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The Principle of Loyal Opposition

Jeremy Waldron

1. Political competition

Democracy is a sort of competition with winners and losers. Joseph Schumpeter famously defined it as “an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”¹

Why do we compete in democratic life? Well, every society has to choose its public policy positions from an array of alternatives, some of them starkly opposed to one another. And every alternative in that array is supported by some of the people in the society. There many of us: and there is politics, as Hannah Arendt insisted, because not one man, but men inhabit the world; not one person (with a social conscience just like mine) but people.² And we the people disagree with one another, though we all belong to one society.

There are all sorts of explanations for the existence of political dissensus. On a low-minded view, conflicts of opinion are generated by conflicts of interest—personal interest or class interest, interest in power pure and simple or interests in material wealth. People struggle for power or for the opportunity to plunder the economic system, and they manufacture views on various issues that will aid them in this struggle, or they dress up various options that will redound to their benefit as principles or policies intended to benefit the whole society. There is a lot of that, no doubt.

But the main reason people disagree is because the questions are difficult, and even with the best will in the world, focused resolutely and honestly on the common good, the different perspectives and experiences that we bring to politics take us to different positions on every single

1 Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, p. 269.

2 Hannah Arendt, *On Revolution* (1973), 175

question of what we should do together. These are what Rawls called, in *Political Liberalism*, the burdens of judgment.³

Different conceptions of the world can reasonably be elaborated from different standpoints and diversity arises in part from our distinct perspectives. It is unrealistic ... to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain.⁴

And so he concludes, quite rightly, that many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will arrive at the same conclusion.

Unfortunately Rawls and his followers squandered this insight by maintaining that it applied only with regard to religion, ethics, and comprehensive conceptions of the good, not to issues of justice and social policy, on which clearly some consensus is necessary. But the need for consensus in these areas does not make the burdens of judgment go away. We disagree about justice and social policy too, and for the same sorts of reasons. No doubt, each politician or political activist has confidence in her own principles and her own proposals: she thinks it is supported not just by her will or her interests but by the objective balance of reasons. But that doesn't preclude disagreement because every political activist thinks of their convictions in this way (in this "objective" mode) and still they are opposed to one another. And the best explanation of that disagreement is once again the difficulty of the issues and the variety of the perspectives we bring to them. This is the premise of everything I am going to say in this lecture and much that I have written elsewhere.⁵

Political competition goes through phases. It has a periodicity to it, driven in modern democracies by the regular rhythm of elections.⁶ (Indeed, democratic politics is arguably more properly described as competitive than what we call economic competition, because in politics there are well-defined contests and clear-cut criteria for winning—for counting as *the winner*, for a certain period—which mostly do not exist in

3 John Rawls, *Political Liberalism*, 54ff on "the burdens of judgment."

4 *Ibid.*, 58.

5 See e.g., Jeremy Waldron, *Law and Disagreement* (1999).

the economic realm. In political competition some people are legally identifiable winners and others are legally defined as losers.

So: groups of people in the society struggle to have the positions that they favor implemented as policy and legislation rather than the positions that other people favor. And when they lose, the losers have to live with policies they don't support and those policies have to be implemented among and in the presence of (indeed in the lives of) many people who oppose them. Or even if people are just struggling for power itself, without much interest in the positions they have manufactured to give them a distinctive platform or to cover the cynicism of their class-interest, once again the losers are going to have to put up with a situation in which they turn out to be subjects not rulers, and in which—gallingly—others, who they reckon no better than themselves, are reaping the spoils that they coveted. There always losers, full of resentment. Losing in politics is a massive loss of recognition. And it is worth asking whether a political system can do anything to honor or empower those who have to be regarded as the unfortunate opponents of the government for the time being.

2. The role of the losers: just waiting their turn?

One obvious possibility is that the loser has the opportunity to hang around and hope for better luck next time. He has to temper his resentment and his ambition, waiting patiently for vindication in the next election, when the winner's policies which he knew all along were flawed turn out to have been disastrous or unpopular in their implementation. But while he waits, is the loser anything more than a pure subject, subjugated by the victory of his opponent?

Rousseau complained that the English people prided themselves on being free because they elected their rulers. But they weren't free at all, said Rousseau: “[A]s soon as the Members [of Parliament] are elected, the people is enslaved,” presumably the losers in the election especially, along

6 Nancy Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (2008), p. 363, notes that “the system of regulated rivalry ... means that unlike minorities in other arenas of majority decision making, partisans do not see minority status as irreversible. In other social and political contexts the term of power is not periodic and fixed by rules; the conflict is not iterative; the future may disappear from view.” But she goes on, in ordinary politics, “[p]artisans do not secede or revolt, go underground or withdraw in defeat. ‘Elections are not followed by waves of suicide’” (quoting ____).

with everyone else.⁷ They have to wait in resentful servitude for another Election Day, another opportunity to cast off their chains.

Maybe that's unkind. Alexis de Tocqueville put it more cheerfully when he says, of another representative democracy, that losers actually value the empowerment of the winners:

for as the minority may shortly rally the majority to its principles, it is interested in professing that respect for the decrees of the legislator which it may soon have occasion to claim for its own.⁸

In general, we may say, there is nothing ignoble about taking one's turn. A citizen, says Aristotle, "is ... one who has a share both in ruling and being ruled."⁹ Citizens claim the right "to take it in turns to exercise authority."¹⁰ They have to be good "at both ruling and obeying," which is why people who cannot stand being ruled—who cannot stand being losers in the sense that I have defined—may have to be ostracized and exiled, on Aristotle's account.¹¹

Still: is that all there is?—waiting to take one's turn, hoping that the electoral tables are eventually turned and that the loser turns out to be a winner in the next phase of competition?

3. Rights guarantees

One obvious point is that our political system in general offers certain guarantees to everyone that no matter whether they are winners or losers in the political process, there are certain interests and liberties that they will not have to abandon. They will not have to give up their religion; they will not be interned without trial, they will not be tortured; they will not be expropriated or killed and nor will the members of their families. The familiarity of these guarantees should not blind us to the fact that they

7 Jean-Jacques Rousseau, *Social Contract*, III, Ch. 15 (Cranston translation, p. 141). Cf. Bagehot's comment on America in *The English Constitution*, p. 54: "[U]nder a presidential government a nation has, except at the electing moment, no influence; it has not the ballot box before it; its virtue is gone, and it must wait till its instant of despotism again returns."

8 Alexis De Tocqueville, *Democracy in America*, Volume I, Ch. 14

9 Aristotle, *The Politics*, Bk. III, Ch. 13 (Sinclair Penguin translation, p. 131)

10 Ibid., Bk. III, Ch. 6 (p. 115).

11 Ibid., Bk. III, Ch. 4 (p. 109) and Ch. 14 (p. 134).

protect losers in our politics from having to suffer do have to endure or have had to endure

4. Tolerating dissent

In this regard it is particularly important that the losers, like other citizens, maintain the right to persevere in vociferous dissent, even during (maybe especially during) the period of their opponents' ascendancy. We assume that the losers will continue agitating against their opponent's policies, looking for opportunities to discredit the faction that has won. It is not their responsibility to remain quiet or just congratulate the winners, like good sports at a football game. For one thing, they have to prepare for the next round of competition: quite early in the term of an elected president in this country, for example—right now, for example—we see politicians from other parties jockeying for position among potential presidential candidates. And indeed we hope this is not just preparation; we hope their competing oppositional attitudes will keep the current administration honest and establish a basis of accountability.

We take this for granted. But in many societies it is not easy to establish even this as a privilege of the losers; there are periods in our society too when we have been tempted, in the words of Edmund Burke, to “confound[] the unhappiness of civil dissension with the crime of treason.”¹² After all, the rulers have won the right to have their policies stand, to have them implemented in the name of the whole nation. Just as it would be wrong for civil servants to oppose the implementation of policies with which they happen to disagree, so perhaps it is wrong for the political losers to try to stir up opposition to the policies they opposed at the election, given that they have lost—wrong for them to try to make the implementation of these policies more difficult. That was the point of the competition. And since it was conducted for the sake of the nation, the whole political community, it is not unnatural to think that there is something treasonous in attempting vociferously to undermine the implementation of the winner's policies during the defined period of their victory, and to react accordingly.

It is remarkable that despite all this, most modern democracies pride themselves on preserving a right of robust dissent and on tolerating

12 Edmund Burke, as quoted by George Anastaplo, “Loyal Opposition in a Modern Democracy,” 35 *Loyola U Chicago LJ* 1009 (2004), at 1014. Anastaplo added: “It does take experience and discipline on the part of a people not to regard conscientious criticism as really subversive (1015). Anastaplo's article is about the only good piece in the law-review literature on loyal opposition.

as a matter of routine political normality the free expression of oppositional views.

Of course opponents of the victorious régime may not find this right of dissident free speech, in itself, particularly satisfying. Sure it is better than the alternative. For most of us, though, it is hard to avoid the impression that rights of free expression are just freedoms to let our words go out into the air, where by and large and for most of us they dissipate without any discernable effect on the government that is being conducted by others in our name and with our lives and livelihood. People sometimes talk about the waste or the meaninglessness of an individual vote: what does one vote mean among so many? But at least each vote is counted. The expression of my opinion, anyone's opinion, is not even formally registered. Nobody really takes note.

We mitigate this frustration in various ways. To help make dissent and political activity meaningful, we organize. We associate our opinions with those of others in various ways—gathering together to hammer out and express opinions that can stand not as my view or yours but the view of an organization that comprises you, me, and thousands of others. We value freedom of speech, but effective and meaningful freedom of speech presupposes freedom of association. An organization can have an effective presence in a political system, which an individual cannot.¹³

5. Parties

In a recent and important book titled *On the Side of the Angels: An Appreciation of Parties and Partisanship* (2008), Nancy Rosenblum has spoken out about the lack of interest in political parties in modern political theory. She identifies a major strand in the canon of political theory, associated with thinkers like Rousseau, for whom the aim is the sustenance or restoration of some social whole, the people taken as a unity, the general will, and to whom the emergence of parties (if their aim is anything other than the abolition of faction) is anathema.¹⁴ Parties create division, she says, and sponsor a sense among the people of how important differences of political opinion are. In so doing they elevate a line of division in society into general political awareness, and make it a

¹³ And actually the same is true of voting. We reduce our concern about wasted votes, by coordinating our voting behavior with that of large numbers of like-minded people. Cite to recent book by Richard Tuck.

¹⁴ “From the standpoint of what I call ‘holism,’” says Rosenblum, “all social and political groups threaten the unity and integrity of political order.”

permanent feature of the social landscape.¹⁵ From Rosenblum's own point of view, this is one of the most important things parties do: they reinforce "the assumption that the nation is not *une et indivisible*."¹⁶ But of course from the point of view of a holist or a philosopher preoccupied with the integrity of his own vision of social justice, the permanence of opinionated faction is a nightmare. It raises before him the horror that his own righteous vision may have to be compromised with other less worthy programs in the sordid mess of partisan politics.

That is a matter of political theory. From the more practical viewpoint of winners and losers, parties offer different advantages and disadvantages.

Losers can regard parties in the solace of solidarity. They are not alone in their galling defeat. By associating ourselves with a party, we enter political competition not just as individuals, with aspirations whose futility and insignificance are revealed by the reality of political defeat, but also as large and permanent organizations, with experience of the rhythms and residual opportunities of politics. Defeat is no longer something hopeless; this organization to which we belong has been out of power before and regained office then. It is likely in due course to regain office now and to nourish its power by the prospect of that turnabout.

The ruling group, whom I have called the winners, may take a more jaundiced view. For their part, the existence of opposition in the form of an organized party might exacerbate the temptation to regard dissent as treason. For if the losers organize themselves into a party, they may have an apparatus which mimics and rivals the rulers' own organization in scale and articulation. The losers' party may have branches throughout the country, and separate sub-entities that elaborate programs opposed to those that the government is pursuing. It may be hard not to see all this as a vast conspiracy to usurp the government or at least make the winners' task of governing much more difficult.

So: just as the toleration of dissident speech requires a considerable effort, so too the toleration of organized opposition —organized in the form of a party which seeks to match the government in scope and structure if not scale and resources, is a considerable achievement. And Rosenblum is right that the normalization of party competition—the

15 Rosenblum, *On the Side of the Angels*, pp. 11 and 105.

16 Ibid., 38.

understanding that faction is not a temporary or aberrant, phenomenon, but a settled part of the political landscape—is indispensable in this regard. The key move, she said, was “to distinguish party opposition from sedition, treason, and a prelude to civil war.” And for that, what was needed was several things: first, something like the accidental experience of rotation in office—that, as it happened, the Whigs had power, and then the Tories did, and then the Whigs again—and no one happened to be hanged in the process; and secondly, people started to regard this as business as usual; and thirdly, it was not just business as usual but something more or less institutionalized. That was the achievement of the spirit of party; in Rosenblum’s words, “[o]nly parties bring opposition into the frame of government, regularize it, eventually legalize it, and make it politically mundane....” By going public, parties begin to act as responsible institutions and they cease to be regarded “as secretive societies, or seditious cabals, nurseries of rebellion.”¹⁷

6. Her Majesty’s Loyal Opposition

My theme is loyal opposition, and we are approaching an understanding of it through various stages: political competition; rhythm and turn-taking; the right of chronic dissent even during the period of the victors’ ascendancy; and the toleration of the losers’ organization as a powerful political entity reproaching and challenging the government at every turn. All of that is a matter of liberty, and it is of the utmost importance. But the ideal of loyal opposition goes beyond liberty. It is a matter of constitutional empowerment.

I want to begin with the best-known example of the sort of empowerment I mean; and then (in conjunction with other examples) I will move to a more abstract consideration of loyal opposition as a principle of politics. I am going to start with Britain, because, as Nevil Johnson has put it, “[t]he notion of opposition as an inherent feature of the political system itself is more sharply defined in Britain than anywhere else, and has been for a far longer time.”¹⁸

In Britain (indeed in parliamentary systems throughout the English-speaking world)¹⁹ they do something quite interesting for the losers (considered as organized political competition). They don’t just tolerate

¹⁷ Ibid., 121

¹⁸ Nevil Johnson, “Opposition in British Political System,” *Government & Opposition*, 32 (1997), 487.

organized political opposition; they *institutionalize* it in the structure of the constitution. One party or one coalition wins an election, but the largest group of losers in Parliament (those who won their seat but are not in the majority party in the House of Commons), are designated as Her Majesty's Loyal Opposition. Their leader, the Leader of the Opposition--defined by statute since 1937 as "that member of the House of Commons who is for the time being the Leader in that House of the party in opposition to His Majesty's Government having the greatest numerical strength in that House"²⁰—holds a paid government office, with the salary equivalent of a cabinet minister, and an official car and staff and so on.²¹ When this arrangement was instituted, there was some opposition to it.²² But the majority in the debate recognized that the Leader of the Opposition had "a definite and distinct part to play in constitutional government,"²³ and that he wouldn't always have independent wealth to eke out his salary as an ordinary MP for the taxing demands of this extraordinary office. As Sir Ivor Jennings put it: "It may seem strange that the Government should by taxation raise £2000 a year in order to enable its principal opponent to criticise it; but in truth opposition is an essential part of democratic government."²⁴

Actually Dean McHenry points out that the Leadership of the Opposition was already established as a salaried office in Canada and Australia before it was established in Britain. "In 1905 a resolution was

19 Dean E. McHenry, "Formal Recognition of the Leader of the Opposition in Parliaments of the British Commonwealth," *Political Science Quarterly*, 69 (1954), pp. 438-452

20 Ministers of the Crown Act 1937. There is recognized opposition in both chambers, though the post of "Leader of the Opposition" is defined only for the Commons in the 1937 statute.

21 When it was instituted, the amount was the same as that for the Minister of Pensions, "much less than those of ministers usually of Cabinet rank, but more than those of junior ministers." (See Dean E. McHenry, "Formal Recognition of the Leader of the Opposition in Parliaments of the British Commonwealth," *Political Science Quarterly*, 69 (1954), 438, at 440.)

22 One MP said, for example, that "[t]he function of an Opposition is to gain recognition from the electors of the country and to force it from the Government, not to receive it from the Government as a gift."-- Sir Archibald Sinclair (Liberal) in the House of Commons, debating the 1937 measure, quoted from Hansard by McHenry, at ___.

23 Viscount Hailsham in the House of Lords, debating the 1937 measure, from Hansard, *ibid.*, at ___.

24 Ivor Jennings, *Parliament* (19__), p. 82

introduced in the House of Commons at Ottawa, providing that the member occupying the recognized position of House opposition leader should be paid a sessional allowance of not exceeding \$7,000, in addition to his stipend as M.P.”²⁵

Anyway, wherever it began, this practice—“the institutionalization within the workings of everyday politics of a standing alternative to the government of the day”—has been described as “the greatest contribution of the nineteenth century to the art of government.”²⁶

Apart from the salary, the powers, privileges and duties of the office and of the opposition party generally are defined mainly by practice.²⁷ The Leader of the Opposition, as a sort of alternative prime minister, has a ceremonial presence at events of state; he will normally meet with foreign dignitaries, etc. He will be entitled to confidential briefings on foreign affairs and (some) security issues by the Prime Minister and he will cooperate with the Prime Minister or latter’s nominated Leader of the House of Commons and the whips in organizing the agenda in the legislature.²⁸

There is also a practice now of the Leader of the Opposition appointing spokesmen in the various areas in which the ruling party has appointed cabinet ministers:²⁹ this is called the Shadow Cabinet, and there is the shadow foreign secretary, the shadow minister of justice, the shadow minister of education and so on. As shadow ministers, they are subject to something like the discipline of the principle of collective responsibility that applies to the ruling Cabinet.³⁰

What is the point of all this? The opposition and its leaders now have an officially designated role in the system of government. But what

25 McHenry, “Formal Recognition of the Leader of the Opposition,” p. 443. This was followed by a similar decision in Australia in 1920, which also included the Senate opposition leader in the stipendiary arrangement and (since 1947) some payment to the leadership of smaller parties. (Ibid., p. 448.) In Britain, there is no additional salary for the opposition leader in the House of Lords. No payment for Leader of Opposition in New Zealand until 1951

26 Nevil Johnson, “Opposition in the British Political System,” p. 487, citing A. L. Lowell, *The Government of England*, New York, Macmillan, 1924, Vol. I, p. 451. Also: As Walter Bagehot, put it, UK was first country which made a criticism of administration as much a part of the polity as administration itself. ...”

27 Allen Potter, “Great Britain: Opposition with a Capital ‘O’,” in Robert Dahl (ed.) *Political Oppositions in Western Democracies* (Yale UP 1966), 3, at pp. 13-14.

28 There is a good account in Neil Johnson’s article.

is that role? Primarily it is to make the legislature work as a forum for genuine critical debate. If Bagehot is right that the principle of party is “inherent” in the House of Commons, then Jennings is also right that “It is not untrue to say that perhaps “the most important part of Parliament is the Opposition in the House of Commons.³¹ So there is the organizational task I mentioned—the Opposition must work with the government to organize the agenda for parliamentary debate (a function that we shouldn’t underestimate; imagine how legislative and other business would be conducted without it)³² and ensure that sufficient time is allocated for criticism, explanation, and accountability.³³ The Leader of the Opposition also has, as Clement Atlee observed, a special responsibility to defend the rights and privileges of ordinary MP’s considered simply as members of the legislative body, apart from their

29 This was formalized by Atlee around 1955. As late as the close of the nineteenth century, the function was still left informally and primarily “to the tendency of many ex-Ministers when in opposition to concern themselves particularly with the affairs of their old departments to which they hoped to be appointed in the future.” – Punnett’s observation—from R. M. Punnett, *Front-Bench Opposition: The Role of the Leader of the Opposition, the Shadow Cabinet and the Shadow Government in British Politics* (New York: St. Martin’s Press, 1973)—quoted in review by Dell G. Hitchner in *Journal of Politics*, 37 (1975), 611. See also Jorgen S. Rasmussen, review of Punnett, *Front-Bench Opposition*, *American Political Science Review*, 69 (1975), 1499.

30 Ibid. (Rasmussen). Also those who attain Cabinet office in a government will have usually had this as part of their training. Jennings, *Cabinet Government*, pp. 213-4: “The Cabinet consists of party leaders with parliamentary experience. For the most part, they will have borne the burden of opposition, itself a training for government.”

31 Bagehot, *The English Constitution*, p. 125; Jennings, *Cabinet Government*, p. 439.

32 Nancy Rosenblum, *On the Side of the Angels*, on the lack of party organization and opposition parties in the Confederate legislature in the 1860s, making that a quite dysfunctional body. Rosenblum also quotes Hegel as follows: “Whoever has reflected a little on the nature of an Assembly of Estates ... cannot fail to see that without an opposition such an assembly is without outer and inner life. It is precisely this antagonism within it that forms its essence and justification, and it is only when it has engendered an opposition within itself that it is properly constituted.”

33 Cf. Jennings, *Cabinet Government*, p. 464: “The apparent absurdity that the Opposition asks for parliamentary time to be set aside by the Government in order that the Opposition may censure the Government, or that the Government is asked to move a vote of supplies for the Ministry of Labour in order that the Opposition may attack the Minister of Labour is not an absurdity at all. It is the recognition by both sides of the House that the Government governs openly and honestly and that it is prepared to meet criticism not by secret police and concentration camps but by rational argument.”

party affiliation, particularly the right of every Member to express his opinion freely on all matters of public policy.”³⁴

Beyond those matters of institutional responsibility, of course the important thing—perhaps not the most important thing; we we’ll come to that in a moment—is for the opposition party to oppose,³⁵ to “scrutinise the government,” to “hold them accountable for their decisions,”³⁶ “to limit the extremity of the Government's action, to arouse public criticism of any dangerous policy, and to make the Government behave reasonably,”³⁷—in short it is the duty of the opposition to serve in Edmund Burke’s words as a “vigilant watchman over those in power.”³⁸ The point of this is not necessarily to defeat the governing party in a confidence vote in the Commons—though that has been known. It is to familiarize the winners and the country at large with the point that criticism is OK and that policies are to be presented and defended in an explicitly and officially sanctioned adversarial environment.³⁹ Maybe this leads to an

34 Atlee, quoted in Potter, “Great Britain: Opposition with a Capital ‘O’,” pp. 14-15. See also Jennings, *Parliament*, 83-4: “The Leader of the Opposition controls the Opposition whips, accepts responsibility for the course of negotiation about business with the Government, arranges the subjects for debate where (as in Committee of Supply) practice leaves the choice of subject to the Opposition, cross-examines the Prime Minister and other ministers, watches for encroachments on the rights of minorities, demands debates when the Government is trying to slide away without parliamentary criticism, arranges for the more important speakers to reply to ministers. He must be in his place even more constantly than the Prime Minister. He must be familiar with all the tricks of skilled parliamentarians and all the opportunities of the rules of the House.” Also Jennings, *Cabinet Government*, pp. 464-5: ‘The most important elements in parliamentary procedure are the discussions “behind the Speaker's Chair” or “through the usual channels”. The Prime Minister meets the convenience of the leader of the Opposition and the leader of the Opposition meets the convenience of the Government. The respective Whips, in consultation with the respective leaders, settle the subjects to be debated, the time to be allowed and, sometimes, the information to be provided and the line of attack. The Government agrees that a vote of censure be moved on Monday provided that a Bill be given a second reading on Tuesday. The Opposition assents to its inevitable defeat at 6.30 p.m. in order that it may move a resolution for the rest of the evening and suffer its inevitable defeat at 10 p.m.”

35 Hansard, Lords—December, 1973: “[T]he Opposition's constitutional role as Her Majesty's loyal Opposition with the job of probing and criticising....”

36 Parliamentary Education Office: FAQ: Our Government, http://www.peo.gov.au/faq/faq_17.html (last visited Jan. 17, 2010).

37 Jennings, *Parliament*, p. 83.

38 Burke, as quoted by Rosenblum: *On the Side of the Angels*. “The Parties who are Out, are always a Curb, and a Bridle to those which are In....”

“exaggeration of adversarial relationships in the public sphere,”⁴⁰ though it is mitigated somewhat by the relation between this function of criticizing the government and holding it accountable, and the next function I want to talk about—which is, if anything, even more important.⁴¹

It has been said that the main role of the official opposition is to prepare for government.⁴² “Our Constitution,” wrote Sir Ivor Jennings, “assumes that at any moment, if the Government resigns, or is defeated, or breaks up, an alternative can be formed from the Opposition.”⁴³ And he added: “Her Majesty's Opposition is Her Majesty's alternative Government. The leader of the Opposition is almost Her Majesty's alternative Prime Minister.”⁴⁴ Obviously, this duty—to provide a government-in-waiting—affects the way in which the duty to criticize is performed. The early development of the doctrine of parliamentary opposition, at the hands of Burke and others, included promotion of a

39 McHenry, “Formal Recognition of the Leader of the Opposition,” p. 439: “Although the skirmish often leads to a test of strength in a vote of confidence, the opposition rarely has hopes of defeating the government; its goal, more likely, is to influence public opinion to the extent that at the next election the government will be retired.”

40 Johnson, “Opposition in the British Political System,” 509-10. See also Ivor Jennings, *Cabinet Government*, p. 16: “The Opposition is at once the alternative to the Government and a focus for the discontent of the people. Its function is almost as important as that of the Government. If there be no Opposition there is no democracy. ‘His Majesty's Opposition’ is no idle phrase. His Majesty needs an Opposition as well as a Government.”

41 Rosenblum, *On the Side of the Angels*, observes that members of Opposition parties “are less anxious to overthrow their rivals than to preserve the system which, in due course, and by the connivance of those rivals, will bring to them also the opportunities and emoluments of office.”

42 Brazier? Also Potter, “Great Britain: Opposition with a Capital ‘O’,” p. 6: “The development of opposition in Parliament was essentially from an opposition to particular men or measures to an opposition offering an alternative government.” A former clerk of the House of Commons, Lord Campion, defined the Opposition as “the party for the time being in the minority, organized as a unit and officially recognized, which has had experience of office and is prepare to form a Government when the existing Ministry has lost the confidence of the country.” -- as quoted in Potter, “Great Britain: Opposition with a Capital ‘O’,” p. 16.

43 Jennings, *Parliament*, p. 83.

44 *Ibid.*, p. 79. Potter, “Great Britain: Opposition with a Capital ‘O’,” p. 14, puts it this way: “More and more, the Leader of the Opposition is treated in effect as Her Majesty’s alternative prime minister, in public ceremonies and in private conversations with the Prime Minister on confidential matters, though it is constitutionally improper to describe him thus, since the choice of a new Prime Minister is the personal prerogative of the monarch.”

consistent program to be advocated in opposition and realized in office.⁴⁵ This imposes a certain discipline of responsibility (a degree of shared responsibility for the public world, born of the constant possibility that one might have to take office at the next election or after the next confidence vote in the House).⁴⁶ As Campion put it, the Opposition must have a positive policy of its own and not merely oppose destructively.⁴⁷ Even from a strategic point of view, the opposition party must take care that criticisms do not suggest the endorsement of extreme policies. It must identify its constituency with some very broad proportion of the mass of the people that it may be called on at any time to govern.⁴⁸ As Jennings puts it:

Irresponsible opposition is not part of democratic government, though many democratic States have never learned that lesson. The Opposition is giving a hostage to fortune whenever it takes a decision. It may be called upon—it hopes that it will be called upon—to assume in a short time the burdens of government.⁴⁹

45 Anastaplo, “Loyal Opposition in a Modern Democracy,” 1013.

46 Canovan, *Hannah Arendt*, 35. Not an Arendt quote. Passage from my piece in *Cambridge Companion to Hannah Arendt*. Also Anastaplo, “Loyal Opposition In A Modern Democracy,” p. 1016: “The Government is thus put on notice that there are others equipped and prepared to replace it.”

47 Campion, as quoted in Potter, “Great Britain: Opposition with a Capital ‘O’,” p. 16.

48 Jennings, *Parliament*, 170: “The Opposition, while maintaining the support of its solid core of voters, has to make itself attractive to the floating vote, by keeping up a fire of sound and statesmanlike criticism and, if need be, by taking as its own policy, with embellishments and improvements, those items of Government policy which seem most popular.” See also Bagehot, *The English Constitution*, p. 126: “An Opposition, on coming into power, is often like a speculative merchant whose bills become due. Ministers have to make good their promises, and they find a difficulty in so doing. They have said the state of things is so and so, and if you give us the power we will do thus and thus. But when they come to handle the official documents, to converse with the permanent under-secretary — familiar with disagreeable facts, and though in manner most respectful, yet most imperturbable in opinion — very soon doubts intervene. Of course, something must be done: the speculative merchant cannot forget his bills; the late Opposition cannot, in office, forget those sentences which terrible admirers in the country still quote. But just as the merchant asks his debtor, ‘Could you not take a bill at four months?’ so the new minister says to the permanent under-secretary, ‘Could you not suggest a middle course? I am of course not bound by mere sentences used in debate; I have never been accused of letting a false ambition of consistency warp my conduct; but,’ &c. And the end always is, that a middle course is devised which looks as much as possible like what was suggested in opposition, but which is as much as possible what patent facts—facts which seem to live in the office, so teasing and unceasing are they—prove ought to be done.”

49 Jennings, *Parliament*, 83.

And he concluded, perhaps chauvinistically: “Our system alone can produce a responsible Opposition, one with a consistent policy known to the country in broad outline, one which is not anxious to win at the expense of ruining the game.”⁵⁰ This is, in Burke’s phrase, “*regulated rivalry*”—regulated not by any particular constraints or focus of loyalty—I will say much more about that in a moment—but just by this prospect, which the Opposition entertains and which it embodies symbolically and realistically for the nation. The nation knows it can be governed by different people with different policies: there they are, designated as such, present and recognized within the legislative institutions.⁵¹

So—that is the practice of loyal opposition in the land where it is best known and institutionally most clearly identified. The term “His or Her Majesty’s Loyal Opposition” is said to have come from an MP, a Mr. Cam Hobhouse⁵² in a debate in 1826 in the House of Commons.⁵³ Obviously it works well in a two-party system (Whigs and Tories; Labor and Conservative; maybe Democrat and Republican), perhaps less well in a multiparty system: as Neil Johnson has said, it involves “a certain kind of brutal disregard for those parties which are not players in the big league.”⁵⁴ Shortly I will say something about how it works in relation to coalition government, of the type we see in Britain at the moment.

We do not have the institution of Leader of the Opposition in the United States, though there is something like recognized opposition in the roles and privileges of minority parties and minority leaders in the legislature. The phrase is not heard as often in American politics as it is in British politics, though it was “The Word” on *The Colbert Report* on February 10, 2009—riffing on Pete Sessions’ suggestion that to fight the

50 Ibid.

51 Jennings, *Cabinet Government*, 16: “The Opposition is at once the alternative to the Government and a focus for the discontent of the people.”

52 Hobhouse was a well-known trouble-maker; he was Byron’s best man and was once sent to Newgate gaol for insulting Parliament.

53 *The London Standard*, December 20, 1897, “There is hardly any phrase more constantly used by politicians than “Her Majesty’s Opposition.” It is accepted by both sides; and has been employed by both of the great parties when in that ‘position of greater freedom and less responsibility’ which it serves to designate.” <http://query.nytimes.com/gst/abstract.html?res=F10E16FE3B5416738DDDA90A94DA415B8785F0D3>

54 Johnson, “Opposition in the British Political System,” pp. 509-10.

Obama administration, “insurgency may be required.”⁵⁵ Institutionally, it would have to be different anyway, because as we all know the US has a quite differently shaped political system. As George Anastaplo put it,

The preponderance of governmental powers in Great Britain is exercised or regulated, directly or indirectly, by Parliament. It is, therefore, clearer in that country than in the United States precisely where the Loyal Opposition is, for the most part, located. ... It is the House of Commons which, in principle, authorizes and empowers the government of the day, with the Loyal Opposition prepared to provide an alternative government whenever the House of Commons is prepared to support it.⁵⁶

I shall say more about US situation shortly—I believe there are important parallels as well as differences between the British and American practices—but first I want to see what we can extrapolate from the British constitutional position by way of a general principle.

7. The idea of loyal opposition

Obviously the idea of loyal opposition is something we can abstract from the British institution. Indeed the idea can be abstracted from formal politics, and used in any setting; one might talk—people often do talk—about loyal opposition within a corporation, or church, or an academic department. These uses often do not go very far beyond the idea of, on the one hand, the tolerance of continuing dissent, and on the other hand, the willingness to restrain one’s consent so as not to bring down the structure that houses it. Both are important, but often the settings to which this talk is applied cannot capture the specific mode of empowerment that characterizes the institutionalized British practice. That opposition need not be construed as disloyalty, is one part of the loyal opposition idea. But that opposition figures should actually be empowered and their oppositional practice sponsored and facilitated by the system that defines them for the time being as losers—that is more challenging. In non-political settings, this is likely to be a more a matter of the personal whims and preferences of the powerful than a settled affirmative feature of the

⁵⁵ <http://www.colbertnation.com/the-colbert-report-videos/218486/february-10-2009/the-word---loyal-opposition>

⁵⁶ Anastaplo, “Loyal Opposition in a Modern Democracy,” p. 1014.

constitution of any of the groups in question. So I shall mostly pass by these other uses of the term.

There is a second regard in which, we might choose not to focus only on specifically political arrangements. In a society like Britain, Canada or Australia, where there are formalized arrangements for Loyal Opposition, we may think that they are likely to work institutionally only when they are backed up by a suitable ethos in society at large. Within Parliament, for example, the role of Opposition and its relations to the Government require a certain level of civility—Burke sometimes referred to opposition as “the Civil Opposition”—and it may be difficult to sustain that civility unless it is nourished by broader civility at the level of society as a whole. People sometimes worry, for example, about the extreme antagonism that has in recent years entered informal American politics and that it tends to contaminate and undermine the civil transaction of business in the House of Representatives. The serious suggestion, on the one hand, that prominent members of the Bush administration should face investigation and trial after the Democratic victory of 2008, or the suggestion by right-wing commentators that their liberal opponents are not just wrong but demonically so⁵⁷—neither of these bodes well for the civility on which traditions of loyal opposition depend. I am not going to be able to say any more about this, except that it is surely an important issue; but we should remember that formalized practices of loyal opposition probably make as much of a contribution to practices of civility and tolerance in the community as the other way round. As Russell Muirhead and Nancy Rosenblum put it, the formalized practices embody, highlight, proclaim, and assume that political opponents are to be regarded as “reasonable rivals not enemies to be destroyed.”⁵⁸ Or, as Rosenblum puts it in her book, formalized oppositional practice gets people used to what she calls “the legitimacy of ongoing, managed, institutionalized conflict”

I am concentrating, then, on loyal opposition as a constitutional principle. And I believe it is one of the leading principles of the British Constitution. It might seem ironic that the most advanced development of

57 See, e.g., Ann Coulter, *Demonic: How the Liberal Mob is Endangering America* (Crown Forum, 2011).

58 Russell Muirhead and Nancy L. Rosenblum, “Political Liberalism vs. the Great Game of Politics: The Politics of Political Liberalism,” *Perspectives on Politics*, 4 (2006), pp. 99-108 speak of “the view that opponents are reasonable rivals not enemies to be destroyed.”

this constitutional idea is in a country which does not have a single codified written constitution, either to embody this principle or to serve as the residual focus of loyalty in opposition—again, more on that in a moment.⁵⁹ But British writers since Albert Venn Dicey have talked usefully of the principles of the constitution nonetheless. For Dicey, there were two of them: the sovereignty of Parliament and the rule of law.⁶⁰ I would add a few others, such as limited monarchy, the devolution principle, universal suffrage, the independence of the judiciary, respect for human rights, and—I now want to say—loyal opposition.

It is not a principle that gets much attention from English constitutional writers. Bagehot and Jennings spoke extensively about it. But in recent years Vernon Bogdanor simply ignores it in his book on *The Changing Constitution*—perhaps because it is such an entrenched feature of Parliamentary and party that he thinks it can be taken for granted. I worry about this, because now that there are some tentative moves to begin codifying British constitutional arrangements, it would be a pity to see this left out of the picture, simply because it was too familiar, or crowded out of explicit consideration by other more sexy topics of constitutional concern.

We talk about free speech and a tolerant political culture—but again I want to emphasize that the principle of loyal opposition goes far beyond that. It is not just the negative idea of not treating one's opponents as though they were enemies of society; the idea of legitimizing dissent; “freedom of speech and the right to publicly and legitimately oppose the policies and actions of the government of the day.”⁶¹ It is not just the idea that one can oppose actively and, in an organization devoted to such opposition, continually criticize and proclaim alternatives to government policies—vehement organized opposition, opposition seeking to discredit ministers and officials, and actively seeking to supplant the government which won the election, without being labeled a subversive or a traitor. All of that is important, but the Principle of Loyal Opposition is also the

59 Anastaplo, “Loyal Opposition in a Modern Democracy,” says that “An acknowledged constitutional system provides the soil in which the institution of the Loyal Opposition is rooted.” Ironic that the British do this without a written constitution.

60 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*.

61 Ludger Helms, “Five Ways of Institutionalizing Political Opposition: Lessons from the Advanced Democracies,” *Government and Opposition* (2004).

idea of positive empowerment by the creation and sponsoring of an official recognized role for oppositional practice within the constitutional fabric, making “the propriety of opposition as integral a part of the constitutional structure ... as the authority of government.”⁶²

8. A prerequisite for democracy?

The practice and acceptance of the principle of loyal opposition, is, I think, an important prerequisite for democracy.⁶³ Maybe it is not a necessary or indispensable prerequisite,⁶⁴ but I mean to say that if a country does not have substantial experience of it, does not have this in the repertoire of its political culture, it is less likely to be successful in setting up a democracy, that is, a system that rotates rival factions in and out of office on the basis of periodic popular votes.

You may ask, “Well how can loyal opposition be a prerequisite? How can it pre-date democracy? How can there be any way of identifying an opposition party or an opposition leader except in a democracy? What else but a system of democratic elections could provide the medium in which parties alternate in and out of office?” One obvious answer is that the practice of loyal opposition may become familiar to a polity in a proto-democratic stage: Britain before the Reform Acts, or apartheid South Africa, for example—where there is voting, and there are winners and losers in elections, but the franchise is not fully extended to all.

Or political competition could take place in some other medium, and winners separated from losers in some currency other than ballots. There might be competition for royal favor, or the vicissitudes of the principle of heredity or the monarch’s mortality might provide a basis on which groups of politicians alternate in and out of power. Beyond that, and this is just fun speculation, we might imagine political competition, and the rotation of winners and losers, in terms of the waxing and waning of charismatic power, the fickle support of Praetorian guards, the whim of the Gods revealed through auspices, or just the vicissitudes of manifest

62 Potter, “Great Britain: Opposition with a Capital ‘O’” at p. 3.

63 Jennings, *Cabinet Government*, 16: “If there be no Opposition there is no democracy.”

64 Ian Shapiro, “Review: Democratic Innovation: South Africa in Comparative Context,” *World Politics*, 46 (1993), pp. 121, considers “that unlike democratic systems that evolved gradually out of semiconstitutional monarchies, in transitions from authoritarianism there is no opportunity for counterélites, the seeds of a loyal opposition, to emerge during the predemocratic order.”

success and failure of policy revealed in famines, military defats, fiscal crises and so on.

In environments of these kinds, political practice might be such that people become used to the idea of the recognized presence of a defeated politician hanging round in some public role, not just tolerated but empowered as an oppositional presence, carping and criticizing to anyone at court who will listen, and waiting for the wheel of fortune to turn again. Getting used to this even in a non-democratic environment makes it possible for people to approach both the powers of victory and the gall of defeat in democratic elections more responsibly.

I mention this because I think it is important for a democracy, early in its life, not to think of electoral victory and defeat on any sort of analogy with military victory and defeat. Military victory aims at the destruction of the enemy's force, even though it is often necessary for battles to be waged successively over a period of time in order to accomplish that. But elections don't aim at the permanent eradication of a losing party. They aim at its relegation to a loser's role for the time being. Yet political theorists persist, irresponsibly in my view, with this analogy. Adam Przeworski suggests that "voting constitutes 'flexing muscles': a reading of chances in the eventual war. If all men are equally strong (or armed) then the distribution of votes is a proxy for the outcome of war."⁶⁵ The idea is that the losers submit to the winner's rule because they are informed by the voting of how likely it is that they would be destroyed in a fight. All too often, powerful parties in new democracies face their first elections in this spirit, understanding that the point of the election is to settle once and for all, by some surrogate for fighting, which party is to prevail in the polity, and which party is doomed to permanent exile from political life.⁶⁶ That, as I say, is a bad model; much better to have had experience of rotation in and out of office and the empowerment of

65 Przeworski, "Minimalist Conception of Democracy: A Defense" in *The Democracy Sourcebook*, edited by Dahl, Shapiro, and Cheibub (MIT Press, 2003), 12, at p. 15. Admittedly, Przeworski goes on to say that also that the balance of forces warns the winners that they would have had to be much stronger (in this currency of ballots = bullets) if they were to avoid holding subsequent elections (ibid.).

66 Rosenblum, *On the Side of the Angels*, Loc. 6955-60: "The system of regulated rivalry also means that unlike minorities in other arenas of majority decision making, partisans do not see minority status as irreversible. In other social and political contexts the term of power is not periodic and fixed by rules; the conflict is not iterative; the future may disappear from view. Partisans do not secede or revolt, go underground or withdraw in defeat. 'Elections are not followed by waves of suicide.' Partisans keep the losing side alive, in public view, on the ready not just to alter a particular outcome but to have their party take responsibility for governing."

opposition in some non-democratically competitive environment than to understand the environment of democratic competition in this militaristic spirit.

9. The American version

With these reflections in mind, I want to turn now to a political system with which we are much more familiar, but whose democratic environment honors the principle of loyal opposition in a rather different way.

In the United States, there is no equivalent of the role of Leader of the Opposition—though we came close to it in the old understanding of the Vice-Presidency (before the 12th Amendment in 1804): “The Constitution ... originally provided that the Vice President would be the person who secured the second highest number of electors for the Presidency. This meant, in effect, that the President would likely have as his Vice President someone who had been an electoral opponent. Thus, John Adams’s Vice President in 1797 was his political rival, Thomas Jefferson, who would defeat him in the following Presidential election.”⁶⁷ Nor is there any constitutional designation of a party in the legislature as the Loyal Opposition—the Constitution says nothing at all about political parties⁶⁸—though both houses have evolved the recognized office of “Minority Leader,” and accorded it some modicum of standing.

But the Principle of Loyal Opposition—though seldom labeled in that way—is still respected and has been since the time of the anti-Federalists.⁶⁹ George Anastaplo emphasizes that those who win the presidency by defeating an incumbent have usually been oppositionally active in national politics for several years in the period immediately preceding their election, either in the legislature or in a state house; and often they have had experience as an advisor, cabinet member, or other high appointee of a previous administration.⁷⁰ So we have the rotation idea.

More broadly: our politics remain intensely adversarial, and we expect parties to be engaged in organized, well-funded, root-and-branch

67 Anastaplo, “Loyal Opposition in a Modern Democracy,” 1011.

68 See discussion in Pildes and Levinson, “Separation of Parties not Powers,” and their cites.

69 David J. Siemers, *Ratifying the Republic: Antifederalists and Federalists in Constitutional Time* 219-22 (2002)

opposition to the powers that be (sometimes opposition to the President; sometimes against the majority party in the legislature), not only without being designated as traitors to our society, but also in terms of the recognition of multitudes of oppositional figures as prominent *players* in the political system. The UK focuses its acceptance of the principle in the specific office of the Leader of the Opposition, whereas in the US loyal opposition is much more ubiquitous in character.⁷¹ Polsby remarks that

[t]his is so much the case that it probably makes less sense to talk of opposition than to speak in the American context of political disagreement or conflict or checks and balances or oppositions (plural) and therefore to describe ways in which the varied forms of opposition are embodied in [various] institutions.⁷²

Because there are diverse centers of power, separated from one another, there are diverse opportunities for oppositional politics and oppositional presence in various institutions.⁷³ What this means is that it is possible for a party and its leaders to be power-holders in one institution (say, the House or the Senate) even while a different party and its leader are power-holders on the executive. (And something similar often happens—as it has now—as between the two chambers of the federal legislature).⁷⁴ This is not pre-ordained—the same party can be in power in the legislature and in

70 Anastaplo, “Loyal Opposition in a Modern Democracy,” 1010: “Those in the United States who do take over the Executive have not been merely in opposition up to that point. Typically, they have been serving either in the national legislature or in State governments. Although they may have been excluded from the national executive up to that point, they may themselves have been in control of the national legislature or in control of one or more branches of State governments—with loyal oppositions of their own to deal with.”

71 Nelson Polsby, “Political Opposition in the United States,” 32 *Government and Opposition* (1997) 511.

72 Ibid.

73 Polsby again, p. 517: “The fact that there is no consolidated, well-institutionalized, unified, system-wide opposition connects with the fact that government is spread among constitutional branches and levels and entities and is itself by design not consolidated or unified.”

74 And actually even *in* the elective branches, party discipline is pretty loose and there can be centers of loyal opposition *within* (and relative to the power structures inside) a majority or minority party. Within the executive, there is less of this -- spoils system -- but diversity and sometimes other-party statesmen in Cabinet. (Also: debate about unified executive.)

the White House.⁷⁵ But it happens often enough that we can say the American system is capable of giving greater power than the British system gives to politicians whom we can regard (from one or another point of view) as opposition leaders. Constitutional theory, under the heading of checks and balances, legitimizes active opposition and resistance to the plans of those who dominate one branch by those who dominate another. We value that clash of branches and parties. And it also sets things up some that it is very difficult—not impossible—for a party to push through its program simply on the basis of its own political resources. The constitutional structure—bicameralism, the President’s veto, advise-and-consent, and perhaps also judicial review—means that it has to coordinate and usually compromise with leaders of other persuasions.⁷⁶

Add to all of this, the federal structure of the constitution, with separate administrations in fifty states, and we have a whole additional layer of potential and piecemeal opposition, complicated, in turn, in a sort of fractal fashion by the way in which the constitutional structure of each state recognizes separation of powers, bicameralism (except in Nebraska), and the principle of checks and balances in the structure of its governance. State constitutions empower loyal opposition to state administration at various points, and state office and state institutions can also be centers of opposition in national politics.⁷⁷ We can see all of this coming together, for example, in the divers centers of opposition to “Obama-care”—the health care legislation enacted in 2009. The House of Representatives would repeal it if it could, but there is probably still a majority to sustain it in the Senate. And there is ferocious opposition in the states. Note also that the situation is fluid because the presidency, the two chambers of congress, and the states, sometimes work on different electoral schedules, so that

75 Daryl J Levinson and Richard H. Pildes, “Separation of Parties, Not Powers,” 119 *Harv. L. Rev.* 2312 (2005-2006): “[T]he 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.”

76 Polsby, “Political Opposition in the United States,” p. 513 (my emphasis)

77 See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHICAGO. L. REV. 483, 499-505 (1991) on the role state governments play in criticizing federal policy, monitoring federal officials, and training the loyal opposition. I owe this citation and this description to Heather Gerken, *The Supreme Court 2009 Term Foreword: Federalism All The Way Down*, 124 HARVARD LAW REVIEW 4 (2010).

things reshuffle and rearrange themselves. The majority party in the House of Representatives was not oppositional to the Obama administration when the health care legislation was passed but now it is. As we will see, this matter of different schedules of election (and appointment) is quite important for the way in which practices of loyal opposition play out in American politics.

Nor do I exclude the judiciary from this account. The courts can be a focus of opposition to the program of a powerful president or a powerful faction in Congress. They can strike down legislation that has been enacted by the elective branches, and—as we all know—whether they do so often depends on the interplay between the judges’ own political predilections and their view of the often vague and ambiguous terms of the Constitution.⁷⁸ It is not just the Supreme Court: there is a hugely complicated picture here. Obama-care has been assailed by some district courts around the country (usually at the behest of state administrations) and supported by others. It has been upheld by some circuit Court of Appeals and assailed by others. And at the appellate level, we see that each court empowers a diversity of judges, with varying politics and allegiances.⁷⁹

Nelson Polsby uses a revealing phrase in his description of the way the American system accommodates opposition. He talks of “forms of opposition” being “embedded in the routines of American government as a natural consequence of the constitutional necessity for checks and

78 Of course many judges would be horrified by the suggestion that they are simply the creatures of party, or that their oppositional role, such as it is, is defined by their party status compared with that of the occupiers of some other center of power. They can be part of the loyal opposition nonetheless—minority dissenting opposition to a perceived political majority on the court, institutional but still political opposition as between the powers that dominate the court and the Congress or the Presidency.

79 Again we see the force of the point that people are appointed and empowered on different schedules. A judge may be appointed by a Democrat administration, confirmed grudgingly by a Republican dominated Senate, and then he has to take his seat among Republican appointees as well, some of whom may have been nominated when the Republican party was a somewhat different creature than it is now. Different schedules of appointment, and no provision for regular re-appointment or accountability, mean that our judiciary empowers judges of all political shades in a sort of layered representation of the country’s political history.

balances.”⁸⁰ I think what he has in mind or, whether Polsby had it mind or not, what is the case is the following.

The United States Constitution separates and disperses power: partly on federalist principles, partly simply to reduce the amount of power in the hands of any one person or agency, and partly on the basis of rule of law ideas that require the function of legislation to be sharply separated from the judicial and executive functions, lest legislators make oppressive laws in the confidence that they can ensure that the laws are not applied to them and their family and friends.⁸¹ This can often mean that separated powers are in the hands of people who are politically opposed to one another. Now so far that is not an empowerment of opposition. The functional separation of powers requires the executive and the judiciary to faithfully interpret and execute the statutes that the legislature has enacted according to the terms, and it requires the executive to faithfully carry out judicial orders according to their terms. Functional separation requires a sort of assembly-line fidelity. But in America we *also* associate the separation of powers with the doctrine of checks and balances; and the point of checks and balances is to empower the branches sometimes to act oppositionally to one another. This empowerment is partly formal, as in procedures of judicial review or Presidential veto; and it is partly informal, empowering—indeed taking for granted—that it is constitutionally legitimate for the President sometimes square off against the legislature or vice versa. There is the same combination of constitutional distinction and constitutional empowerment *mutatis mutandis* in the case of the states and their relation to the centers of national governmental authority. On the one hand, the authority of the states is sharply distinguished by the Constitution from the authority of federal government; but we also accept as part of the informal constitution that state officials—state governors or state legislators, for example, should feel empowered from time to time to engage in oppositional politics vis-à-vis various elements at the federal level. And vice versa.

So that is the basis—the very loose and dispersed basis—on which America respects the principle of loyal opposition.

80 Polsby, “Political Opposition in the United States,” p. __. Actually Polsby’s complete phrase is: “forms of opposition ... embedded in the routines of American government as a *natural* consequence of the constitutional necessity for checks and balances that require of actors who come to office by uncoordinated means coordination with one another in the conduct of ordinary business.”

81 Cite to Locke and Montesquieu.

10. Loyal opposition and opposition participation in government

The matter is complicated in an interesting way by the interaction of the principle of loyal opposition with another related practice—that is, the actual mitigation of political defeat by the assignment of losers to actual political offices, or the insistence that in various regards winners must share power with losers. (David Fontana, a young law professor at George Washington University has written an excellent article on this, called “Government in Opposition,” published in the *Yale Law Journal* in 2009.)⁸² This business of opposition participation in government is partly what is going on with separation of powers, of course, and federalism. The US does not operate on a winner-takes-all system. Opposition figures work with government figures in various areas of policy and leading opposition politicians are taken into the confidence of the current administration in various ways. (This is particularly true in respect of foreign policy, intelligence, and national security matters.)⁸³ Something similar happens in the UK, sometimes under the auspices of Her Majesty’s Privy Council, which counts opposition statesmen among its membership.

Obviously the structure of modern legislatures ensures that this business of “opposition participation in government” happens or has the potential to happen to a very considerable extent. An individual or a party may be a loser, so far as majorities and minorities are concerned; but that makes sense only on the assumption that the members have a vote in the legislature. And that vote is sometimes used affirmatively in governance not just oppositionally. Sometimes if a policy that the administration wants to enact is unpopular with some members of its own party, the administration will rely on opposition votes to get it through.

A third respect in which we see this “opposition participation in government” has to do with the rhythms of election and appointment. Different chambers in a bicameral legislation may be on different election schedules, and this may produce disparities as between the two chambers that make it difficult—it’s a healthy difficulty—to say who is government and who is opposition. And then there are appointed offices, whose

82 Opposition participation in Government -- wonderful article by David Fontana, “Government in Opposition,” 119 *Yale Law Journal* 548-624 (December 2009).

83 For doubts about the accountability advantages of all this: see Pildes and Levinson, “Separation of Parties, Not Powers,” pp. 2342 ff. (Does this footnote really belong here?)

empowerment often outstrips the administration who appointed them. This is obviously true so far as the judiciary is concerned. So, life-tenure judges may be empowered governmentally even though they are political opponents of the current administration.

Finally we need to remember that law itself operates in this way. No democracy adopts a year-zero mentality to the law in every change of administration. Law at any moment operates as a sort of archaeological midden, representing the residue of legislative and adjudicative activity of previous generations of judges and law-makers, many of them in parties or with convictions opposed to the current generation of rulers. Rotation of various parties and judges of various political flavors in and out of power over a century or two produces a challenging patchwork of laws. Time does not permit me to explore here what legal theorists—most notably Ronald Dworkin—have made of this challenge in their attempt to treat such a patchwork as a coherent whole, with some unifying integrity, for the purposes of bringing the whole law to bear on any particular case.⁸⁴

The principle of opposition participation in government is evidently closely connected to the principle of loyal opposition. They work together, most notably in the American system; they work necessarily together to the extent that the locus of opposition is in a parliament which affirmatively empowers each of its members with a legislative vote.

But they are distinct principles. We can see this, I think, in the some of the things that have been said in the British context about the distinction between the practice of loyal opposition, on the one hand, and the formation of coalition—which obviously is a sort of opposition participation in government, with losing parties—minority parties—acquiring cabinet office etc.

During the Second World War, in Great Britain, a “National Government” was formed, with members from all major parties. The country was engaged for five or six years in a desperate struggle for national survival and it was felt that this required something other than adversarial politics as usual. (It is noteworthy, however, that even in these circumstances, parliamentary practice required that there be a Leader of the Opposition to carry out certain parliamentary functions, and one was

84 See Dworkin, *Law's Empire* (1986); Raz., “The Relevance of Coherence”; Waldron, “The Circumstances of Integrity” in *Legal Theory and in Law and Disagreement*; and Waldron, “Did Dworkin ever Answer the Critics?”

created artificially, precipitated (so to speak) out of the National Government coalition.⁸⁵

After the war it was suggested that this coalition be continued, because the country still faced national crises well into the 1950s. The proposal met with vehement opposition. Some said “that those who talk of a national Government misunderstand the whole nature of the present political situation. They forget especially that this country invented the concept of the loyal Opposition.”⁸⁶ And even during the war, in the House of Commons, Sir Arthur Baxter said this:

When in 1940 the country was placed in a great crisis it seemed a wise and spontaneous act for a Coalition Government to be formed. That crisis in its intensity has passed. Now victory is reasonably within sight, and the problems of post-war development are closer and more urgent all the time. Therefore the real reason for maintaining this Parliament another year is to maintain the Coalition Government. I wonder whether we think enough of the effect of this upon the country. For decades upon decades the government of this country was carried on by the principle of the Government and His Majesty's loyal Opposition. It worked through great crises, it brought and developed human liberty to its present state here, and was an inspiration in the outside world. Then we said, ‘Here is a crisis; a war which cannot be handled on that basis. We do not want His Majesty's loyal Opposition, we do not want an Opposition at all, save by a band of guerrillas who have got in here as Independents.’ That to my mind is a denial of the very strength of our Parliamentary system.”⁸⁷

I don't want to judge the case against coalition government. And anyhow, usually it does not have the totalizing effects of an all-party coalition, which is what Britain had during the War. Usually it is more like the present situation in Britain, with a coalition between one large party (the Conservatives) and a small party (the Liberal Democrats), but still with a large and active party (the Labour Party)—not much smaller than the

85 See Potter, “Great Britain: Opposition with a Capital ‘O’”, p. 15.

86 Hansard: Lord Chalfont Lords — December 18, 1973

87 Hansard: Prolongation of Parliament Bill Sir Arthur Baxter Commons — October 26, 1943.

ruling party and with very extensive experience of government in the opposition benches.

Though the principles are closely related, then, the key difference is that the principle of opposition participation in government empowers losing parties with respect to affirmative governmental functions, while the principle of loyal opposition empowers losing parties specifically with the function of opposing and criticizing and preparing to supplant the party currently in office.

11. Cooption?

I want finally to edge towards a discussion of this concept of loyalty, embedded I think in both of these ideas, but explicitly of course in the principle of loyal opposition. George Anastaplo has said that “[a]t the heart ... of a ... spirit of Loyal Opposition is the settled opinion in the community that there are things more important than ... the interests of one's party.” Loyal opposition, he said, involves “a dedication to established common objectives that reminds political opponents that what unites them should be considered far more significant, and more enduring, than what happens to divide them for the moment.”⁸⁸ I think we need to be very careful about this.

When I was at high school, it was the enlightened practice of the principal to appoint as prefects some of the dissident and smart-ass elements in the school, flattering them with a degree of limited authority in order to co-opt them and curb their unruliness. It was an admirable practice and I was one of the beneficiaries of it in 1969 and 1970. But that, surely, is not how we want the empowerment of loyal opposition to be understood as a form of political cooption, like the party-approved version of the Catholic Church in China, or a more sinister example, the party-approved version of the Lutheran church in Nazi Germany against which Dietrich Bonhoeffer struggled so courageously. We have memories too of the dignifying of certain parties close in spirit to the Communist Party as pathetic approved “opposition” figures in the Soviet Bloc in the 1950s and 60s.⁸⁹ When Cam Hobhouse first used the term “His Majesty’s Loyal Opposition” in 1826, another MP, George Tierney said that it was an apposite phrase because “we [the Opposition] are, certainly, to all

⁸⁸ Anastaplo, “Loyal Opposition in a Modern Democracy,” p. 1020.

⁸⁹ Cite?

intents and purposes, a branch of his Majesty's government."⁹⁰ Nevil Johnson describes the Loyal Opposition in Britain as "a state agency."⁹¹ So, is cooption a problem?

It has occasionally been said in British political circles, that the Loyal Opposition has a duty to support the government. They are loyal to the Queen, said Samuel Warren in 1857, and that means supporting her authority wielded by her government, at least "as long as I believe they are doing it wisely and justly, and for the benefit of the country."⁹² Lord Bruce said something similar in the Upper House: "[I]t is our duty ... to give such constructive help as we can to the newly-formed Government in the carrying out of policies for which they have received the decisive support of the electorate as a whole."⁹³

The duty to support the government has often been thought to be particularly important in matters of foreign policy. For example, it is often said that the Opposition should not criticize the treaties that the government has entered into.⁹⁴ (Correlative to this is a duty on the part of the government to consult with Opposition leaders.)⁹⁵ Also, although the Leader of the Opposition is entitled to meet with foreign heads of state and heads of government when they make official visits to the UK, it was long thought inappropriate for him to maintain separate lines of communication with foreign powers.⁹⁶ But there are now serious limits on this doctrine. Potter notes that in 1937 a Conservative M.P. put down a motion of censure against the Leader of the Opposition for speeches he

90 *The London Standard*, December 20, 1897. See note 51 above

91 Johnson, "Opposition in the British Political System," p. 488:

92 *Source? All I have is a date*: February 27, 1857.

93 Hansard: Address in Reply— May 16, 1979

94 Bagehot, *The English Constitution*, p. 25. Bagehot describes the ways in which government and opposition sometimes work together to suppress such criticism by radical members.

95 Jennings, *Cabinet Government*, p. 465: "Sometimes, indeed, [the Opposition] agrees not to oppose. This is particularly true of foreign affairs. For the enmity within is as nothing compared with the enmity without. The suggestion that the nation is divided gives encouragement to enemies abroad. From the outbreak of war in 1914 until the formation of the Coalition Government in 1915 the Opposition did not oppose in public but made representations in private. ... Agreement was especially necessary where secret promises were made which might have to be carried out by a subsequent Government, as with the promise to allot Constantinople to Russia."

had made during a visit to the Spanish Republican government. (The Conservative government's policy was—at best—indifference between the Republican government and Franco's "Nationalist" rebels.) Atlee responded with this personal statement in the House of Commons:

The Leader of the Opposition ... owes no allegiance to the Government. No action of his can in any way implicate the Government. He is responsible only to his constituents and to the Members from whom he derives his position.

Apparently that was the end of the matter.⁹⁷ And Potter infers from this that, even in this area of foreign relations, "Her Majesty's Opposition is not a 'licensed' opposition: the status of being the official opposition is not in the gift [or under the control] of the Government."⁹⁸

12. Loyal to what?

What then does "loyal" mean in the phrase "Loyal Opposition"? The relatively abstract idea that one can oppose but still be loyal is made more concrete when we ask and "loyal to what?" What is one not entitled to oppose if one's opposition is to be described as "loyal"?

(i) The Queen. In Britain, the opposition is described as "Her Majesty's Loyal Opposition." Is the monarch then the focus of loyalty?⁹⁹ It seems an attractive idea. Indeed it might be thought to be an advantage of having a (constitutional) monarchy that the monarch can serve the function of providing, in Jennings' phrase, a safe "focus for patriotism."

This is of particular importance in a democracy, for the Government for the time being, though supported by a section of

96 Cf. *The Works of Edmund Burke*, Loc. 26118-20: "The legitimate and sure mode of communication between this nation and foreign powers is rendered uncertain, precarious, and treacherous, by being divided into two channels,—one with the government, one with the head of a party in opposition to that government; by which means the foreign powers can never be assured of the real authority or validity of any public transaction whatsoever."

97 Whole passage quoted *ibid*, 14-15.

98 Potter, "Great Britain: Opposition with a Capital 'O'", p. 15.

99 Anastaplo, "Loyal Opposition in a Modern Democracy," p. 1013: "Their opposition is not to the Monarch, but rather to the Government (or its policies), a government that they are prepared to replace at any time with one of their own."

the people only, is the instrument of the whole. It is possible, therefore, for opposition to the Government to be attacked as opposition to the nation. The Government, too, does nothing to destroy the idea. It parades the national flag and uses every opportunity to take to itself the title of 'National.' The ordinary individual appears to be on the horns of a dilemma. Either he must support the Government, or he must oppose the nation. The monarchy provides a simple means of demonstrating that the dilemma does not exist. A person can be loyal to his King and yet oppose the Government.¹⁰⁰

Certainly the monarchy is one focus of the cooperation between government and opposition: the Prime Minister must by convention consult with the Leader of the Opposition on any matter concerning the monarchy or the royal family.¹⁰¹

But does this mean that in order to be accounted loyal the Opposition must be monarchist in its principles? That would be a problem, because even in Britain and elsewhere in the Commonwealth there are respectable politicians who want the monarchy to be done away with. But the matter can be finessed. In the UK, before a Member of Parliament can receive any of the public money allocated to support the activities of opposition parties, he must swear allegiance to the Crown: "I . . . swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth, her heirs and successors, according to law. So help me God."¹⁰² David Fontana reports that the House of Commons has found ways to fund Sinn Fein, the Irish nationalist group, as an opposition party despite the fact that its members refuse to take this oath.¹⁰³

100 Jennings, *Cabinet Government*, pp. 363-4. See also Potter, "Great Britain: Opposition with a Capital 'O'", p. 7: In the Victorian period, "it came to be accepted that neither Her Majesty's Government nor Her Majesty's Opposition was, in theory at least, any more or less the Queen's Friends than the other."

101 Jennings, *Cabinet Government*, p. 354.

102 Fontana, "Government in Opposition," p. 599, citing See Chris Sear, Parliament & Constitution Ctr, House of Commons Library, *The Parliamentary Oath*, (Research Paper 01/116, 2001), available at <http://www.parliament.uk/commons/lib/research/rp2001/rp01-116.pdf>

103 Fontana, "Government in Opposition," p. 600, citing Richard Kelly, *Short Money*, House of Commons Library, SN/PC/1663, at 12-14 (2009), available at <http://www.parliament.uk/commons/lib/research/briefings/snpc-01663.pdf>

(ii) The Constitution. In the United States, we might expect the focus of loyalty in “loyal” opposition to be adherence to the Constitution.¹⁰⁴ Article VI of the US Constitution requires state and federal legislators and all executive and judicial officers to “be bound by Oath or Affirmation” to support the Constitution.¹⁰⁵

But again we have to contemplate the possibility of opposition statesmen who oppose various provisions of the Constitution. The US Constitution hasn’t always been the object of unconditional worship as it is now. There were abolitionists in the antebellum period who regarded the Constitution as a “covenant with death” and “an agreement with Hell.”¹⁰⁶ Yet there might still be a distinction of loyalty between them and the insurgent John Brown who actually rose up forcibly against the government on this basis.

Less apocalyptically, we might also note (and deplore) the tendency of modern politicians to try to insert controversial party positions into the constitutional structure (of a state or the federal constitution), in an attempt to outflank or outfox one’s opponents—whether it is prohibitionists in the 18th Amendment in 1919, or conservatives who have contrived the insertion of bans on the legal recognition of same sex relationships in thirty state constitutions. The politics of this may be understandable, but of course the more we do things like this on controversial issues on which reasonable people in the polity disagree, the less the constitution can function as a focus of allegiance to define the supposed loyalty of the political opposition.

Rosenblum’s position seems more sensible. She is skeptical about a constitutional focus of loyalty, and about insisting that “parties operate within an agreed-on constitutional framework.”

104 For the UK, Potter, “Great Britain: Opposition with a Capital ‘O’”, p.16, says that the Opposition (and the Government too) must behave “so as not to call into question the structure of constitutional conventions and understandings regulating their relationship.

105 In the US Congress, “I, (name of Member), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”

106 Cites.

I see no reason to ... say that by definition parties operate within a settled constitutional framework or constitutional consensus and that interpreting and challenging constitutional bounds or the character of the regime is no business of parties. Often enough parties are organized over or against it, advocate and effect constitutional change, sometimes radical.¹⁰⁷

(iii) “Constitutional essentials.” Can we solve the problem by “slimming down” the constitutional focus of loyalty? Consider, for example, John Rawls’s notion of “constitutional essentials” in *Political Liberalism* and elsewhere. As I noted earlier,¹⁰⁸ Rawls is one of the free political philosophers who bothers talking about loyal opposition. And he says that “[t]he government and its loyal opposition agree on ... constitutional essentials. Their so agreeing makes the government legitimate in intention and the opposition loyal in its opposition.”¹⁰⁹ (On his account, constitutional essentials include “the fundamental principles that specify the general structure of government and the political process” as well as “basic rights and liberties ... that legislative majorities are to respect.”)¹¹⁰ He includes the principle of loyal opposition itself among these constitutional essentials.

This idea of constitutional essentials played a major role in Rawls’s work. It is the focus of his controversial doctrine of public reason—i.e. his insistence that arguments by officials and among citizens on constitutional essentials are to be conducted within the limits of reasoning that is intelligible to the whole public,¹¹¹ and that people are not to cite religious or other deep philosophical grounds for their views on these matters that might not make sense to others who come at them from a different perspective. He also holds the view is that “[p]ublic political discussion[s], when constitutional essentials and matters of basic justice

107 Rosenblum, *On the Side of the Angels*, Loc. 2355-59.

108 Cite back.

109 Rawls, *Justice as Fairness*, 49.

110 John Rawls, *Political Liberalism* (1996), p. 227-8: “[T]he essentials ... concern basic rights and liberties and can be specified in but one way, modulo relatively small variations. Liberty of conscience and freedom of association, and the political rights of freedom of speech, voting, and running for office are characterized in more or less the same manner in all free regimes.”

are at stake, are always, or nearly always, reasonably decidable on the basis of reasons,”¹¹² and he thinks it follows that this sets them apart from the normal hurly-burly of politics as being matters on which deliberative consensus is available and on which we should not expect very much change.¹¹³ And he thinks it follows too that we should not expect them to be changed very often, certainly not in way that reflects the temporary ascendancy of party.

I applaud Rawls for taking the principle of loyal opposition seriously, but I think he is wrong about all this. The fact (if it is a fact) that everyone can approach constitutional essentials in terms of public reasons that seem to compel a certain conclusion does not demonstrate that reasonable disagreement on these matters is impossible. This was the point I made at the beginning of the paper. There are many views on these matters, and each of dozens of contestant view puts itself forward as a cogent working through of public reasons, as though no other conclusion were possible. We mustn't let the style of philosophical presentation lure

111 Ibid., p. 214: “[T]he limits imposed by public reason do not apply to all political questions but only to those involving what we may call ‘constitutional essentials.’” See also *ibid.*, p. 224: “on matters of constitutional essentials and basic justice, the basic structure and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires.” I have criticized that doctrine elsewhere—Jeremy Waldron, “Public Reason and ‘Justification’ in the Courtroom,” *Journal of Law, Philosophy and Culture*, 1 (2007)—and I won't go into it here.

112 Rawls, *Political Liberalism*, xlix: “When citizens share a reasonable political conception of justice, they have a basis on which public discussion of fundamental political questions can proceed and be reasonably decided, not of course in all cases but we hope in most cases of constitutional essentials and matters of basic justice.” Also *ibid.*, 225: “the values specified by that conception can be suitably balanced or combined, or otherwise united, as the case may be, so that those values alone give a reasonable public answer to all, or to nearly all, questions involving the constitutional essentials and basic questions of justice.”

113 In other words, he seems to think that constitutional elements are not up for grabs. Once settled we should not expect them to be changed. Thus he says (*ibid.*, p. 232) that by means of “a democratically ratified constitution with a bill of rights, the citizen body fixes once and for all certain constitutional essentials, for example, the equal basic political rights and liberties, and freedom of speech and association, as well as those rights and liberties guaranteeing the security and independence of citizens, such as freedom of movement and choice of occupation, and the protections of the rule of law. This ensures that ordinary laws are enacted in a certain way by citizens as free and independent.” Or, in one of his more moderate formulations (*ibid.*, p. 228): “[I]t is vital that the structure of government be changed only as experience shows it to be required by political justice or the general good, and not as prompted by the political advantage of one party or group that may at the moment have the upper hand. Frequent controversy over the structure of government, when it is not required by political justice and when the changes proposed tend to favor some parties over others, raises the stakes of politics and may lead to distrust and turmoil that undermines constitutional government.”

us into insisting as focus of loyalty on doctrines that, whether we like it or not, are still subject to the reasonable disagreements with which we are familiar in real-life politics.

I know that many political philosophers and some constitutional theorists are attracted by the idea that not everything should be up for grabs in politics,¹¹⁴ and many are convinced that the things that should not be up for grabs are normally to be found in the Constitution. I come across this in defenses of judicial review.¹¹⁵ The Constitution is supposed to represent a consensus that transcends politics and that can therefore be designated the focus of social unity and political allegiance for the system as a whole.¹¹⁶ But those who take this view surely understand (at some level of consciousness) that in the real world, people disagree about many of these formulations: the burdens of judgment are such that we must expect such disagreement.¹¹⁷ Rawls said that he himself had objections to certain features of the US Constitution under which he lived,¹¹⁸ and presumably he would have had no difficulty voting for a party that swore to alter the Constitution in this regard.¹¹⁹ No doubt Rawls would say that the idea of a loyal opposition—loyal to the constitutional essentials of the society in which it operates—is a conception for a well-ordered society, and the United States as presently constituted is not well-ordered in his

114 For the logic of “up for grabs,” see Waldron, *Law and Disagreement*, pp. 302-12.

115 Mention also the similar temptation in discussions of immigration and Muslims-in-Europe etc. to specify norms that newcomers must agree to and be loyal to if they are to be accepted here.

116 For a philosopher’s view of constitutional consensus, see Kurt Baier, “Justice and the Aims of Political Philosophy,” *Ethics* (9 (1987)), 771.

117 Cite to burdens of judgment in PL & L&D. See text accompanying notes 3 and 4 above.

118 Rawls’s own objections in *Political Liberalism*, p. 407, to the constitution: “I would have ... objections deriving (in my case) from the two principles of justice to our present constitution and society’s basic structure as a system of social cooperation. To mention three: the present system woefully fails in public financing for political elections, leading to a grave imbalance in fair political liberties; it allows a widely disparate distribution of income and wealth that seriously undermines fair opportunities in education and employment, all of which undermine economic and social equality; and absent also are provisions for important constitutional essentials such as health care for many who are uninsured.”

119 Rawls also mentions the abolitionist example as an instance of “when a society is not well ordered and there is a profound division about constitutional essentials” (*ibid.*, p. 249).

view.¹²⁰ To that extent his work on this is mildly utopian. Fair enough. But we need a concept of loyal opposition for the imperfect real world here and now. This is especially so if we are imagining at as a principle whose acceptance will help build a democratic constitutional society in countries that have not hitherto enjoyed those advantages.

(iv) The rules of the game. Even more minimally can we say that a loyal opposition party must at the very least accept the basic ground rules of political game—the “fundamental tenets of the democratic system,”¹²¹ the rules that designate it as the legitimate loser in a democratic contest and the party it is opposing as the winner?¹²² Lord Campion suggested that it is important for the Loyal Opposition not to be “anxious to win at the expense of ruining the game.”¹²³ There is something to this, though again we are well advised not look for a doctrinal formulation, a sort of loyalty test that must be administered to any party before it can be admitted to this status. Many Democrats thought that the “rules of the game”—at least as administered by the Supreme Court in *Bush v. Gore*¹²⁴—were illegitimate; they didn’t rise up against the Bush administration, but many did not concede its legitimacy either. Do we want to say that they were not “loyal” in their opposition to the Bush regime? What about people – say, supporters of a radical change to proportional representation—who believe that the present electoral system is quite unjust? Are they to be excluded from being described as a loyal opposition if they propound this view and do what they can to undermine and replace the rules of the game that they are supposed to be playing?

120 Rawls draws mainly upon the American experience, though he has acknowledged elsewhere that, as things stand, the United States certainly cannot be regarded as a well-ordered society. See John Rawls, “Kantian Constructivism in Moral Theory,” in *Collected Papers* pp. 303, 355 (Samuel Freeman ed., 1999).

121 Who is this quote from?

122 Rosenblum, *On the Side of the Angels*, Loc. 2711-12: “As long as partisans accept regulated rivalry, do not aim at eliminating the opposition, and concede that political authority is partisan and contestable.”

123 As quoted in Potter, “Great Britain: Opposition with a Capital ‘O’.”

124 Cite.

We might say, well if an opposition party doesn't like the current system, the rules of the game as it is currently played, they must be prepared to work within the system to change the rules. That is what it takes to be "loyal" in a system like ours. So, for example, the US Constitution envisages that certain changes may take place and it ordains a process for that. Should we say that a party counts as loyal if, even though it criticizes some aspects of our constitutional system, it nevertheless is willing to work through Article V of the Constitution to amend it? Attractive; but even this will not do. Many people think Article V ordains a process which is outrageously difficult for a constitution most of whose terms were laid down hundreds of years ago in radically different circumstances. Bruce Ackerman has reminded us that many of the most important changes in our constitution have taken place through irregular means.¹²⁵ I don't mean this to be the basis of a thoroughgoing constitutional skepticism—just to indicate that once again it is mistake to think we can isolate certain norms or certain provisions as the focus of unequivocal loyalty.

(v) The nation. I am afraid that much the same has to be said about other less formal suggestions about what the opposition has to be loyal to. Maybe it is loyalty to the nation that is important. But opposition parties may be secessionist or anti-Unionist—as with Sinn Fein in Northern Ireland, or *Parti Québécois* in Canada. Or people might disagree with the particular basis on which their nation is constituted, and may be unable to take loyalty oaths that draw attention to that principle. Avigdor Lieberman's suggestion that loyalty oaths be administered to all Israel's citizens, including Arab citizens was rightly criticized on this ground. Wherever we look, we see to see difficulties with any doctrinal test for loyalty.

In all of this, maybe we should look less to what the opposition has to say, in order to be counted as loyal, and more to what a loyal opposition is supposed to *do*. In the British House of Lords, the Earl of Lauderdale put it this way: [W]e respect the Government even if we disagree with them; we obey them; we obey the laws; ... even though we form part of Her

¹²⁵ Cite to the *We the People* volumes.

Majesty's loyal Opposition”¹²⁶ A responsible opposition party doesn't try to seize the government benches when the majority members' backs are turned or counsel disobedience in the community. They are loyal to the ruling party (or to the system that designates a party as the ruling party) to that extent. But even here, we will run into antinomies having to do with “civil” modes of disobedience and resistance. Few of us, I think, will want to say that a party is disqualified from being designated a “loyal” opposition party simply because some of its members or even its leadership engage in disobedience of this sort.

Or think of the paradoxes that Otto Kirchheimer got into in trying to distinguish between loyal opposition parties and parties whose ideology or behavior “indicates the desire for a degree of goal displacement incompatible with the constitutional requirements of a given system.”¹²⁷ He called the latter an “opposition of principle”—which was a curiously respectful label, given that he wanted to associate it for example, with the Nazis and Communists in the Weimar period.¹²⁸ But he acknowledged the indeterminacy of the concept in less extreme cases, where you have in a given party, say the German Social Democrats, some oscillation between two tendencies: (1) treating elections as a temporary “ready-made battleground, where they might integrate and exploit their gains and then proceed [perhaps violently] to more far-reaching political action” and (2) a more patient state of mind where it is accepted that electoral politics is

126 Hansard: Earl of Lauderdale Lords — January 14, 1976.

127 Otto Kirchheimer, “Germany: The Vanishing Opposition,” in Dahl, *Political Opposition*, p. 237.

128 Fontana, “Government in Opposition,” discusses what he calls “the Weimar Problem.”: “In countries with political parties that do not believe in the fundamental tenets of the democratic system, government in opposition rules might empower those parties by giving them winners’ powers. ... [T]his is part of the structural explanation of how Adolf Hitler destroyed the constitution of Weimar Germany. Hitler's Nazi Party, when still a minority party (but a part of the majority coalition), used the powers granted to several ministries to eliminate opposition and eventually repeal the entire Weimar Constitution itself. We might worry less about these destabilizing parties and this “Weimar Problem” in stable democracies. ... In stable democracies, we can talk about the “loyal” opposition. ... Parties that might be seen as ideologically extreme are still sympathetic enough to the basic goals of democratic systems that they can be incorporated into governing coalitions. ... This, therefore, is more a concern about fragile democracies, and whether government in opposition rules undermine the core stability of these new democracies. If government in opposition rules do actually present the possibility of creating the “Weimar Problem,” there are institutional design responses. One common institutional design response ... is simply to prevent such political parties from operating in the first place. This so-called “militant democracy” approach—which is used in many countries and was discussed very recently by Samuel Issacharoff in his *Harvard Law Review* article on the subject—prevents political parties from operating if they do not believe in certain basic tenets of the democratic system.

the only field of action for the medium-term, even though in the long run the seizure of the state cannot be ruled out.¹²⁹ In both cases, we have a party whose engagement in the “game” of electoral politics seems strategic at best, a way of biding their time until they can launch themselves into more activist and determined opposition. But do we want to characterize all such tendencies as “disloyal” or to use the difference in time-scale to indicate some important distinction so far as the loyalty of an opposition party is concerned?¹³⁰ I don’t know what to say about all that.

Clearly there is some considerable difficulty pinning down the focus of loyalty in the principle of Loyal Opposition. Whatever work loyalty is doing in this regard, it has to do it in the context of plurality, the context of reasonable disagreement about virtually everything, which has been our starting point in this analysis. The circumstances of modern politics¹³¹ are such that different people are bound to have different accounts of what everyone needs to be loyal to. So that is inevitably going to be a basis of contestation; and we have to deal with it as such.

I think what I want to say is that it is probably a mistake to regard “loyal” in the concept of loyal opposition as denoting some sort of doctrinal or behavioral test that a party has to pass before it can be dignified with this appellation. It is probably a mistake to distract ourselves with the question of what is that goes into the test, what are the essential commitments that stand above party competition. Instead of saying that the word “loyal” in “Loyal Opposition” refers to a stipulated focus of allegiance, we should say that it indicates the way in which the opposition party must be regarded in a constitutional system. The word “loyal,” in my view, operates as a sort of admonition to the ruling party: their opponents are to be regarded for all purposes as loyal; their loyalty is not to be questioned; it is to be assumed. Their loyalty to *what* is not to be

129 Ibid., pp. 238-9.

130 There is a separate question about the particular requirements that may be imposed on parties (perhaps for good reasons) in a particular political system: a prohibition on sectarian appeals to religion in India, for example, or until recently a prohibition on overt Islamist parties in Turkey. These restrictions may or may not be justified, but it is probably a mistake to try to link them with the idea of loyal opposition—since of course they may be controversial within the political system in question, and we need to worry about attempts to suppress attempts to challenge or reform them. Refer to Issacharoff, “Fragile Democracies.”

131 Cite to Waldron, *Law and Disagreement*, pp. ___.

questioned, you may ask. I answer loosely: their loyalty to *anything* whose perceived absence might be cited as a ground for suppressing their criticism or disempower them from the oppositional role that I have been talking about. They are assumed to be loyal, not in the sense that there are certain things they may not criticize, but in the sense that none of their criticism is to be a reason for regarding them as a subversive. They are assumed to be loyal in the sense that the prospect of their becoming a government is constitutionally and politically thinkable and respected, no matter what the nature of their program. This principle is an open and inclusive one, and the benefit of its application is to be open to any party that has the capacity to fulfill the role ordained by the principle.¹³²

13. Conclusion

Loyal opposition has the appearance of a paradox¹³³—but if it is I hope I have shown that it is a productive paradox and one of the more interesting things that constitutions do, one of the more interesting roles and plays that the political game makes provision for.

According to Ludger Helms (a political scientist at the LSE, and author of an extremely interesting article entitled “Five Ways of Institutionalizing Political Opposition”): “It has long been acknowledged by democratic theory that the principle of legitimate political opposition belongs to the most fundamental components of any liberal democracy.”¹³⁴ I wish that were true; I wish that the people Helms calls democratic theorists would devote some time to the acknowledgment of and reflection upon this principle. Most of them—most self-described political theorists in the academy ignore the principle of loyal opposition (in the same way that, as Rosenblum reminds us, they ignore political parties). In fact, in my experience, too many political theorists ignore the

132 This approach is not entirely reckless about the political consequences of this sort of open-ness. On the contrary, I follow Satori in thinking that the conditions for responsible political competition are more likely to be fostered by this openness than by insistence on an *ex ante* loyalty test. Sartor writes in *Parties and Party System*, p. 192: “It should not be taken for granted . . . that twopartyism presupposes a set of favorable conditions—cultural homogeneity, consensus on fundamentals, and the like. If one reviews the development of the two party countries historically, it appears that twopartyism has largely nurtured and molded such favorable conditions.

133 Otto Kirchheimer: “Political opposition is an eternal paradox. It postulates the principle that impediments to political action may be whole-some and are therefore to be protected.” (pincite?)

134 Helms, “Five Ways of Institutionalizing Political Opposition,” 22.

principles of political institutions altogether.¹³⁵ they say it is not philosophical enough; leave it to the law professors, or the empirical political scientists, they say, or the comparativists; the theorists are too busy writing pamphlets on global justice But that's a story for another day. John Rawls was an exception: he described "the idea of loyal opposition" as "an essential idea of a constitutional regime."¹³⁶ Though in a moment I shall express some divergence from Rawls's view of the matter—his view of the focus of loyalty—I do appreciate the fact that he spoke about it at all.

When I came to Oxford earlier this year to take up the Chichele Chair in Social and Political Theory, I was alarmed to find that the people designated as political theorists—faculty and students—had virtually no interest in principles of this kind, normative principles relating to the actual mechanics of political systems. They had no interest at all in loyal opposition; they also had next to no interest in the separation of powers, bicameralism, civilian control of the military, the independence of the judiciary, and they had very little interest in the rule of law or anything to do with the basis of representation. It was only with great difficulty that they could be persuaded to distract themselves long enough from discussions of global justice, luck egalitarianism, or poems about republican virtue, and the 57 different varieties of Rawlsianism to interest themselves in democracy. Their inclination was to say that these principles raised issues that were insufficiently philosophical and could in any case be handled by empirical political scientists or comparativists, more suited than the theorists to these menial tasks.

I think there are all sorts of things wrong with this asserted division of labor within the study of politics. I think theorists, comparativists, and empirical political scientists in the best departments in North America are now working together on issues of political organization and constitutional design. Nancy Rosenblum's book on parties is resounding evidence of that; so is a similar coming together of theory, law, and empirical understandings of politics and constitutionalism in our law schools: I think of the work of my colleagues at NYU Law School Choudhry, Ferejohn, Hills, Levinson, Issacharoff, Pildes, and others. Of

135 I mean principles like: the rule of law; separation of powers; civilian control of the military; bicameralism; representation of all substantial interests; the separation of church and state; the independence of the civil service; independence of the judiciary.

136 John Rawls, *Justice as Fairness: A Briefer Restatement*, 49

course there is an important place for more philosophical reflection on political issues, including—I readily concede—philosophical reflection on the matters like justice, rights, and equality which represent the content of the work done within the housing that constitutions provide.

But there is theoretical work to be done on the housing as well, on the structures that accommodate our politics. I have tried in this lecture to give some indication of this in these reflections on the idea of loyalty in politics, in the idea of opposition, and in the way in which various principles operate in our system—principles like political competition, Aristotlean turn-taking, the toleration of dissent, the importance of parties, the separation of powers, the principle of checks and balances—to recognize and dignify opposition with an empowered role of criticism and the positing of an alternative within an orderly democratic system.

At its best officially empowered opposition involves what George Kateb called a “radical chastening” of political authority.¹³⁷ It is not *just* about free speech or the toleration of dissent, though those are important. A theory of human rights or constitutional rights is not all we need to understand this principle. We have to look to the way in which political opposition is empowered and dignified in a democratic system, and the way in which doing that pays tribute to and teaches lessons about what Rosenblum calls “the provisional nature of political authority” in circumstances of plurality. As I said at the beginning,¹³⁸ politics exist because not one person, but people inhabit the world—people in all their diversity with all their disagreements. Even if the objective truth about justice or the common good is singular, still here on earth there are many of us with many views, and ways must be found to accommodate us all in a political system.

137 Cited by Rosenblum, *On the Side of the Angels*, Loc. 6966

138 Quoting Arendt.