finds, however, that divided government was associated with greater congressional investigatory zeal during the 1990s. See *id.* at 223–26.

<sup>150</sup> See JOHN HART ELY, *WAR AND RESPONSIBILITY*, at ix (1993).

<sup>151</sup> Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. PA. J. CONST. L. 422, 422 (2000).

<sup>152</sup> See SCHLESINGER, *supra* note 87, at 156–58.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Pub. L. No. 93-148, 87 Stat. 555 (1973).

text, was passed by a Democratic Congress over President Nixon's veto. The three Supreme Court nominees who have been voted down by the Senate since World War II were nominated by Republican Presidents and defeated by Democratic Senates.<sup>156</sup> And the divided Nixon and Ford Administrations saw a marked rise in visible efforts by Congress to assert greater control over administrative agencies by writing more detailed statutes, including legislative veto provisions, spending more time on oversight hearings, and the like.<sup>157</sup>

More systematic measures of the differences between same-party and opposite-party congressional monitoring and checking of the Executive are harder to come by. Here again, Professor David Mayhew has found that, over the course of American history, the most significant clusters of congressional "opposition actions" to the President have "centered as often as not in the President's own party."<sup>158</sup> For example, the two most recent opposition movements Professor Mayhew identifies are Watergate, involving Democratic congressional opposition to a Republican administration, and Vietnam, involving Democratic congressional opposition to a Democratic administration (if Johnson is considered the primary target and Nixon only secondary).<sup>159</sup> But Professor Mayhew's focus on the eighteen highest-profile legislative-executive conflicts in U.S. history (dating back to the Madison-led opposition to Hamilton's treasury program in the Washington Administration)<sup>160</sup> selects for events of such magnitude as to blur even the most sharply drawn party lines. And in any event, the performance of the sometimes fractious Democratic party of the 1960s and 1970s poorly predicts more recent party dynamics. Speculating about how his results might extend to recent decades, Professor Mayhew identifies three candidates for opposition cluster status: the Democratic opposition to the domestic and foreign policies of President Reagan during his first term, the Republican opposition to the Clinton Administration's health care reform proposal, and the House Republicans' subsequent impeachment of President Clinton.<sup>161</sup> All were products of divided government.

If divided and unified governments do, in fact, generate significantly different levels of interbranch accountability, that should affect our think-

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<sup>156</sup> These were Nixon's nominations of Haynsworth and Carswell and Reagan's nomination of Bork. One might also point to President George H.W. Bush's nomination of Clarence Thomas, who squeaked through, and Reagan's nomination of Douglas Ginsburg, who was forced to withdraw. On the unified side, President Johnson was forced by a Democratic Senate to withdraw his elevation of Abe Fortas and subsequent nomination of Homer Thornberry. See MICHAEL COMISKEY, *SEEKING JUSTICES* 9 (2004).

<sup>157</sup> See MAYHEW, *supra* note 47, at 191-92.

<sup>158</sup> *Id.* at 115 (emphasis omitted).

<sup>159</sup> See *id.* at 111-12, 115-16.

<sup>160</sup> See *id.* at 111-12.

<sup>161</sup> See DAVID MAYHEW, *CONGRESSIONAL OPPOSITION TO THE AMERICAN PRESIDENCY* 7 (2001).

ing about separation of powers law and theory across a range of issues. For example, deep disagreement exists about the Senate's proper role in the judicial appointments context (or the meaning of the constitutional authority to advise and consent); Congress's proper role in authorizing and overseeing the use of military force (or the scope of Article II executive power); and Congress's proper role in delegating discretion to agencies and exercising ongoing control over their decisionmaking (or whether Article I limits the delegation of legislative power or the use of such devices as the legislative veto). In these and other contexts, what some see as beneficial or constitutionally mandated checks and balances will be viewed by others as detrimental or unconstitutional congressional "micromanagement" or "harassment" of the Executive, or "usurpations" of executive power. Viewing separation of powers in light of political parties obviously cannot resolve these normative and interpretive controversies. It can, however, identify the political conditions under which we should expect to find higher and lower levels of congressional skepticism of, and opposition to, executive actions.

### III. REENVISIONING, AND REFORMING, THE SEPARATION OF POWERS

Reorienting separation of powers around parties might lead constitutional law and theory in a number of different directions. Most obviously, the doctrinal rules and theoretical underpinnings of separation of powers law look very different in light of a party-based understanding of separation of powers. The first section of this Part reexamines three of the most important areas of separation of powers law and theory: executive powers, administrative agencies, and (reintroducing the third branch) judicial review. The primary ambition is critical: to show how the branch-based Madisonian model that dominates constitutional law goes astray, especially (though not exclusively) under conditions of unified government and cohesive parties, in which interbranch checks and balances are at a minimum and standard separation of powers analyses and constitutional rules will tend to point and push in exactly the wrong directions.

This section also considers some modifications to existing doctrine that might mitigate the corrosive effects of unified parties on separation of powers aspirations — in particular, on preserving Madisonian checks and balances under conditions of party-unified government. Because the possibilities for doctrinal reform are limited, however, the sections that follow turn to two other possible points of leverage over this problem: modifications to the political institutions of government and modifications to the structure of political parties.

The second section addresses the political institutions of government, adopting the perspective of comparative constitutional law and institutional design. Borrowing the idea of "opposition rights" from parliamentary democracies, this section explores the possibility of analogous institutional

design features in the American system. Such features might include measures to empower the minority party to oversee government action, such as the power to initiate investigations, to obtain information through the subpoena power or other means, or to control audit or similar oversight committees. Supermajority voting rules in some contexts, like the Senate filibuster for judicial appointments, might also serve as opposition rights during unified government. So might strengthening the independence and capacity of the bureaucracy to enable it to resist political pressures from an executive-congressional complex joined in partisan ambitions.

Finally, the third section focuses on the political parties themselves, and the legal regimes governing democratic politics that shape the parties. Once separation of powers is framed by the dynamics of partisan competition, it becomes clear that legal regulation of the structure of that competition will interact with, and essentially shape, the law and politics of separation of powers. In particular, the legal rules that affect the dynamics of partisan competition in the electoral context will also affect the dynamics of partisan competition in the governance context once candidates become officeholders. Thus, the law of democracy — the set of constitutional and statutory rules that regulate matters such as the design of primary elections and the construction of election districts — will influence how cohesive and polarized, or fragmented and moderate, the parties in government are, and thus, how the separation of powers works in practice.

Our primary normative focus throughout this Part is on compensating for the disappearance of checks and balances during periods of strongly unified government. In emphasizing this problem, we provisionally embrace the dominant perspective of constitutional law and theory, taking for granted that some substantial measure of intergovernmental competition, accountability, and checks and balances is desirable. As we have recognized elsewhere in this Article, this is a partial and disputable outlook, the premises of which are in fact deeply contested both within and outside of constitutional law. The emergence of strongly unified and polarized parties will produce extreme forms of *both* unified and divided government, each with distinctive risks and pathologies, and there are reasons to worry about both extremes.<sup>162</sup> For present purposes, however, the strongly Madisonian commitments of the courts and scholars who shape separation of powers law and theory, combined with the recent and underexplored emergence of strongly unified government for the first time in a generation,<sup>163</sup> perhaps justify giving greater priority to unified government.<sup>164</sup>

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<sup>162</sup> As we have seen, both parliamentarians and party government advocates have emphasized the problems associated with strongly divided government.

<sup>163</sup> Although the Democratic Party controlled the presidency, House, and Senate during the one-term Carter presidency, the political parties in the mid-1970s were substantially less unified than they are today. The change is most evident in the extent to which the (much smaller total number of) Southern Democrats in the twenty-first century have voted more like other Democrats than Southern Democrats

### A. Separation of Powers Law

This section explores how the constitutional law and theory of separation of powers falter when parties are substituted for branches as the locus of democratic competition.

1. *Rights and Executive Powers During War and Crisis.* — Legal conflicts over rights and security in times of crisis are often cast as debates between executive unilateralists and civil libertarians.<sup>165</sup> Unilateralists assert that a largely unchecked Executive, free from oversight by the other branches, is needed because times of crisis demand the distinct qualities the executive branch tends to possess: access to information, decisiveness of decisionmaking, and the ability to maintain secrecy. Presidents and executive branch lawyers regularly press this view, but they are far from alone.<sup>166</sup> In contrast, civil libertarians argue that in times of crisis courts must play an especially vigilant role in protecting individual rights from political bodies thought to be acting out of panic, irrationality, or worse, group stereotyping or bias.<sup>167</sup> As a descriptive matter, however, both sides agree that courts have been “silent in the face of war.”<sup>168</sup> Executive unilateralists celebrate this fact; civil libertarians condemn it.

But in fact courts have not been silent. Over many decades, they have developed a subtle intermediate role, one that neither endorses unilateral

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did in the Carter era. From 1976 to 1980, the percentage of Southern Democrats who voted each year with a majority of their party in party-line votes ranged from 52% to 64% in the House and from 46% to 64% in the Senate. Comparable figures from 2000 to 2004 range from 77% to 85% in the House and 69% to 80% in the Senate. HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2005–2006, at 218–19 (2006).

<sup>164</sup> If one were equally concerned with the heightened pathologies of divided government during an era of strong parties, one would consider additional questions: Are modifications available that manage the unified government problem without further aggravating the problems of divided government? Are certain modifications capable of being switched on and off depending on whether government is unified or divided? Or are the best available modifications ones that must be designed to deal with the “average” context of unified and divided government? We address some of these considerations in passing, but our primary focus, for reasons just noted, is the unified government challenge to separation of powers.

<sup>165</sup> The material here and in the next few paragraphs borrows from Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004). See also Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (contrasting “National Security Maximalism” with “Liberty Maximalism” and arguing instead for “minimalism”).

<sup>166</sup> For particularly strong recent expressions of this view, see JOHN YOO, THE POWERS OF WAR AND PEACE (2005). See also Memorandum from John Yoo to Timothy Flanigan, Deputy Counsel to the President (Sept. 25, 2001), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

<sup>167</sup> See, e.g., DAVID COLE, ENEMY ALIENS (2003); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004). For a sustained critique of the civil libertarian perspective, see RICHARD A. POSNER, NOT A SUICIDE PACT: CONSTITUTIONAL RIGHTS IN TIME OF NATIONAL EMERGENCY (forthcoming 2006).

<sup>168</sup> See WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 202 (1998).

executive authority nor directly enforces civil rights and liberties against the government.<sup>169</sup> Instead, the courts typically have sought to tie the constitutionality of presidential action to the requirement of congressional authorization. When there is sufficiently broad political agreement that both the legislature and the Executive endorse a particular liberty-security tradeoff, the courts have generally accepted that judgment. When the Executive has acted without legislative approval, however, the courts have applied close scrutiny and, even during wartime, have sometimes invalidated those actions.<sup>170</sup> This process-oriented jurisprudential framework, which finds its most eloquent expression in Justice Jackson's famous concurring opinion in *Youngstown*,<sup>171</sup> dates back at least to the Civil War.<sup>172</sup>

Recently, the Supreme Court has applied the *Youngstown* framework in deciding critical post-9/11 cases concerning the war on terror. Consistent with constitutional history, the Court has leaned heavily on the constitutional requirement of congressional agreement with assertions of executive power. In the most significant decision so far, for example, the Court upheld executive detention of American citizens who had been engaged in armed conflict against the United States in Afghanistan.<sup>173</sup> But the Court refrained from concluding that *unilateral* executive detention was constitutional. Instead, the decision rested on the conclusion, under the *Youngstown* framework, that Congress had authorized executive detention in such circumstances in the 2001 Authorization for Use of Military Force<sup>174</sup> (AUMF). Thus the Court largely avoided resolving constitutional claims of inherent executive authority or of expansive individual rights.<sup>175</sup>

There is much to be said in favor of the Court's ongoing inclination to resist both first-order rights holdings, which would preclude governmental action no matter how broad the political consensus behind it, and affirmations of unilateral executive powers, which would threaten unchecked and unaccountable rule in contexts where important rights and liberties are at stake.<sup>176</sup> But the *Youngstown* framework assumes that Congress will be

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<sup>169</sup> For a defense of judicial reluctance to impose first-order substantive rights barriers to executive judgments during wartime, see Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

<sup>170</sup> See Issacharoff & Pildes, *supra* note 165, at 9–30.

<sup>171</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>172</sup> See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); see also Issacharoff & Pildes, *supra* note 165, at 9–19 (discussing *Milligan*).

<sup>173</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

<sup>174</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>175</sup> The Court did also hold, as a matter of due process, that Hamdi was entitled to “notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi*, 124 S. Ct. at 2648. This procedural requirement was an exceedingly modest step in the civil libertarian direction.

<sup>176</sup> See POSNER, *supra* note 167 (manuscript at 26–27, on file with the Harvard Law School Library); Issacharoff & Pildes, *supra* note 165; Posner & Vermeule, *supra* note 169; Sunstein, *supra* note 165.

actively involved in making the difficult policy decisions required during wartime and will provide the oversight of Executive-initiated action that courts feel ill-suited to offer through first-order rights adjudication. *Youngstown* thus embraces the Madisonian expectation that Congress will compete aggressively with the President for power and vigilantly monitor and check presidential decisionmaking. Here again, however, the Madisonian vision founders on the realities of partisan political competition. Especially when government is unified by party, we should not expect Congress to resist executive power in the way that courts and commentators take for granted.

A closer look at Congress's role in the battle against terrorism illustrates the point. This drama might be divided, to date, into three acts. In the immediate wake of 9/11, Congress took two decisive steps, first enacting the AUMF and then the initial Patriot Act.<sup>177</sup> But then, for the remainder of President Bush's first term, Congress became largely dormant. Silently ceding the terrain to a President implementing a series of novel and controversial measures to fight terrorism — executive detention of citizens deemed “enemy combatants,” use of military tribunals to try foreigners captured overseas, closed deportation hearings, and the like — Congress neither adopted measures to affirm these executive branch actions nor attempted to define the boundaries of executive powers. As the war in Iraq has dragged on into President Bush's second term and midterm elections draw near, there are signs that Congress is returning to the stage — enacting a ban on torture<sup>178</sup> and demanding more information about executive branch activities. Whether Congress is merely putting on a show to allow its members to dissociate themselves from a politically weakened President during election season or is actually moving toward addressing major policy issues in the war on terror remains to be seen. Nonetheless, the most glaring institutional fact about the war on terror so far is how little Congress has participated in it. The President has resolved most of the novel policy and institutional challenges terrorism poses with virtually no input or oversight from the legislative branch.

Avoidance of responsibility in the foreign affairs arena seems to some extent to be a genuinely institutional, cross-partisan feature of the modern Congress, reflecting the relatively low material stakes of congressional constituencies and the high level of risk aversion among incumbent legislators. Since World War II, Congress has preferred to let the President lead the country into war, eventually either jumping on the bandwagon or turn-

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<sup>177</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

<sup>178</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2739, 2739–2744 (to be codified at 42 U.S.C. 2000dd to 2000dd-1).

ing critical depending on how events played out.<sup>179</sup> But there remains a substantial range of variation in Congress's willingness to second-guess the Executive during wartime, and some of it is due to patterns of party control. An important part of the explanation for congressional passivity in the post-9/11 period is the fact of unified government.<sup>180</sup> For Congress to respond to executive initiatives is to give the opposition party an opportunity to call into question, criticize, or potentially embarrass the President. If a partisan majority in Congress generally shares the President's ideological and policy goals, abdication might further the party's interest in uniting behind the President. Why run the risk that unpleasant facts will be revealed in congressional deliberations or that blame for failures will fall on the party as a whole?<sup>181</sup>

Congress's remarkable passivity during much of the war on terror brings us back to a closer reading of Justice Jackson's celebrated opinion. Essential to Justice Jackson's realist assessment was the claim that "[s]ubtle shifts take place in the centers of real power that do not show on the face of the Constitution,"<sup>182</sup> including the "rise of the party system," which has made a "significant extraconstitutional supplement to real executive power."<sup>183</sup> Justice Jackson's opinion emerged just at the end of the longest stretch of essentially unified party control of government in American history.<sup>184</sup> Perhaps Justice Jackson was especially attuned to the risk of "totalitarian"<sup>185</sup> power and "dictatorship"<sup>186</sup> in the presidency not just because of recent European events, but also in light of an American system of government in which the President could leverage party loyalties to

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<sup>179</sup> See ELY, *supra* note 150, at ix, 52–54; HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 117–33 (1990).

<sup>180</sup> See Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2679 (2005) (noting that when the government is unified "Congress will probably authorize anything for which the President asks").

<sup>181</sup> One answer to these questions, which helps account for recent criticisms of aspects of the Bush Administration's war on terrorism by prominent congressional Republicans like John McCain, is that weak, second-term Presidents pursuing unpopular policies may become a political liability for members of their party in Congress. Outgoing presidents may also provide a foil for members of their party who aspire to replace them in the White House. With the President barred from further office, other political actors from the President's party, particularly in the Senate, have electoral incentives to position themselves as potential alternatives. Notice that these political phenomena have nothing to do with Congress's institutional interests. Instead, they are a reflection of the changed partisan competitive dynamics generated by the Twenty-Second Amendment.

<sup>182</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

<sup>183</sup> *Id.* at 654.

<sup>184</sup> Truman endured a brief period of divided government when he lost control of both houses in his first midterm election in 1946. He then ran against the "do nothing" Congress in 1948 and gained overwhelming control of the House (263 Democrats and 171 Republicans were elected with Truman) and the Senate (54–42) when he won. KENNETH C. MARTIN, THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS, 1789–1989, at 26 tbl.4 (1989) (Senate); NELSON W. POLSBY, HOW CONGRESS EVOLVES 5 tbl.1.1 (2004) (House).

<sup>185</sup> *Youngstown*, 343 U.S. at 641 (Jackson, J., concurring).

<sup>186</sup> *Id.* at 653.

fight an undeclared war with minimal congressional opposition. Justice Jackson was concerned about the “concentration [of political power] in a single head,” who, by leveraging party loyalty and policy agreement, could “extend his effective control into branches of government other than his own.”<sup>187</sup>

Justice Jackson obviously intended his tripartite categorization of presidential-congressional relations to serve as a check on executive unilateralism, but as applied by subsequent courts, his framework has turned out to be elusive. The problem has been that placing an executive action in the correct, outcome-determinative Jacksonian box requires confident judicial judgments about when congressional statutes clearly endorse or prohibit specific presidential actions in novel areas of policy — areas in which the (many) conceivably relevant statutes tend to be ambiguous, contradictory, or not designed with the particular issue in mind.<sup>188</sup> In many cases, the candid answer is that Congress simply did not address the question. This leaves courts in Justice Jackson’s purgatorial “zone of twilight,” guided by “the imperatives of events and contemporary imponderables rather than . . . abstract theories of law.”<sup>189</sup> Understandably reluctant to take responsibility for making crucial and controversial decisions unguided by either specific law or knowledge of the likely consequences when the stakes are so high (also the reason courts are reluctant to make first-order rights decisions in these contexts), judges frequently attribute to vague legislation a “clear” congressional endorsement (or sometimes, a “clear” congressional prohibition) of the executive action at issue.

But perhaps Justice Jackson’s linkage between constitutional analysis and the realities of modern party competition offers courts more guidance than has been recognized. When it is not clear whether congressional statutes prohibit the executive action at issue or simply do not address it, *and Congress is controlled by the President’s political party*, perhaps courts should follow Justice Jackson in tilting toward prohibiting presidential action (particularly when that action amounts to a novel expansion of executive power). Such a default rule would reflect Justice Jackson’s working assumption that Presidents can mobilize same-party Congresses with relative ease to accomplish measures they deem necessary to national secu-

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<sup>187</sup> *Id.* at 653–54.

<sup>188</sup> Compare Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure* 37–38 (Univ. of Chi., Pub. Law & Legal Theory Working Paper No. 104, 2005), available at <http://ssrn.com/abstract=791725> (criticizing as fictional judicial reliance on purported congressional authorization or denial in the “emergency” cases), with Issacharoff & Pildes, *supra* note 165, at 36–43 (noting that the process framework for these cases may be partly illusory but pointing out potential institutional benefits of preserving that illusion).

<sup>189</sup> *Youngstown*, 343 U.S. at 637.

rity.<sup>190</sup> In the *Youngstown* context, Justice Jackson appears to have believed that President Truman could have pressed a responsive Congress to grant him power to seize the steel mills and would have readily received permission if his claims of necessity had any real warrant.<sup>191</sup> Requiring President Truman to seek explicit congressional permission might at least have led to the release of more information about the actual risk of a steel shortage that would have hindered the war effort and to greater public deliberation about the merits of seizing the mills.<sup>192</sup> When Presidents face partisan opposition in Congress, however, the risks of delay, political squabbling, and stalemate may outweigh the benefits of deliberation and bipartisanship.<sup>193</sup> Thus, the flipside of the Jacksonian default rule might be that courts should more generously construe statutes as supporting executive authority when government is divided.

To be sure, this default-rule approach is a rather “minimalist” solution to the broader problem of executive unilateralism during wartime.<sup>194</sup> Even so, there is reason to doubt both the capacity and inclination of judges to

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<sup>190</sup> See *id.* at 653 (“In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute.”).

<sup>191</sup> Sometimes what the current Congress would do will be sufficiently clear, and the Executive’s need sufficiently urgent, that even a court applying this default rule would find authorization. In those contexts, court decisions requiring the President to go back for legislative authorization would, perhaps, be meretricious. That appears to be the best explanation for *Dames & Moore v. Regan*, 453 U.S. 654 (1981), in which the Court upheld powers President Carter had asserted in conjunction with his settlement of the Iranian hostage crisis. Commentators have long complained about the Court’s willingness to read the statutes as authorizing President Carter’s use of these powers. See, e.g., KOH, *supra* note 179, at 139–40 (“[T]he Court should have demanded more specific legislative approval for the president’s far-reaching measures.”). But President Carter’s deal to get the hostages returned was uncontroversial — nullification of judicial attachments against assets of the Iranian government — and would surely have been overwhelmingly endorsed by Congress. *Dames & Moore* may simply have been a bow to that reality. See, e.g., Arthur S. Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104 (1982).

<sup>192</sup> Thus, Jackson’s approach in *Youngstown* is a kind of “preference-eliciting” statutory default rule. See EINER ELHAUGE, STATUTORY DEFAULT RULES (forthcoming 2006) (manuscript at 182–83, on file with the Harvard Law School Library). Professor Elhaug explains:

[W]hen enactable preferences are unclear, often the best choice is instead a preference-eliciting default rule that is more likely to provoke a legislative reaction that resolves the statutory indeterminacy and thus ultimately leads to statutory results that reflect enactable political preferences more accurately than any judicial estimate possibly could. That legislative reaction might be ex ante, through more precise legislative drafting to avoid the prospect of the default rule. Or it might be ex post, through subsequent legislative override of the interpretation imposed by the default rule.

*Id.*

<sup>193</sup> Given Congress’s general passivity when it comes to politically risky decisions about war and crises abroad, one could make the case that such a default rule would be justifiable across the board. The benefits of extending the rule would have to be weighed against the risk of partisan obstreperousness during divided government.

<sup>194</sup> For a defense of judicial “minimalism” in this context, see Sunstein, *supra* note 165, and Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005).

apply it.<sup>195</sup> In contrast to the stable and clearly visible constitutional lines between the branches, patterns of party control are fluid, and varying degrees of party cohesion and polarization make them both difficult and controversial to discern. At least in the current constitutional culture, moreover, it is hard to imagine courts expressly making legal doctrine turn on the partisan configuration of government (though it is easier to imagine them doing so *sub rosa*). Though courts entered the “political thicket” forty years ago, Justice Frankfurter’s warning has continued to haunt the enterprise.<sup>196</sup> After the imbroglio of *Bush v. Gore*<sup>197</sup> — which some have called Justice Frankfurter’s revenge — courts may be all the more reluctant to attend expressly to party politics when crafting legal rules.<sup>198</sup> Finally, as we emphasize below,<sup>199</sup> the judicial branch itself is hardly quarantined, at least in the long run, from the effects of party politics. The hope that courts will use constitutional rules to check unified party government must be tempered by the recognition that the same unified government will be appointing judges and exercising some measure of ongoing political control over the courts.

Still, the liberty and security issues arising from the war on terror suggest that such a Jacksonian default rule might well be an improvement. If courts were less inclined to read ambiguous legislation as affirmative authorizations of executive action, the President would be forced to press Congress to address the merits of the administration’s antiterrorism strategy. A default rule against latitudinous interpretations in support of executive power during unified government could be an action-forcing mechanism to press a reluctant, but not ideologically recalcitrant, Congress to

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<sup>195</sup> A rare exception is Justice Scalia’s dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), in which, while explaining the political dynamics surrounding the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591–599 (2000), he notes that “[i]f Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not.” *Morrison*, 487 U.S. at 733 (Scalia, J., dissenting). More commonly, however, the Court ignores partisan influence on the behavior of political institutions, as when the Court assumes, rather abstractly, that “Congress” will police partisan gerrymandering in the states — without recognizing that, in a world of modern parties, it is often partisan forces in Congress that *drive* states to engage in partisan gerrymandering. See *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (plurality opinion) (holding that partisan gerrymandering claims are nonjusticiable); *id.* at 1775 (resting holding, in part, on point that the Framers gave Congress the power to regulate state design of congressional districts, without acknowledging that the rise of parties makes that power a less effective check than envisioned originally).

<sup>196</sup> In the 4–3 plurality opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), Justice Frankfurter argued that claims of malapportioned congressional districts should be nonjusticiable because “[c]ourts ought not to enter this political thicket.” *Id.* at 556 (plurality opinion). *Baker v. Carr*, 369 U.S. 186 (1962), overruled *Colegrove*.

<sup>197</sup> 531 U.S. 98 (2000).

<sup>198</sup> Squeamishness about partisan politics may help account for the absence in later cases of Justice Jackson’s discussion of the effects of parties on separation of powers and, more generally, the delegitimation of parties in constitutional discourse.

<sup>199</sup> See *infra* section III.A.3, TAN 239–254; *infra* TAN 280–287.

share responsibility for these difficult choices — or at least give them a serious airing.

For present purposes, it is enough to suggest that those who seek insight on these issues from Justice Jackson's *Youngstown* analysis — which is to say nearly all judges and constitutional scholars — should understand its functional premises. Issues of executive power in the war on terror are too important to be left to the kind of legal scholasticism that characterizes judicial opinions and much scholarship on these issues.<sup>200</sup> At least for the heirs of Jacksonian realism, the best approach to executive power must depend on the actual political dynamics between the legislative and executive branches. As Justice Jackson once tried to tell us, these dynamics, in turn, depend centrally on political parties.

2. *The Administrative State.* — The overarching goal of the constitutional separation of powers as applied to the administrative state is “to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle.”<sup>201</sup> Thus, when courts adjudicate disputes between the legislative and executive branches related to their control over agencies, they see their job as guarding against the “encroachment” or “aggrandizement” of one branch at the expense of its rival.<sup>202</sup> At the same time, however, many courts and theorists see the emergence of the post–New Deal administrative state as the greatest threat to the balance of powers between the branches since the Founding.<sup>203</sup> There is some tension, to put it mildly, between the assumption that Congress is perpetually engaged in cutthroat competition for power with the Executive and the reality of massive congressional delegations of authority to the executive branch.

A number of familiar theories explain why delegation might be in the interests of MCs, whether or not in the public interest. Delegation might

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<sup>200</sup> We take this to be the overarching theme of POSNER, *supra* note 167, and Tushnet, *supra* note 180.

<sup>201</sup> Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

<sup>202</sup> See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991) (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)); *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (citing *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)); *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (citing *Buckley*, 424 U.S. at 129); see also A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1368 (1994) (harmonizing these and other separation of powers decisions as serving the goal of preventing Congress from aggrandizing its own power); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 126, 156 (1994) (explaining and defending separation of powers law as checking “presidential aggrandizement without the concomitant risk of congressional aggrandizement”).

<sup>203</sup> See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 557–61 (1992); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1819–21 (1996); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994).

represent a strategic effort on the part of legislators to duck controversial decisions that will inevitably displease one or another interest group, or to take credit for regulatory benefits while shifting the blame for regulatory costs.<sup>204</sup> Alternatively, congressional delegation might simply represent an efficient division of labor between the branches. Congress can get more policy bang for its lawmaking buck if it can spend its scarce legislative resources making wholesale value and policy judgments while relying on the technocratic expertise of bureaucrats to implement those judgments most effectively. On this view, Congress delegates not to abnegate policymaking responsibility, but to maximize accomplishment of its policy goals.<sup>205</sup>

To the extent that Congress cares about policy outcomes, it will be much more willing to delegate policymaking authority to an executive branch actor who shares, or can be kept in line with, its policy preferences. This leads to the prediction that Congress will delegate more authority to the executive branch when government is unified than when it is divided. Empirical studies confirm this prediction.<sup>206</sup> Professors David Epstein and Sharyn O'Halloran, who have done the most systematic work on the topic, look at both the amount of discretionary authority delegated by Congress and the constraints imposed on the delegate — such as direct oversight, appeals procedures, legislative vetoes, and approval requirements. They find that MCs are significantly more likely to vote to delegate discretion to an executive branch controlled by their party and that Congress does indeed delegate significantly less, and with significantly more constraints, when the opposing party controls the executive branch.<sup>207</sup> This is consistent with the historical pattern. The most extensive congressional delegations since the New Deal took place during the Kennedy-Johnson Great Society era when the Democrats held both branches (as they also did, of course, during the New Deal), with a marked drop-off during the divided Nixon and Reagan presidencies (when the parties were becoming more coherent and polarized).<sup>208</sup>

We should also predict that when Congress does choose to delegate, it will choose the agent most likely to share its policy preferences. Epstein and O'Halloran find that when government is divided, congressional delegations move away from the Executive Office of the President and execu-

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<sup>204</sup> See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 55–63 (1982); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–54 (1982).

<sup>205</sup> See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91–95 (1985).

<sup>206</sup> See EPSTEIN & O'HALLORAN, *supra* note 133, at 121–62; see also JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?* 139–70 (2002) (examining state level data).

<sup>207</sup> See EPSTEIN & O'HALLORAN, *supra* note 133, at 131–38, 142–50.

<sup>208</sup> See *id.* at 115–17. Interestingly, Professors Epstein and O'Halloran find that the amount of delegated discretion has declined on average since World War II. *Id.* at 117.

tive agencies and toward independent agencies and commissions.<sup>209</sup> When Congress confronts a President who disagrees with its policy objectives, in other words, it directs its delegations to the executive branch actors most insulated from presidential control, and perhaps also most susceptible to congressional control.

The conventional constitutional law wisdom of continuous interbranch rivalry offers no resources for explaining these variations. Courts and constitutional theorists debate the legality and desirability of delegations, executive privilege oversight, and independent agencies in general, without regard for the political dynamics that generate these arrangements. For example, proponents of the unitary executive express outrage at the Court's willingness to countenance limitations on the President's removal power over the heads of independent agencies.<sup>210</sup> But neither the Court nor the unitarian theorists pause to wonder why Congress does not *always* aggrandize itself by creating or delegating to agencies insulated from presidential control, rather than voluntarily giving up power to its institutional archrival by delegating to executive agencies. Has Congress lost sight of its own institutional interests?

Consider the famously underenforced nondelegation doctrine, which frowns upon excessively broad grants of discretion to the executive branch and nominally requires Congress to supply at least an "intelligible principle" to guide the exercise of delegated authority. Although the Court has invalidated only two acts of Congress on nondelegation grounds, both during the New Deal, the principle lives on in the form of a number of "non-delegation canons" of statutory construction<sup>211</sup> and is invoked from time to time by Justices calling for its revival.<sup>212</sup> The principle also lives on in the scholarly literature. Advocates of a robust nondelegation doctrine argue that overly broad delegations not only violate the Constitution by passing legislative power to the executive branch, but also diminish accountability by allowing Congress to duck difficult policy decisions or dupe different constituencies about the decisions it has made.<sup>213</sup>

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<sup>209</sup> See *id.* at 154–60.

<sup>210</sup> The leading cases are *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988), and *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–32 (1935). Scholarly arguments in favor of the unitary executive include Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

<sup>211</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

<sup>212</sup> See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring); *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *rev'd sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

<sup>213</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131–34 (1980); THEODORE J. LOWI, *THE END OF LIBERALISM* 92–126 (2d ed. 1979); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993).

Recognizing the difference between Congress's delegation strategies during unified and divided government might lead to a somewhat less alarmist view. For one thing, to the extent the concern is simply with sweeping delegations, if opposite-party delegations are generally restrained and well-supervised, we should worry much less when government is divided than when it is unified. This might suggest that any reinvigoration of the nondelegation doctrine should be partial, premised on a distinction (doctrinally explicit or *sub rosa*) between delegations under divided and unified government, with only the latter subject to serious scrutiny. But from this perspective, even same-party delegations might seem less worrisome. To the extent that broad delegations reflect policy agreement between the branches, we should expect the same general policy thrust regardless of the immediate institutional decisionmaker. It is hard to see how legislative accountability is sacrificed in any meaningful way if Congress is in fact making the same basic policy judgments in its decision to delegate that it would have made had it written a more specific statute. If the animating ideal of the nondelegation principle is to "ensure[] . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will,"<sup>214</sup> perhaps we should rest assured that Congress will adequately police itself.

Indeed, if there is a problem with sweeping delegations, it would seem to be primarily a matter of time inconsistency. Patterns of party control change periodically, but many broad delegations passed under unified government stay in effect indefinitely, until the statutes are revised or repealed. Evidently, and not surprisingly, MCs have limited time horizons. When government divides, Congress is confronted with large measures of executive policymaking that it would substantively reject if it could. As commentators have emphasized, however, Congress will have limited recourse against an opposite-party executive empowered by broad delegations.<sup>215</sup> Given divided government, Congress cannot pass a subsequent statute reversing executive branch policy unless it can override the President's veto. Congress can attempt to use the usual tools of oversight and influence to bring the relevant agency back into line, but at least when it comes to executive branch agencies, there is good reason to expect that the President's policy preferences will more often prevail.<sup>216</sup>

Should executive policymaking that conflicts with the preferences of the current (though not necessarily enacting) Congress be a cause for separation of powers concern? Notice that an analogous situation would seem to arise whenever, say, a Republican Congress under divided government is confronted with a regulatory regime enacted by a previous Democratic

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<sup>214</sup> *Indus. Union Dep't*, 448 U.S. at 685 (Rehnquist, J., concurring).

<sup>215</sup> See, e.g., Greene, *supra* note 202, at 182–84.

<sup>216</sup> See, e.g., Eskridge & Ferejohn, *supra* note 203, at 535 (making this conventional assumption).

Congress. How much difference should it make, from a separation of powers perspective, whether the enacting statute spelled out the policy choices of the regulatory regime in detail or left these choices to the discretion of an executive branch agency inclined to make them in the same way? If there is a constitutional concern here, it would seem to be an issue of intertemporal entrenchment of policy choices more than interbranch delegation.<sup>217</sup> Conventional separation of powers discourse, focused exclusively on the relationships between the branches qua branches, makes it difficult to appreciate that the relevant conflict is as much between a (prior) Democratic and (present) Republican Congress as between Congress and the President.

Of course interbranch disagreement over the exercise of delegated policy authority might also result from a change in party control of the presidency. This situation has been reflected in several of the Court's landmark administrative law decisions, including *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*<sup>218</sup> and *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>219</sup> Both cases involved agency interpretations of open-ended statutory provisions (governing auto safety and environmental protection, respectively) enacted by Congress during periods of unified Democratic control of the federal government. In each case, the relevant agency switched its interpretation, substituting a less stringent regulatory regime shortly after Reagan's election in 1980 divided government between a Republican President and a Democratic Congress. And in each case, the Court, while formally requiring a "reasoned" explanation or "reasonable" interpretation, seemed to recognize and tolerate the change in presidential administration as the real reason behind the agency's reversal, going so far in *Chevron* as to recognize the agency's political accountability to the President as a justification for judicial deference.<sup>220</sup> *State Farm* and *Chevron* thus recognized that changes in partisan

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<sup>217</sup> Compare, e.g., Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. BAR FOUND. RES. J. 379, and John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation*, 91 CAL. L. REV. 1773 (2003) (making the conventional case that legislative entrenchment is constitutionally and normatively undesirable), with Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (rebutting the conventional case).

<sup>218</sup> 463 U.S. 29 (1983).

<sup>219</sup> 467 U.S. 837 (1984).

<sup>220</sup> See *id.* at 865 ("In contrast [to courts], an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . ."). This was approximately Justice Rehnquist's view in *State Farm*:

The agency's changed view of the standard seems to be related to the election of a new President of a different political party . . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains

control of the executive branch can and do motivate agencies to change the application of previously enacted statutes.

These cases should help us see that branch interests are not intrinsic and stable but rather contingent upon shifting patterns of party control. And to some extent they have. Commentators have suggested, for example, that future Congresses will now think twice before delegating regulatory authority to an executive branch that could change partisan hands — and policy outlook — and legally be able to implement its new policies through agency reinterpretations of statutes. But these same commentators have failed to extend this insight to changes in partisan control of Congress. Contemporaneously with *State Farm* and *Chevron*, the Supreme Court decided *INS v. Chadha*<sup>221</sup> and *Bowsher v. Synar*.<sup>222</sup> By invalidating the legislative veto in *Chadha*, and by prohibiting Congress from delegating to “an officer under its control” in *Bowsher*, the Court limited Congress’s ability to exercise ongoing control over policy decisions made pursuant to broad delegations. This has led commentators to suggest that *Chadha* and *Bowsher* complement *State Farm* and *Chevron* in creating “a structurally enforced nondelegation doctrine” for Congress.<sup>223</sup> If Congress is stripped of control over broad delegations as soon as they are enacted, the argument goes, then surely it will be wary of enacting them in the first place, for fear of executive branch policy drift facilitated by *State Farm* and *Chevron*.

This is right as far as it goes. But to the extent Congress does delegate, there is no reason to believe that stripping Congress of the power to delegate to itself, as *Chadha* and *Bowsher* do, will lead Congress to delegate less power to executive branch agencies than it would if Congress were able to maintain control over those delegations through devices such as the legislative veto or retention of removal power. To believe that a congressional majority will generally prefer to delegate to a future Congress than to a future executive branch is to view Congress as an entity with stable institutional interests of its own. As should now be clear, however, congressional policy itself may also drift over time, depending on partisan shifts. A Democratic Congress delegating to a Democratic executive branch will be reassured by the availability of the legislative veto only to the extent it believes that the Republicans will sooner recapture the presidency than Congress itself. If it is Congress that is under greater

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within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part). Although a majority in *State Farm* voted to reverse the agency order under a “hard look” standard, this result merely reflected the view that a change in administration was not sufficient to justify the regulatory reversal.

<sup>221</sup> 462 U.S. 919 (1983).

<sup>222</sup> 478 U.S. 714 (1986).

<sup>223</sup> John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 711–12 (1997); see also Lessig & Sunstein, *supra* note 210, at 114–16.

threat (say because partisan control of one chamber is precariously balanced), then we should expect incumbent MCs both to prefer broad delegations to the more safely Democratic executive and to welcome the abrogation of tools of ongoing congressional control as in the *Chadha* and *Bowsher* decisions.

When it is the presidency instead that seems to be under greater threat of partisan turnover, a congressional majority will prefer to do what it can to limit the discretion of agencies to reverse policies in the way that *Chevron* invites. This was precisely the political context in which Congress, many years before *Chevron*, had enacted in 1946 the Administrative Procedure Act.<sup>224</sup> Correctly anticipating the imminent loss of the presidency to the Republicans, Democrats in Congress sought to consolidate and entrench the policy gains of the New Deal by implementing a set of procedural restrictions that made it difficult for agencies to shift policy from the status quo.<sup>225</sup> Had the New Deal Democrats expected to lose control of Congress while holding on to the presidency, their preferences with respect to administrative autonomy might have been quite the opposite.

The discussion thus far has proceeded on the conventional assumption that the primary concern about delegation is the preservation of Congress's lawmaking role. A different approach to separation of powers in administration, increasingly prominent in the scholarly literature, is to accept, if not celebrate, the inevitability of broad executive discretion, but to push for greater presidential control over the executive branch. Here, too, the distinction between unified and divided party control, and the different political dynamics that result, can be illuminating.

Consider Dean Elena Kagan's recent description and defense of "presidential administration."<sup>226</sup> As Dean Kagan emphasizes, the assertion of greater presidential policy control over the regulatory activity of executive branch agencies — in other words, the rise of presidential administration — under Presidents Reagan and, even more so, Clinton was motivated in large part by divided government. Facing a cohesive and hostile Republican majority in Congress that prevented him from pursuing his policy agenda through legislation, Clinton turned to unilateral action, using directive orders to effect policy change through administrative action.<sup>227</sup> Dean Kagan convincingly shows that, in an era of cohesive and polarized parties, divided government tends to displace policymaking from the legislative to the administrative process. Somewhat less convincing, perhaps, is her optimistic take on the relationship between presidential administration and congressional oversight, which she portrays as largely complemen-

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<sup>224</sup> Ch. 324, 60 Stat. 247 (1946).

<sup>225</sup> See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999).

<sup>226</sup> See Kagan, *supra* note 84.

<sup>227</sup> See *id.* at 2248–50.

tary.<sup>228</sup> We should expect that the same party competition under divided government that gridlocks the legislative process and motivates presidential administration will create an adversarial “oversight arms race” between the President and Congress over the bureaucracy.<sup>229</sup> The administrative equivalent of legislative impasse is a politicized, strategic bureaucracy, subject to fragmented and conflicting accountability, sacrificing neutral competence and efficiency in order “to survive in a force-field dominated by rival political leaders.”<sup>230</sup>

Interbranch battles over agency control also complicate the application and normative underpinnings of *Chevron* deference. Consider the Supreme Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>231</sup> denying *Chevron* deference to the FDA’s move to regulate cigarettes as a “drug” or “device” under the Federal Food, Drug, and Cosmetic Act<sup>232</sup> (FDCA). The FDA’s decision came in response to a directive from President Clinton and clearly conflicted with the preferences of the Republican majority in Congress — presidential administration in action.<sup>233</sup> The Court declined to apply the ordinary *Chevron* presumption that “a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>234</sup> “In extraordinary cases,” the Court explained, “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”<sup>235</sup> The Court’s opinion does not clearly identify what exactly makes this case “extraordinary,” but one interpretation is that the Court was uncomfortable choosing sides in a political battle between a Republican Congress and a Democratic President.<sup>236</sup> This has nothing to do with the intent of the Congress that enacted the FDCA; that Congress, legislating in 1938, very likely would have embraced broad interpretive authority for an ideologically sympathetic agency.<sup>237</sup> But perhaps the Court understood *Chevron* deference to be more about the preferences of the present Congress than the enacting one, and understood the “extraordinary cases” exception to be warranted by major policy disagreement under divided government.

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<sup>228</sup> See *id.* at 2346–49.

<sup>229</sup> See Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL’Y 227, 235 (1998); see also Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819.

<sup>230</sup> Ackerman, *supra* note 6, at 699.

<sup>231</sup> 529 U.S. 120 (2000).

<sup>232</sup> 21 U.S.C.A. §§ 301–399 (West 1999 & Supp. 2005).

<sup>233</sup> See Kagan, *supra* note 84, at 2283.

<sup>234</sup> *Brown & Williamson*, 529 U.S. at 159.

<sup>235</sup> *Id.*

<sup>236</sup> See ELHAUGE, *supra* note 192 (manuscript at 173–75).

<sup>237</sup> See *Brown & Williamson*, 529 U.S. at 165–66 (Breyer, J., dissenting) (“That Congress would grant the FDA such broad jurisdictional authority should surprise no one. In 1938, the President and much of Congress believed that federal administrative agencies needed broad authority and would exercise that authority wisely — a view embodied in much Second New Deal legislation.”).

The unifying theme of these observations is that a Madisonian, turf-war understanding of the relationship between Congress and the President fails to capture what is at stake in separation of powers controversies over administration.<sup>238</sup> The interests of the branches are not intrinsic or stable but rather contingent on shifting patterns of party control, coming in and out of alignment over time. Understanding that party more than branch competition structures the administrative state is a necessary first step in making sense of the politics that separation of powers and administrative law seek to govern.

3. *Judicial Review.* — For many decades, debates over judicial review centered on what Alexander Bickel denominated the “countermajoritarian difficulty,”<sup>239</sup> the moral and political problem posed by the power of courts to invalidate legislation supported by democratic majorities (or at least legislative ones). In recent years, however, the pendulum has swung in the other direction: it has now become commonplace for scholars to assert that the countermajoritarian difficulty is an academic illusion, one based on an insufficiently realist understanding of the relationships between courts, political institutions, and public opinion. In this revisionist view, reflected in work by political scientists,<sup>240</sup> constitutional historians,<sup>241</sup> and constitutional scholars influenced by positive political theory,<sup>242</sup> judicial review is severely constrained by the political branches. As a result, judicial decisions cannot stray far or for long from the policy preferences of national majorities. The conclusion is that constitutional theory should stop worrying so much about the countermajoritarian difficulty because judicial review has not been and cannot be very countermajoritarian.<sup>243</sup>

<sup>238</sup> Professor Brown characterizes the conventional understanding of separation of powers as a “turf” war. See Brown, *supra* note 51, at 1519.

<sup>239</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1986).

<sup>240</sup> In political science, the first expression of this view is typically traced to Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 282–86 (1957). See also John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002) (explaining means by which political institutions and public opinion constrain judicial power); Keith E. Whittington, “*Interpose Your Friendly Hand*”: *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005) (describing the dependence of judicial power on support of political institutions).

<sup>241</sup> See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004) (arguing that Supreme Court civil rights decisions were largely ineffective through most of the twentieth century because they departed from majoritarian political preferences).

<sup>242</sup> See, e.g., Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003) (analyzing constraints that political institutions and public opinion impose on courts).

<sup>243</sup> This argument is pressed most directly in Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002). Note that, to the extent the criticism of judicial review is a moral one, the values of democratic self-government are compromised even if the courts generate the same outcomes that democratic majorities would have reached. The fact of judicial convergence on majoritarian preferences would be beside the point. For a criticism along these lines, see JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999), and Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

Both the conventional worries about the countermajoritarian difficulty and the revisionist view assume that political constraints on the Court are relatively constant over time; revisionists see these constraints as strong, while countermajoritarian theorists see them as weak. Both sides focus on moments in American history that support their conclusion, but these moments provide only a partial picture; the two sides therefore seem to talk past each other. For a crucial variable in understanding the extent to which courts can contradict the preferences of the political branches is the relationship between the legislative and executive branches. Whether government is unified or divided conditions the ability of political institutions to respond to judicial decisions holding legislation or other governmental action unconstitutional. In divided periods, when there is no dominant legislative-executive consensus on policy, judicial review *can* be significantly countermajoritarian, given the strong supermajoritarian requirements for political action. When a relatively cohesive majority controls the legislative and executive branches, on the other hand, courts are much more constrained.

The ability of national majorities to constrain the Court is typically supported by historical evidence from two of the most dramatic eras in which the Court clashed with the political branches and then backed down: the New Deal and Reconstruction. In the New Deal era, resistance to progressive state legislation, such as wage and hours laws, followed by invalidation of New Deal programs, was reversed in the wake of President Roosevelt's overwhelming second-term electoral triumph in the 1936 elections. During the campaign and after, FDR leveraged his political mandate to attack the Court's resistance to the New Deal, culminating in his infamous Court-packing plan.<sup>244</sup> Though the plan was not enacted, the threat it posed, along with FDR's attacks and electoral mandate (the largest electoral victory in the history of two-party competition), were considered central causes of what scholars for many years viewed as a dramatic "switch in time" by the Court. After 1937, the Court consistently upheld New Deal legislation and reversed inconsistent precedents — a transformation aided by five appointments that FDR made to the Court in the two and a half years after the plan's defeat.<sup>245</sup> The precise causal role the Court-packing plan played is debated by historians,<sup>246</sup> but most agree that the

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<sup>244</sup> For a detailed history of the origins and reception of the plan, see WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 82–162 (1995). In Professor Leuchtenburg's view, "[n]o event of twentieth-century constitutional history is better remembered than Franklin D. Roosevelt's ill-fated 'Court-packing' scheme of 1937." *Id.* at 82.

<sup>245</sup> *Id.* at 154.

<sup>246</sup> The leading revisionist account is BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998).

Court's jurisprudence changed after 1936 and came to reflect the preferences behind the New Deal.

Somewhat similarly, in the Reconstruction era, when a dramatic initial Court decision, *Ex parte Milligan*,<sup>247</sup> appeared to threaten Congress's fundamental Reconstruction policies, Congress enacted a law (over a presidential veto) that withdrew the Court's jurisdiction over a case that had already been argued before the Court but not yet decided. At the same time, Congress began impeachment proceedings against President Andrew Johnson.<sup>248</sup> When the Court finally confronted the constitutionality of Congress's attempt to close its doors, it upheld Congress's power to do so in the famous *Ex parte McCardle* decision.<sup>249</sup> This dramatic reversal, too, is thought by many to demonstrate that a Court confronting majoritarian political opposition will back down.<sup>250</sup>

Not sufficiently appreciated, however, is the fact that the New Deal and Reconstruction eras were historically distinctive, characterized by some of the most sustained concentrations of national partisan political power in American history. From 1935 until 1939, Democrats outnumbered Republicans in the Senate 69–25 and 76–16; in the House, 322–103 and 334–88. Similarly, in 1865 and 1869, Republicans outnumbered Democrats in the Senate 39–11 and 57–9, respectively; in the House, 136–38 and 173–47, respectively.<sup>251</sup> When one party controls the presidency and both chambers with margins of 73–82% over four years (the New Deal) or controls both chambers with veto-proof majorities of 78–86% over four years (Reconstruction) even with a President of the opposite party,<sup>252</sup> the political branches are able to amass a level of power reached only during exceptional moments in American political history.

Reconstruction and the New Deal do suggest that in eras of extraordinarily unified partisan domination of the political branches, a Court that threatens core partisan agenda items can be effectively disciplined politically. Judicial review then is indeed constrained by the presence of sustained, cohesive partisan majorities. But to generalize about the practice of judicial review and political constraints based on periods of strongly unified government is a mistake.<sup>253</sup> In periods of divided government (and

<sup>247</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>248</sup> See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 78 (13th ed. 1997).

<sup>249</sup> 74 U.S. (7 Wall.) 506 (1868). For a discussion of the historical relationship between *Milligan* and *McCardle*, see Issacharoff & Pildes, *supra* note 165, at 9–19.

<sup>250</sup> The Reconstruction “lesson” is more ambiguous than the New Deal one since within six years of *McCardle* the Court began undermining central aspects of Reconstruction. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875).

<sup>251</sup> MARTIN, *supra* note 184, at 25 tbl.4.

<sup>252</sup> Recall that Andrew Johnson lacked electoral legitimacy, having become President by assassination, and was impeached, avoiding conviction by only one vote.

<sup>253</sup> This point is most fully considered in Cornell Clayton, *Law, Politics, and the Rehnquist Court: Structural Influences on Supreme Court Decision Making*, in *THE SUPREME COURT IN AMERICAN*

even unified government, if the majority party is fragmented and lacks the enormous majorities of the New Deal and Reconstruction eras), courts will have much greater latitude to operate free of effective political discipline.

The distinction between unified and divided government thus highlights a deep irony of countermajoritarian judicial review. Judicial review may be most needed as a supplemental source of checks and balances in eras of strongly unified government, when partisan majorities pursue linked aims through the political branches without any internal check. During divided government, in contrast, partisan conflict and competition between the political branches may reduce the need for an external check. Yet it is precisely under strongly unified governments that the political branches are most able to constrain the Court and over time to exercise further control by appointing a number of Justices. Only during divided government do courts have the independence to act as a meaningful check on national majorities. In short, strongly independent judicial review may be possible only when least necessary.<sup>254</sup>

### B. Democratic Institutional Design

Although constitutional lawyers and scholars are likely to focus first on doctrinal implications, a party-centered approach to separation of powers points in other directions as well. Particularly when it comes to confronting the unique challenge of strongly unified government, we should push beyond constitutional doctrine and think about separation of powers at the level of institutional design.

1. *Minority Opposition Rights.* — Viewing the absence of intragovernmental competition as a problematic feature of their parliamentary systems, many Western democracies have embraced the idea of “opposition rights” for minority parties out of power.<sup>255</sup> The idea of minority opposition rights and institutions has not had much purchase in the American context, largely because American constitutional design assumes that political opposition, like political competition more generally, will be rooted

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POLITICS 151, 155–56 (Howard Gillman & Cornell Clayton eds., 1999) (“Without a stable coalition controlling the elected branches, the Court has less fear of institutional retaliation if it makes unpopular decisions. Unlike in earlier periods, recent presidents and Congresses have not just been unwilling to coordinate an assault on the Court, but parties controlling each have acted to protect the Court’s independence from threats mounted by the other.”); *see also* TUSHNET, *supra* note 6, at 31 (“Divided government might make a stronger form of judicial review possible and even attractive to politicians.”); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 64 (2002) (noting in passing that “the present penchant for divided government serves to protect the Court from action being taken against it”).

<sup>254</sup> This irony is noted in Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 317 (2005) (“The Court likely is most constrained when the other branches are united ideologically, which might be the very time judicial scrutiny is most appropriate in a system of checks and balances.”).

<sup>255</sup> The classic comparative study of political opposition is POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES (Robert A. Dahl ed., 1966).

in the branches. Congress is cast as the “opposition” to presidential governance, its “rights” are those associated with separation of powers, and “opposition rights” are thus subsumed into the ordinary workings of checks and balances.<sup>256</sup> As we have seen, however, the structural position of the minority party under unified American government is more closely analogous to that of minority parties shut out of parliamentary governments than observers have recognized. Perhaps American constitutional theorists have something to learn from the comparative study of democratic oppositions in Europe and elsewhere.

In the Westminster system, for example, the majority party’s unified control over government is tempered by an elaborate set of rules and conventions that formally designate the minority party as “Her Majesty’s Official Opposition,” charged with organizing a shadow government to offer criticisms of and alternatives to the policies of the party in power.<sup>257</sup> The British opposition lacks any real agenda-setting, veto, or other co-governing power, but devices like opposition days and question times are designed to ensure that criticism of the government’s policies is made highly visible.<sup>258</sup> Other European democracies have gone further in organizing and empowering the minority party to play a more effective role in disrupting or influencing majoritarian governance.<sup>259</sup>

Not surprisingly, since World War II, the constitutional democracies formed from totalitarian states have been acutely aware of the centrality of political party competition to robust democracy and especially of the value of empowering democratic opposition. The German Constitution, probably the most imitated in recent decades, provides explicitly for the protection of parties so that, as the Constitutional Court has held, German political parties have the “rank of constitutional institutions” and are “constitution-

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<sup>256</sup> See MAYHEW, *supra* note 146, at 107; Nelson W. Polsby, *Opposition in the United States*, 32 *GOV’T & OPPOSITION* 511, 511–12 (1997).

<sup>257</sup> See Ludger Helms, *Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies*, 39 *GOV’T & OPPOSITION* 22, 26–30 (2004).

<sup>258</sup> See *id.*

<sup>259</sup> The French system, for example, entitles a minority in Parliament (at least sixty deputies or senators) to invoke judicial review to test the constitutionality of laws passed by Parliament before they go into effect. Individuals, however, lack standing to bring constitutional claims. See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 78–91 (1992); Pasquale Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy*, 11 *RATIO JURIS* 38, 46 (1998). This system of standing and constitutional review was created in 1974 precisely to place limits on the majority party in Parliament. Correctly predicting a Socialist victory in the upcoming elections and fearing nationalization of various industries, the conservatives sought to enlist the court as a partial check. See STONE, *supra*, at 69–72; see also Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of “Constitutional Justice,”* 35 *CATH. U. L. REV.* 1, 17 (1985); John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 *TEX. L. REV.* 1671, 1675 n.12 (2004). More generally, giving minorities access to the Constitutional Court to block majority initiatives has made judicial review in the French system an “instrument of a ‘moderate,’ or limited government — a mechanism of the liberal tradition, which guards against potentially tyrannical majorities.” Ferejohn & Pasquino, *supra*, at 1685 (citation omitted).

ally integral units of a free and democratic system of government.”<sup>260</sup> Opposition parties are empowered to participate in the Bundestag’s agenda-setting process, to chair a number of standing committees, and to initiate constitutional review of legislation before the Constitutional Court whenever one-third of the members of Parliament so request.<sup>261</sup> Combined with representation in the Bundesrat, this political leverage enables the opposition to force compromises on the legislature and to enact a significant part of its policy agenda.<sup>262</sup>

In telling contrast to the U.S. Supreme Court’s focus on protecting the branches, the German Constitutional Court has been concerned with protecting minority parties. Thus, in one famous case, the German Court enforced a state constitutional right allowing a minority in Parliament to initiate investigations of government activities in the face of efforts by a parliamentary majority to subvert it.<sup>263</sup> The Court explained its role in precisely the terms of separation of parties:

The original tension between parliament and government — as it existed during the constitutional monarchy — has changed. In a parliamentary democracy the majority [party] normally dominates the government. Today, this relationship is characterized by the political tension between the government and the parliamentary fractions supporting it, on the one hand, and the opposition [party or parties], on the other hand. In a parliamentary system of government [therefore] the majority does not primarily watch over the government. This is rather the task of the opposition, and thus, as a rule, of the minority [party]. . . . If the right of the minority — and thus the parliamentary right to control — is not to be weakened unduly, then the minority must not be left at the mercy of the majority.<sup>264</sup>

American political institutions have never been self-consciously designed to grant a structural role to minority parties as a means to ensure meaningful opposition to unified government. Nevertheless, a number of institutional features of American government that do, in fact, empower minorities might be appreciated in this light. As the German model demonstrates, for example, institutional structures that enable minority parties

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<sup>260</sup> See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 201, 209 (2d ed. 1997) (quoting Socialist Reich Party case, Bundesverfassungsgericht [BVerfG] [federal constitutional court] Oct. 23, 1952, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.), and Neufassung des Parteiengesetzes [Political Parties Act of 1967], Feb. 15, 1984, BGBl. 1 at 242, § 1 (F.R.G.)).

<sup>261</sup> See Helms, *supra* note 257, at 30–31.

<sup>262</sup> *Id.*

<sup>263</sup> See Schleswig-Holstein Investigative Committee Case, Bundesverfassungsgericht [BVerfG] [federal constitutional court] Aug. 2, 1978, 49 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 70 (F.R.G.), discussed in KOMMERS, *supra* note 260, at 167–70; Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 697–99 (1998); For further discussion of the German minority investigation right and cases interpreting it, see Issacharoff & Pildes, *supra*, at 697–99.

<sup>264</sup> See KOMMERS, *supra* note 260, at 168–69 (alterations in original) (quoting Schleswig-Holstein Investigative Committee Case, *supra* note 263).

to engage in auditing, investigation, and information gathering are important means of maintaining checks and balances under unified party control of government. In the U.S. system, the Government Accountability Office (GAO), “the primary watchdog agency reporting to Congress,” has to some extent played this role.<sup>265</sup> The GAO enabling statute allows any member of Congress, or any congressional committee, to request an investigation or report.<sup>266</sup> This gives minority party members a tool to oversee government programs. Indeed, one study suggests that during periods of unified government, members of the minority party have successfully used the GAO to seek some balance in policymaking.<sup>267</sup>

A number of other American political institutions similarly allow minorities to investigate and publicize government behavior and enable minority parties to guard against majority overreaching under unified government. Although the now-expired Independent Counsel Reauthorization Act of 1994<sup>268</sup> had plenty of flaws, it did have the virtue of permitting minorities to initiate investigations of executive branch misbehavior, even without control over congressional committees.<sup>269</sup> Less dramatic examples include the Journal Clause<sup>270</sup> of the Constitution, which allows one-fifth of legislators present in the House or Senate to force a publicly visible roll-call vote, and internal congressional rules and statutes that allow minorities on committees to call witnesses and obtain information from the executive

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<sup>265</sup> See Anne Margaret Joseph, *Political Appointees and Auditors of Politics: Essays on Oversight of the American Bureaucracy 180* (May 2002) (unpublished Ph.D. dissertation, Harvard University) (on file with Kennedy School of Government Library). The GAO is the largest agency that works for Congress, producing about 1500 audit and evaluation products each year. As of fiscal year 1999, 72% of its work came through request by a congressional committee or a member of Congress; 23% was mandated by statute. *Id.* at 183.

<sup>266</sup> See 31 U.S.C. § 712 (2000). The statute allows any seven members of the Government Operations Committee in the House (a minority) or any five members of the Government Affairs Committee in the Senate (also a minority) to require disclosure of executive branch documents. The GAO was initially independent of the executive and legislative branches, but was put under congressional control by the Legislative Reorganization Act of 1946, § 136, 60 Stat. 812, 832 (codified as amended at 2 U.S.C. § 190d(a) (2000)). In 1974, the Congressional Budget Act, § 702(a), Pub. L. No. 93-344, 88 Stat. 297, 326, in addition to creating the Congressional Budget Office, established an entity in the GAO to review and analyze government programs with respect to both their initial design and their implementation. *Id.* For the history of the GAO, see Joseph, *supra* note 265, at 179–84.

<sup>267</sup> See Joseph, *supra* note 265, at 209–10. It is also true that the majority party uses the GAO to investigate the bureaucracy more often when party control of the branches is divided. A change from united to divided government corresponded to a 5.68% increase in the probability that a House committee chair would request a GAO investigation. *Id.* at 217; see also JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 59–75* (1990) (concluding that congressional committees averaged 26.2% more oversight during divided government than unified government between 1961 and 1977).

<sup>268</sup> Pub. L. No. 103-270, 108 Stat. 732 (expired 1999).

<sup>269</sup> See 28 U.S.C. § 592(g) (1994) (expired 1999) (allowing a majority of either the majority or minority party on either congressional judiciary committee to petition the Attorney General to appoint an independent counsel).

<sup>270</sup> U.S. CONST. art. 1, § 5, cl. 3.

branch.<sup>271</sup> As Professor Adrian Vermeule demonstrates, these kinds of “submajority” rules “empower minorities to force public accountability and transparency on the majority.”<sup>272</sup>

Supermajority rules can also serve this purpose, by creating a de facto minority-party veto and requiring bipartisan support for action to proceed. Consider, for example, the Senate filibuster in the context of judicial nominations, which might be viewed (sympathetically) as a de facto response to the erosion of a branch-oriented check on presidential nominations during strongly unified government.

Polite rhetorical tropes of judicial insulation from politics notwithstanding, ideological and partisan considerations undeniably play a central role in judicial nominations, perhaps increasingly so as the Court has become a more powerful institution.<sup>273</sup> Presidents overwhelmingly nominate judges and Justices who share their party affiliation,<sup>274</sup> and Presidents generally have been successful in appointing Justices who share their ideological commitments, occasional disappointments notwithstanding.<sup>275</sup> In (constitutional) theory, the main obstacle they are supposed to face is the advice and consent of the Senate. In practice, the Senate’s willingness to second-guess Supreme Court nominees has fluctuated significantly over time.<sup>276</sup> But to the extent the Senate has been willing to play a meaningful role in judicial appointments, its acquiescence or resistance, too, has been closely tied to partisan and ideological considerations. Senators of the same party as the President almost always vote for his nominees; senators of the opposite party do so much less often.<sup>277</sup> As a result, the Senate has confirmed 90% of Supreme Court nominees when the President’s party con-

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<sup>271</sup> See Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities* 2–3 (Univ. of Chi. Law Sch., Pub. Law & Legal Theory Working Paper No. 54, 2004), available at [http://ssrn.com/abstract\\_id=495569](http://ssrn.com/abstract_id=495569).

<sup>272</sup> *Id.* at 8 (emphasis omitted).

<sup>273</sup> See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 26–27, 47–66 (2005); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner’s Dilemma*, 26 *CARDOZO L. REV.* 479, 484–91 (2005).

<sup>274</sup> Since the mid-nineteenth century, 133 out of 150 Supreme Court nominees have come from the President’s own party. See EPSTEIN & SEGAL, *supra* note 273, at 26–27 (figures from source, updated to include President George W. Bush’s three recent nominations). The last cross-party appointment, Lewis Powell, was a Southern Democrat whose ideological and political views were in line with President Nixon’s. *Id.* at 27.

<sup>275</sup> See EPSTEIN & SEGAL, *supra* note 273, at 130–32.

<sup>276</sup> From 1811 to 1894, the Senate rejected more than one-fourth of Supreme Court nominations. See COMISKEY, *supra* note 156, at 9. Then, from 1894 to 1968, the Senate was remarkably passive, rejecting only President Herbert Hoover’s nomination of John Parker in 1930. Since 1968, the Senate has resumed a more activist role, rejecting four nominees (Abe Fortas, Clement Haynsworth, G. Harrold Carswell, and Robert Bork), forcing the withdrawal of two others (Douglas Ginsburg and Harriet Miers), and almost defeating one more (Justice Clarence Thomas). *Id.* (updated).

<sup>277</sup> See EPSTEIN & SEGAL, *supra* note 273, at 107 (reporting 94% same-party support versus 76% opposite-party support for nominees; figures do not include recent confirmations of Chief Justice John Roberts and Associate Justice Samuel Alito).

trolled the Senate, but under 60% when control was divided.<sup>278</sup> And these numbers surely understate the effects of partisanship: Presidents who anticipate resistance from an opposite-party Senate tend to nominate more moderate Justices.<sup>279</sup>

In reality, the relevant battle lines in the judicial appointments process divide not the Senate and the President so much as the two major parties. If the Senate is meant to serve as an institutional check on extreme presidential appointments,<sup>280</sup> we should be concerned that unified party control of the presidency and Senate invites the President to appoint ideologically extreme Justices who can be confirmed by a narrow, party-line majority. The filibuster might be understood as restoring an independent check on judicial nominations by effectively creating a supermajority voting requirement, giving the minority party a veto over the majority party's nominees.<sup>281</sup> Routine use (or threat) of the filibuster would encourage the appointment of politically moderate judges and Justices, with views closer to those of the median Senator and voter than those of the median Senator of the dominant party.<sup>282</sup>

Institutionalization of the filibuster for judicial appointments would bring the United States into line with Germany and other European democracies that require supermajority parliamentary approval of judges nomi-

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<sup>278</sup> *Id.*

<sup>279</sup> See COMISKEY, *supra* note 156, at 185–87; Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1074–78 (1999). In 1975, for instance, President Ford, confronted with a Democratic Senate, passed over Robert Bork in favor of the more moderate John Paul Stevens as a replacement for Justice William O. Douglas. A decade later, after a Democratic Senate rejected Bork as too conservative, President Reagan successfully nominated the more moderate Justice Anthony Kennedy. See COMISKEY, *supra* note 156, at 64–70.

<sup>280</sup> For an argument along these lines, see David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

<sup>281</sup> A number of commentators have argued for a supermajority requirement for judicial confirmation in the Senate. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 196–98 (1994); DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 281–84 (1996) (noting that in majoritarian systems, if only simple majorities are needed to enact legislation and the same majority has the power to confirm judicial appointments, the risk of majority tyranny arises); John Ferejohn, *Judicializing Politics, Politicizing Law*, LAW & CONTEMP. PROBS., Summer 2002, at 41, 64–66; John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543 (2005); Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 897, 926–33 (2005).

This argument assumes, of course, that the majority party in the Senate usually has fewer votes than is required for cloture. Since 1975, that number has been sixty. For discussion of the history of the filibuster and changes in the cloture threshold, see Catherine Fisk & Erwin Chemerinksy, *The Filibuster*, 49 STAN. L. REV. 181, 185–213 (1997).

<sup>282</sup> In fact, the filibuster was not used routinely for judicial appointments until very recently. See Jeffrey Rosen, *The Senate Nears the Point of No Return*, N.Y. TIMES, May 22, 2005, § 4 (Week in Review), at 1.

nated for the equivalent of the Supreme Court.<sup>283</sup> Post–World War II European constitutional designers understood, as the American Framers could not, both the power of courts exercising judicial review and the inevitable centrality of party competition to modern democracy.<sup>284</sup> In these younger democracies, supermajority requirements were demanded to reassure minority parties — every party, *ex ante* — that the majority would not have free rein to pack the judiciary with partisan allies.<sup>285</sup> Supermajority approval requirements were also meant to shore up the legitimacy of newly empowered constitutional courts. The German Constitutional Court has, in fact, displayed more internal consensus and political centrism than the U.S. Supreme Court, with observers crediting the supermajority appointment procedure as a principal cause.<sup>286</sup>

Viewed in this light, the filibuster can be understood as the equivalent of a minority opposition right: a way of recreating the functional consequences of the constitutional requirement of President-Senate consensus on judicial nominations in a political system dominated by partisan, as opposed to interbranch, competition. But this is true only when the filibuster is applied during unified government. When party control is divided between the President and Senate, no longer is there a minority party to protect, and any nominee confirmable by a Senate majority will be effectively screened for ideological moderation. Adding a supermajority requirement when the President and Senate are divided might serve only to increase the costs of the confirmation process.<sup>287</sup>

We have thus far limited our attention to existing devices that strengthen the hand of minorities under unified government. But it is worth thinking about how American political institutions might be restructured to further that goal. Just to give one (borrowed) example, let us return to the problem of congressional oversight of executive action in response to terrorist attacks and other emergencies.<sup>288</sup> One way of addressing the predictable failure of congressional oversight during periods of unified government might be to adopt what Professor Bruce Ackerman terms a “supermajoritarian escalator” for authorizations of emergency presidential powers.<sup>289</sup> Following the lead of the South African constitu-

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<sup>283</sup> See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 489–91 (1999); Ferejohn & Pasquino, *supra* note 259, at 1681–82 (describing different European systems for appointing judges to constitutional courts).

<sup>284</sup> See Wible, *supra* note 281, at 933–37.

<sup>285</sup> See Ackerman, *supra* note 6, at 669.

<sup>286</sup> See Ferejohn & Pasquino, *supra* note 259, at 1702 (“European courts are much less ideologically diverse than the United States Supreme Court. We think the principle [sic] reason for this is to be found in features of judicial appointment and tenure.”).

<sup>287</sup> Conceivably, it might also interfere with the appointment of moderate judges. Minorities on the left or right could veto centrist appointments. The resulting equilibrium might be a more politicized appointment process, if not the ultimate confirmation of fewer centrist Justices.

<sup>288</sup> See *supra* section III.A.1, TAN 165–200.

<sup>289</sup> See Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1047 (2004).

tional designers, we might grant the Executive (through framework legislation, or, less plausibly, judicial intervention or constitutional amendment) blanket emergency powers for a short period of time after a terrorist attack but thereafter require first a majority vote in Congress and then increasing supermajority votes periodically to keep the state of emergency in effect.<sup>290</sup> A bipartisan consensus would thus become necessary to keep the emergency powers in place for an extended period of time. Moreover, to prevent the Executive from withholding information about failures or abuses from the minority, Professor Ackerman suggests following German practice and giving the opposition party control over congressional oversight committees. As he puts it, “[m]inority control means that the oversight committees will not be lap dogs for the Executive, but watchdogs for society.”<sup>291</sup>

The specifics of this particular proposal might be fanciful, but it usefully directs attention to the actual behavior, including the partisan dynamics, of political institutions. Misled by the Madisonian mythology of branch-based separation, the academic literature on constitutional design has given short shrift to the study of institutional means of maintaining intragovernmental checks and balances during periods of unified party control. Creating a functionally Madisonian system of separation of powers — one that actually works in the way that generations of courts and constitutional theorists have imagined — may require some creative constitutional reengineering.

2. *Bureaucracy and the Checking Function.* — Instead of empowering the opposition party to oversee or check the majority party under unified government (or in addition to doing so), constitutional engineering might focus on insulating the administrative bureaucracy more fully from the partisan pressures of unified government. The idea would be to take seriously the metaphor of the bureaucracy as a “fourth branch” of government. One way to ensure that government is never fully unified is to protect this branch from falling into the hands of the majority party — by keeping it independent of *both* parties.

Although we often associate the rise of bureaucracy with more technocratic and instrumental imperatives — the need for a specialized division of labor in the face of increasingly technical and complex regulatory problems — American bureaucracy was self-consciously constructed in the late nineteenth century at least in part for political reasons intimately connected to separation of powers ideals.<sup>292</sup> Indeed, one explanation for the rise of

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<sup>290</sup> See *id.* at 1047, 1055.

<sup>291</sup> *Id.* at 1051–52.

<sup>292</sup> See, e.g., STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 41 (1982) (“The hold that the party machines had gained over American institutions would have to be broken before new centers of national

American bureaucracy is precisely that it was a response to the problem of the first overwhelmingly unified party government in American history, and to the threat that government was thought to pose to traditional American political practice.<sup>293</sup> The Civil War and Reconstruction established the dominance of the national government over the states, leading to greater nationalization and centralization of political power than the country had ever experienced. At the same time, the postbellum ascendancy of the Republican Party vividly demonstrated the prospect of one-party dominance of the newly empowered national government. The resulting threat to checks and balances and a pluralist political culture led even some who had been Jacksonian majoritarians in the antebellum period to see the necessity of new institutional forms.<sup>294</sup> One such form was a professionalized bureaucracy.

In the thirty years after the Civil War, efforts were made to depoliticize the executive branch through the creation of entities such as the civil service in 1883<sup>295</sup> and an agency designed to professionalize customs administration in 1890.<sup>296</sup> The independent regulatory commission, in the form of the Interstate Commerce Commission (ICC), came into being in 1887.<sup>297</sup> These institutions were conceived as means to limit the sphere over which partisan political power could exert control.<sup>298</sup> At the same time, the rise of substantive due process and a judicial method that stressed formalism — which emphasized the distinction between professionalized legal reasoning and partisan politics — gave courts a more central role in

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institutional authority could be built. . . . [S]tate-building efforts in America aimed at the disintegration of party hegemony as it had developed over the course of [the nineteenth] century.”)

<sup>293</sup> This is a central theme of two leading studies of the struggle to create national administrative bodies and to separate them from party politics in the late nineteenth century. See WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900*, at 2 (1982); SKOWRONEK, *supra* note 292, at 39–84.

<sup>294</sup> Tellingly, a prominent supporter of both Andrew Jackson and Martin Van Buren concluded by 1866 that “‘experience prove[d] that the ballot . . . [was] far less effective in securing the freedom and independence of the individual citizen than is commonly pretended,’ for ‘the power of the ballot . . . may be rendered ineffective by the tyranny of party.’” NELSON, *supra* note 293, at 63 (alterations in original) (quoting O.A. BROWNSON, *THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES, AND DESTINY* 272–73 (New York, P. O’Shea 1866)). Reformers began to call “the yoke of party discipline” the “curse of our politics.” *Id.* (internal quotation marks omitted).

<sup>295</sup> See SKOWRONEK, *supra* note 292, at 59–68.

<sup>296</sup> See NELSON, *supra* note 293, at 123–24.

<sup>297</sup> Originally, the Commission had five members, nominated by the President and confirmed by the Senate, who served staggered six-year fixed terms. For a general discussion of the ICC, see THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 60–65 (1984).

<sup>298</sup> As one of the leading civil service reformers put it, reform sought “‘not merely the observance of certain rules of examination’ but also ‘the restoration of political parties to their true function, which is the maintenance and enforcement of national policies.’” NELSON, *supra* note 293, at 121 (quoting George W. Curtis, *The Relation Between Morals and Politics, Illustrated by the Civil Service System, Address Before the Unitarian Conference at Saratoga, N.Y. (Sept. 20, 1878)*, in 2 GEORGE W. CURTIS, *ORATIONS AND ADDRESSES OF GEORGE WILLIAM CURTIS*, at 135 (Charles E. Norton ed., 1984)).

checking the power of the national government.<sup>299</sup> The result of these and related changes was the transformation of nineteenth-century government “from a party-centered to a bureaucratic system of authority.”<sup>300</sup> This transformation, designed to fragment political power and preserve a pluralism perceived to be under threat, rested on a foundational belief that there was a distinct body of knowledge and technique — a “science” of public administration and legal decisionmaking — that justifiably removed certain issues from the majoritarian control of a potentially unified, powerful national government no longer internally checked and balanced.<sup>301</sup>

In light of the separation of powers origins of the administrative state, it is ironic that American political culture over the last forty years or so, on both the right and the left, has become far more skeptical than those of most European democracies about the possibility of a technical expertise that stands relatively independent of politics. The story of the increasing politicization of the administrative state since the New Deal — and the increasing acceptance of the inevitability, if not desirability, of this politicization — is a familiar one.<sup>302</sup> Legal culture has become rightly skeptical of the bright-line distinction between value judgments about ends and technocratic decisionmaking about means, and of the legitimacy or desirability of rule by politically unaccountable “experts” that characterized Progressive- and New Deal-era administrative theory.

Nonetheless, the hope of reestablishing a more politically independent bureaucracy remains an influential countercurrent in the law, theory, and practice of administration. Admiration for something like “the Progressive

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<sup>299</sup> See SKOWRONEK, *supra* note 292, at 41 (“The judiciary’s governing capacities were stretched to their limits in the late nineteenth century to fill the ‘void in governance’ left between party hegemony and rapid social change.”).

<sup>300</sup> NELSON, *supra* note 293, at 159. For a rich account of the gradual emergence of this bureaucratic conception, see ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at 145–63 (1967). See also *id.* at 160 (“[T]he new political theory borrowed its most revolutionary qualities from bureaucratic thought . . .”); FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 324 (1994) (describing the “essence” of late-nineteenth-century reform as the attempt “to remove power from professional politicians and legislative bodies, concentrate it in the executive branch, and place it in the hands of experts”); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 490 (1998) (noting that a new “administrative ethic . . . provided the framework for the development of the new state apparatus and legitimated a vision of the new governing order”).

<sup>301</sup> Scholars dispute the extent to which this initial effort was successful or instead was exploited by partisan political forces before the Progressive Era succeeded in establishing the modern administrative state. Compare SKOWRONEK, *supra* note 292, at 82 (“[T]he results served the interests of the governing class that had been gradually extending its hold over governmental operations for decades.”), with NELSON, *supra* note 293, at 7–8 (arguing that reformers sought to “institutionalize a pluralistic form of government” that would “protect individuals and minorities from the power of the majority”). But there is general agreement that the justifications and aspirations of reformers were to create a sphere of scientific bureaucratic administration insulated from partisan politics.

<sup>302</sup> See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1669 (1975) (tracing the “development and disintegration of the traditional model” of administrative law and critically analyzing the “emerging interest representation model”).

theory of apolitical administration” continues to be an important theme in Supreme Court opinions protecting administrative agencies against various forms of political control.<sup>303</sup> Prominent administrative theorists like Justice Breyer have developed more sophisticated defenses of politically insulated bureaucratic expertise in the context of risk regulation.<sup>304</sup> And, of course, pockets of (relative) bureaucratic independence also persist in institutional practice. If the federal judiciary is too tendentious an example, consider the Federal Reserve Board. Independent central banks have enormous authority over politically charged issues of monetary policy, yet the American Federal Reserve has remained relatively insulated from political influence and is widely admired for its perceived apolitical expertise.<sup>305</sup>

Were we to take more seriously the virtues of an independent bureaucracy, we could easily imagine institutional modifications that would create greater political insulation. Longer tenures, or even life tenure, for high-ranking administrators is an obvious example, though such reforms might demand greater flexibility than the Supreme Court’s formalistic Appointments Clause jurisprudence presently affords.<sup>306</sup> Other doctrinal and institutional reforms to resist presidential control over agencies through the Office of Management and Budget and other mechanisms of presidential administration<sup>307</sup> would also help create the conditions for bureaucratic independence.

Independence might also be sought through cultural means, such as the cultivation of Weberian, professionalized expertise in administration and public acceptance that this expertise provides a legitimate basis for admin-

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<sup>303</sup> See Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, 21 CONST. COMM. 405, 407 (2004).

<sup>304</sup> See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 61–72 (1993).

<sup>305</sup> Academic studies suggest that independent central banks, increasingly the norm, produce stronger, more stable economies than did the direct political control of the monetary supply in earlier eras. See, e.g., CHARLES A.E. GOODHART, *THE CENTRAL BANK AND THE FINANCIAL SYSTEM* 62–71 (1995); see also ALEX CUKIERMAN, *CENTRAL BANK STRATEGY, CREDIBILITY, AND INDEPENDENCE: THEORY AND EVIDENCE* 349–443 (1992) (concluding, on the basis of a comparative empirical analysis, that independent central banks in the developed world are better at maintaining price level stability than central banks subject to political control). It is noteworthy that, while Supreme Court nominations have enormous visibility and generate intense conflict today, nominations to the Chair of the Federal Reserve are barely noticed. See Sheryl Gay Stolberg, *And in This Corner, Fed Choice Is Blip on Some Senators’ Radar*, N.Y. TIMES, Jan. 31, 2006, at A1.

<sup>306</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>307</sup> See Nicholas Bagley & Richard L. Revesz, *OMB and the Centralized Review of Regulation*, 106 COLUM. L. REV. (forthcoming 2006), available at <http://ssrn.com/abstract=786486> (discussing the politicized role of the OMB in agency oversight); Kagan, *supra* note 84, at 2272–2319 (tracing developments in presidential administration through the twentieth century); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 11–16 (1995) (describing the use of the budgetary review process by nearly all twentieth-century Presidents).

istrators to resist the pressures of elected officials. (Note that the federal judiciary combines both types of devices: life tenure and public acceptance that legal reasoning is a form of expertise sufficiently distinct from partisan politics.) Inevitably, elected officials will attack the claims of authority that permit bureaucratic institutions to resist majoritarian will. For bureaucratic independence to survive, voters must value the kinds of technical expertise and knowledge that (potentially) distinguish bureaucrats from politicians. Those who doubt that voters would ever trade immediate political rewards for the longer-term benefits of bureaucratic independence should consider the public reaction to overt attempts by politicians to control the federal judiciary.

The faith of Progressives and New Dealers in neutral policy expertise may well be both naïve and anachronistic. But the separation of powers case for politically insulated administration is neither. Politicization of the bureaucracy in the post-World War II era, whatever its benefits in terms of democratic accountability and political realism, has gradually eroded the capacity of bureaucratic institutions to check and balance unified party government. Perhaps constitutional and administrative lawyers and theorists should take a closer look at what has been lost.

Analogous to a more robust “fourth branch” would be institutional modifications to foster greater internal checks and balances *within* the executive branch itself.<sup>308</sup> In the past, such internal checks have occasionally been decisive constraints on executive power even during wartime.<sup>309</sup> But in the face of a determined administration, the autonomy of these internal checks might be even more difficult to maintain than that of an independent bureaucracy.

### C. *Political Parties and the Law of Democracy*

If the unified-parties/unified-government complex poses the greatest threat to the Madisonian constitutional order, institutional and regulatory modifications might target either the causes or the effects of that complex. Thus far we have focused on mitigating the effects, exploring legal and institutional reforms that might restore some measure of checks and balances. But we might also think about measures designed to prevent strongly unified government from emerging in the first place — for example, by fragmenting or moderating political parties. We cannot return to the Framers’ premodern vision of self-government without parties, but we might use legal rules and institutions to prevent strong parties from unifying government so thoroughly as to threaten Madisonian values.

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<sup>308</sup> For one set of suggestions, see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. (forthcoming 2006).

<sup>309</sup> See Issacharoff & Pildes, *supra* note 165, at 40–41.

As Madison himself cautioned with respect to factions, curing strongly unified government by attacking parties might be worse than the disease.<sup>310</sup> Even as they threaten to erode the system of separation of powers, unified and polarized parties might be healthy for democracy along other dimensions. Recall that proponents of responsible party government have emphasized a number of benefits of strong and sharply differentiated parties.<sup>311</sup> Some of these benefits, such as enhanced government accountability (of a sort), come in the same currency as those promised by separation of powers. Others relate to different democratic values. Some have argued, for instance, that strong parties with coherent ideologies are the primary means by which the government can marshal enough independent policy commitment to minimize being carved up by powerful, rent-seeking economic interests.<sup>312</sup> Strong parties may also encourage citizen participation and voter turnout.<sup>313</sup> Even those most committed to restoring the original Madisonian vision of separation of powers need to ask whether weakening parties comes at too high a price.

With that caveat, we identify several strategies for preventing strongly unified party government from taking hold. We earlier described the confluence of causes that has generated the current party structure. Of course, the long overdue emergence of normal two-party competition in the South, which in turn catalyzed the purification of the national two-party system, cannot be undone through legal reforms, nor would it be desirable to attempt to reimpose a one-party monopoly. Other contributing factors, however, are more susceptible to legal reforms.

1. *Safe Districting.* — The least defensible contributing factor to the rise of unified parties, and the most easily corrected (in principle, if not in political reality), is the corruption of electoral politics reflected in the recent blossoming of “sweetheart” safe election districts throughout the country. As noted earlier, such districts are intentionally designed to be at least 60% Democratic or Republican, in terms of likely voter behavior on general election day. In addition to undermining competitive elections, safe districting undermines centrists, who could win competitive general elections but not primaries in what are essentially one-party districts. Safe districting therefore contributes to greater ideological polarization in government and removes a moderating force from unified governments.

Safe districting is a product of the uniquely American pathology of putting the power to design election districts into the hands of the actors with the strongest self-interested motivations to abuse it. The institutional solu-

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<sup>310</sup> See THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 78–80.

<sup>311</sup> See *supra* notes 52–55 and accompanying text.

<sup>312</sup> See WALTER DEAN BURHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS 133 (1970).

<sup>313</sup> See, e.g., STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 89–90, 170–77 (1993).

tion is readily apparent. Every other democracy that employs election districts takes this power out of the hands of directly self-interested partisan officeholders and gives it to various sorts of more independent commissions.<sup>314</sup> In the eleven states that used such commissions to design congressional districts in 2002 and the nine states that did so in 1992, more competitive elections have, in fact, resulted.<sup>315</sup> These commissions will not generate competitive elections everywhere, of course; where voters of one party are geographically concentrated, general elections will remain noncompetitive.<sup>316</sup> But independent commissions can eliminate safe districts that result from incumbent self-interest, rather than natural geographic distributions. Doing away with incumbent-protecting gerrymanders would increase competitive elections, enhance party heterogeneity, and generate more centrist officeholders capable of checking and balancing parties from within. From the Madisonian perspective, ending artificially safe districts would facilitate legislative centrism and thus afford a potential counterweight to the erosion, during unified government, of a functional system of separated powers.<sup>317</sup>

2. *Primary Election Structures.* — Primary election structures might also be modified to make it easier for voters to generate internal party heterogeneity among those elected to office. State-mandated primary elections can be closed, open, or something in between. Closed primaries (used in twelve states) permit only previously registered party members to vote; open primaries (used in about half the states in some form) permit at least some non-party members, such as independents, to participate as well.<sup>318</sup> Because party activists dominate closed primaries, the winners are

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<sup>314</sup> For a survey of these alternative institutions in other democracies and an analysis of their consequences, see Pildes, *2003 Foreword*, *supra* note 95, at 78–81 & n.211.

<sup>315</sup> See Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 ST. POL. & POL'Y Q. 455 (2004).

<sup>316</sup> Voters have become more geographically concentrated by partisan affiliation in recent decades. See Bill Bishop, *The Schism in U.S. Politics Begins at Home*, AUSTIN AM.-STATESMAN, Apr. 4, 2004, at A1. In addition, the Supreme Court has construed the Voting Rights Act to require creation of “safe” minority election districts where voting is racially polarized, minority voters have cohesive political preferences, and such a safe district can be created. See *Thornburg v. Gingles*, 478 U.S. 30 (1986). These safe districts tend not to be competitive in general (as opposed to primary) elections, and, by concentrating many consistently Democratic voters, such districts can make it more difficult to create competitive districts in other areas of a state, even when commissions draw the plans. Tradeoffs between competitive districts and descriptive representation of minority communities might thus exist. See Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

<sup>317</sup> Eliminating these districts would have other democratic benefits as well. See Pildes, *2003 Foreword*, *supra* note 95, at 114–15. Conceivably, collective-action dynamics might require a uniform national rule, enacted by Congress, lest individual states not unilaterally relinquish benefits of a delegation with long seniority unless all states agree to do so. That states have already shifted to commission districting, however, suggests that this collective action dynamic might not impose too high a barrier. See *id.* at 79 n.211.

<sup>318</sup> See Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries*, in CONGRESSIONAL PRIMARIES AND THE POLITICS OF REPRESENTATION 121 tbl.8.1 (Peter F.

more likely to reflect the extreme ideological views of the median party activist. Closed primaries therefore also contribute, like safe districts but to a lesser extent, to more polarized partisan officeholders and hence to unified government operating in its “purest” form.

Voters and candidates are well aware of these effects of closed primaries. For years, California voters expressed disaffection with the state’s closed primaries. For example, and the more extreme candidates voters confronted as a result on general election day. This disaffection was bolstered by the large and growing number of self-identified independents in the state. But because sitting legislators had been elected under this very system and were strong partisans, the California legislature resisted popular pressure to open the primaries. Once the initiative process gave voters a choice between closed and open primaries, though, voters overwhelmingly endorsed the latter. The main justification for doing so was that open primaries would generate more moderate nominees and give voters more centrist choices on general election day.<sup>319</sup> Centrist candidates also recognize that their prospects depend on the legal structure of primaries. Governor Schwarzenegger and his advisors understood that a socially moderate, pro-choice Republican faced daunting hurdles to survive an ordinary Republican primary. That is surely part of why he seized the opportunity a recall election offered: to bypass the activist-controlled, closed Republican primary and appeal directly to the general electorate in a single election.<sup>320</sup> Though he was the overwhelming choice in that general election, Schwarzenegger would likely have faced greater resistance in the normal Republican primary process.

Greater use of open primaries would likely pull candidates, and therefore officeholders, more to the center. From a Madisonian perspective, such primaries could help mitigate the unified-parties/unified-government threat to functional checks and balances. The constitutionality of open primaries, however, was cast into doubt when the Supreme Court, in an

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Galderisi et al. eds., 2001). For purposes of this Article, “closed” primaries are those that are “purely closed,” meaning that voters who do not declare a party affiliation in advance cannot vote. Primaries can also be “semi-closed,” meaning that new or unaffiliated voters can vote in a primary without declaring an affiliation in advance. We group “semi-open” and “pure-open” primaries together as “open” primaries; the only difference is that the former require voters to choose a party-primary preference on election day in public, while the latter permit that choice to be made in private.

<sup>319</sup> Empirical studies of the two elections conducted under California’s blanket primary, *see infra* note 321 and accompanying text, suggest that it in fact produced more moderate candidates. *See* Elisabeth R. Gerber, *Strategic Voting and Candidate Policy Positions*, in *VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA’S EXPERIMENT WITH THE BLANKET PRIMARY* 192, 210 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002); *see also* Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 *J.L. ECON. & ORG.* 304, 321–22 (1998) (concluding that House representatives from closed primary states adopt policy positions further from their median voters’ position, while those from semi-closed or open primary states take more moderate positions).

<sup>320</sup> *See* Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 *WM. & MARY L. REV.* 415, 415–16 (2004).

unfortunate decision, held that California's version of the open primary violated the associational rights of party members.<sup>321</sup> Only four states used that version, but the principles informing the Court's decision could directly extend to open primaries in all other states. That would be even more unfortunate, since a constitutional requirement that primaries be open only to party members would have the consequence of empowering more extreme voters and more extreme candidates.<sup>322</sup>

3. *Internal Legislative Rules.* — A more recent and contingent contributing cause to ideologically unified legislative-executive policy agendas, as noted earlier,<sup>323</sup> is change in the way legislative bodies are organized. These shifts in formal rules and informal practices have enabled party leaders to discipline more effectively the voting behavior of lower-ranking party members. In unified government, this power is used to ensure united partisan legislative support (and united partisan opposition, on the other side) for the President's policy agenda. If the unified-parties/unified-government complex is troubling, as from the Madisonian perspective it is, another focal point for change could be these internal legislative practices (assuming existing legislative leaders could somehow be made to relinquish the power these practices provide).

In earlier eras, one response to dramatic concentration of partisan national political power was precisely to fragment power within Congress. Thus, in the aftermath of Reconstruction, Congress was restructured to weaken the ability of party leaders to assert unified control; the self-conscious purpose of these changes was to recapture the Framers' vision that political power should be diffused, not concentrated.<sup>324</sup> Measures included the seniority system, which insulated promotion (particularly to

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<sup>321</sup> See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000). California had adopted a "blanket" primary, in which voters could choose, office by office, in which party's primary they wished to vote. For a full description and analysis of *Jones*, see Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 702–06 (2001).

<sup>322</sup> A less familiar alternative to the open primary would be to merge primary and general elections into a single event by adopting new voting rules, such as instant runoff voting (IRV). See ISSACHAROFF ET AL., *supra* note 56, at 1140–41; see also Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 435–41 (1995) (book review) (discussing single transferable voting (STV), a system in which voters rank candidates by preference in at-large or multi-member districted elections).

<sup>323</sup> See *supra* notes 99–111 and accompanying text.

<sup>324</sup> The language congressional reformers used is revealing:

"[T]his oneness of design, this 'harmony of action,' this 'unity of purpose' . . . [was] not consistent with the genius and spirit of our institutions"; it was "not the object for which the framers of this Government labored." On the contrary, the framers had "sought not to concentrate power in the hands of a few men to the end that 'harmony of action' and 'unity of purpose' might be secured, but their great aim was the general diffusion of power."

NELSON, *supra* note 293, at 116 (omission and second alteration in original) (quoting 17 CONG. REC. 235, 237 (1886)). Nelson argues that these reforms were part of the general late-nineteenth-century effort to fragment and diffuse political power in the combined wake of Jacksonian democracy and the demise of federalism, which had given America's institutions a much more majoritarian thrust. See *id.* at 113–55.

committee chairs) from the control of party leaders, and redistribution of power among a larger number of more independent congressional committees.<sup>325</sup> If making unified legislative-executive relations more competitive today is an overriding aim, one focus could be on similar efforts to roll back some of the internal legislative changes of the last forty years that have enabled party leaders to marshal united partisan political power in Congress.

4. *Encouraging Divided Government.* — The discussion up to this point has focused on ways to weaken or moderate the two parties as a prophylactic against strongly unified party control, but we might also think about ways to decrease the probability of party unification occurring at all. The prospect of divided government has long been linked to the micro-practices of voting. Divided government became more possible in the twentieth century, at least during presidential election years, as an unintended byproduct of the shift to the Australian, or secret, ballot in the late nineteenth century. Before then, political parties, not the state, printed ballots; a voter would take a particular party's ballot and cast it.<sup>326</sup> The party ballots endorsed all of the party's candidates, of course, and were color coded to help party agents monitor which ballots voters dropped into the box.<sup>327</sup> To cast a split ticket, a voter had to either paste a sticker with another candidate's name over the candidate listed on the ballot or write a different candidate's name over the listed candidate. Not surprisingly, split-ticket voting was rare.<sup>328</sup> This helps explain why, from 1832 to 1900, divided government emerged only three times in a presidential election but eleven times during midterm elections (when voters could take the ballot of a party other than the President's). Since 1952, however, divided government has emerged seven times in a presidential election and ten times during midterm elections.<sup>329</sup>

The preferences voters reveal on their ballots are thus dependent on the form and structure of the ballot itself. This unavoidable fact could be used to devise ballots that would disfavor unified party control at the margins.

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<sup>325</sup> See *id.* at 114–19.

<sup>326</sup> On the history of the party-printed and party-distributed ballot, see ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 28 (2000), and L.E. FREDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* 21–23 (1968). At the time of the Constitution's founding and for many years after, voting was often "an oral and public act," particularly in the South; by the mid-nineteenth century, almost all states required use of written ballots. See KEYSSAR, *supra*, at 28.

<sup>327</sup> Laws were sometimes passed to require that all ballots be of the same size and color, or that ballots be placed in envelopes before being deposited, in an effort to check party intimidation. See KEYSSAR, *supra* note 326, at 28.

<sup>328</sup> On the difficulty and rarity of split-ticket voting on the party-printed ballots of the nineteenth century, see, for example, RICHARD FRANKLIN BENDEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* 52, 57 (2004).

<sup>329</sup> The data from 1832 until 1992 are from FIORINA, *supra* note 65, at 11 tbl.2-3; we have extended the data through 2004.

One fairly noninvasive way of increasing the probability of divided government, then, would be to raise the transaction costs of marking a straight ticket in the ballot booth. In fact, thirty or so states today do not permit straight-ticket voting for President, Vice President, Senator, and House Representative with a single ballot mark.<sup>330</sup> Extending that rule nationally would increase the likelihood of divided government.

Again, whether any of these strategies would be worth pursuing depends on their concomitant costs to other democratic values, and also on the costs and benefits of institutional and doctrinal alternatives. For present purposes, it is more important to recognize the intimate relationship between the institutional organization of electoral politics and the separation of powers. The intricate electoral rules and practices that structure political parties should be seen as no less foundational to the workings of separation of powers than the basic Article I and Article II provisions creating different constituencies and election cycles for the President, Senate, and House of Representatives. A more realistic account of the dynamics that drive competition and cooperation among governmental institutions makes clear that structural constitutional law and the law that shapes political competition — the law of democracy, including election law — are inextricably joined.

#### CONCLUSION

From nearly the start of the American republic, the separation of powers as the Framers understood it, and as contemporary constitutional law continues to understand it, had ceased to exist. The enduring institutional form of democratic political competition has turned out to be not branches but political parties. Absorbing that insight is essential, not just for descriptive and historical analyses of the practice of democracy in America, but also for normative thought about constitutional law and the design of democratic institutions today. If interbranch checks and balances remain a vital aspiration, the failure of the Framers' understanding of political competition raises the risk of a mismatch between constitutional structures and constitutional aims. Recognizing that failure and replacing it with an understanding of the actual mechanisms of political competition suggests new approaches to constitutional law and institutional design that would more effectively realize the aims of the separation of powers.

Such a project is all the more urgent as we come to terms with an emerging equilibrium of ideologically coherent and polarized political parties. Strong parties will accentuate the differences between unified and di-

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<sup>330</sup> Writing in 1992, this is the number Sundquist used. See SUNDQUIST, *supra* note 54, at 132–33. In some contexts, legislatures have sought to ban straight-ticket voting, but voters have rejected such bans through a referendum process. See *McDonald v. Grand Traverse County Election Comm'n*, 662 N.W. 2d 804, 810–19 (Mich. Ct. App. 2003) (describing recent conflicts over straight-ticket voting).

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vided government, making constitutional law's conceptualization of a singular, static system of separation of powers all the more problematic. And when strong parties combine with extended periods of unified government, the challenge to the Madisonian picture of separation of powers, and to the values it is meant to protect, is stark. If the goal is a system of separation of powers that resembles the one Madison and subsequent generations of constitutional theorists imagined, it will have to be built not around branches but around the institutions through which political competition is in fact organized in modern democracies: political parties.