

RICHARD ALBERT\*

## The Fusion of Presidentialism and Parliamentarism

*No question of constitutional design is more intensely debated than whether emerging democracies should adopt presidential or parliamentary systems. This is an important debate but it misses a critical point about constitutional design—namely that the structural differences between presidentialism and parliamentarism conceal much more than they reveal. In this Article, I demonstrate precisely how conventional accounts of the structural differences between presidentialism and parliamentarism actually obscure their functional similarities.*

### I. INTRODUCTION

Parliamentarism and presidentialism are commonly, and correctly, set in opposition as distinguishable systems of governance that exhibit distinguishable structural features.<sup>1</sup> Yet the structural differences between them do not necessarily give rise to functional differences. Quite the contrary, the very structural features that allow us to distinguish between presidentialism and parliamentarism often conceal their functional similarities.

These similarities between presidentialism and parliamentarism are at once the result of purposeful design, political practice and unintended consequences. They highlight a fascinating dimension of constitutional design that conventional theories of presidentialism and parliamentarism have yet to fully explore: that parliamentary systems may sometimes function as presidential ones while presidential systems may sometimes function as

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\* Assistant Professor, Boston College Law School; Yale University (J.D., B.A.); Oxford University (B.C.L.); Harvard University (LL.M.). For helpful comments on earlier drafts, I am grateful to Bruce Ackerman, Farrah Ahmad, Katherine Cornett, Asha Kaushal, Daryl Levinson, Juan Linz, Jason Marisam, Adam Perry, Vinay Sitapati, Alison Young, and the editorial team of the *American Journal of Comparative Law*. I am also grateful to *La Fondation Baxter & Alma Ricard* for its generous support of this project.

1. See, e.g., Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1454 (2007); Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361, 389 n.88 (2007); Jorge A. Schiavon, *The Central-Local Division of Power in the Americas and Renewed Mexican Federalism: Old Institutions, New Political Realities*, 4 INT'L J. CONST. L. 392, 392 (2006); Alice Poole, *Convergent American and British Anti-Terror Paradigm; Dissonant Policy Implementation*, 11 GEO. PUB. POL'Y REV. 99, 101 (2005-06); Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2693 (2003).

parliamentary ones. These similarities also suggest a larger point about modern constitutional design, namely that political culture can often overcome the strictures of constitutional structure.

Political actors in presidential and parliamentary systems have successfully imported foreign constitutional mechanisms from their counterparts—mechanisms once thought to be incompatible with the constitutional structure of the importing state. This constitutional cross-pollination has fused elements of parliamentarism and presidentialism into a unified constitutional structure, creating a template for a new hybrid form of presidential parliamentarism and of parliamentary presidentialism. In breaking free from their traditional constitutional boundaries, modern forms of parliamentarism and presidentialism offer new insights into the continuing debate on whether political culture shapes constitutional structure or constitutional structure constrains political culture.<sup>2</sup>

My modest task in this Article is to begin to theorize this fusion. I will demonstrate that conventional constitutional theory oversimplifies the differences between presidentialism and parliamentarism, and that it reflects little more than dated caricatures of presidential and parliamentary systems. I will start, in Part II, by challenging the conventional wisdom that parliamentarism fuses powers and presidentialism separates them. In Part III, I will show how parliamentary systems often adhere to the fixed electoral terms characteristic of presidentialism, just as presidential systems are sometimes vulnerable to the forced or variable elections that are more closely associated with parliamentarism. Part IV will critique the idea that parliamentary systems are efficient and that presidential ones are inefficient. In Part V, I will conclude with a few additional observations.

## II. THE SEPARATION OF POWERS

According to constitutional scholars, the separation of powers serves the important purpose of thwarting the rise of tyranny.<sup>3</sup> The theory of the separation of governmental powers insists that each branch of government must not exceed its pre-determined institutional boundaries and must respect the jurisdiction of other branches.<sup>4</sup> Drawing on the insights of Montesquieu—who

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2. See, e.g., Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1775-76 (2004); Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 ANNALS 173, 178 (2001); Roger B. Myerson, *Economic Analysis of Constitutions: The Strategic Constitution*, 67 U. CHI. L. REV. 925, 928-29 (2000).

3. See, e.g., Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1114 (2003); Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1421-22 (1998); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1534 (1991); Larry Kramer, *The Constitution as Architecture: A Charette*, 65 IND. L.J. 283, 286 (1990).

4. David Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure*, 59 S. CAL. L. REV. 449, 479 (1986).

suggested assigning legislative, executive and judicial powers to different institutional agents<sup>5</sup>—states have designed their governing charters consistent with this theory. For instance, the United States<sup>6</sup> and France<sup>7</sup> both separated government powers in their respective constitutions, both among the first written constitutions in the history of the world.<sup>8</sup> Since then, the separation of powers has become viewed as a fundamental feature of democracy,<sup>9</sup> some scholars even regarding it as a *necessary* feature.<sup>10</sup>

Presidentialism and the separation of powers are sometimes used synonymously, as though one entailed the other.<sup>11</sup> The conventional narrative holds that presidential regimes separate governmental powers<sup>12</sup> and disperse public power across autonomous branches of government, typically the executive, legislature, and the judiciary.<sup>13</sup> In contrast, parliamentary systems, according to the conventional wisdom, do not separate powers in the same fashion.<sup>14</sup> One scholar even declares that parliamentarism and the separation of

5. CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Book 11, Ch. 6, 157 (Anne M. Cohler et al. eds., 1989).

6. Note that there is no separation of powers clause in the United States Constitution. It is instead inferred from the structure of the Constitution. DONALD E. LIVELY, *CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES* 369 (2d ed. 2000).

7. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN (1789) ("Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de Constitution.")

8. A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. RICH. L. REV. 9, 30 (2007).

9. See, e.g., Manuel Medina-Ortega, Comment, *A Constitution for an Enlarged Europe*, 32 GA. J. INT'L & COMP. L. 393, 400 (2004); Charles McDaniel, *Islam and the Global Society: A Religious Approach to Modernity*, 2003 B.Y.U.L. REV. 507, 540 (2003); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 927 n.135 (1999).

10. See, e.g., Emanuel Gross, *The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WIS. INT'L L.J. 597, 655 (2004); Lt. Col. Susan S. Gibson, *International Economic Sanctions: The Importance of Government Structures*, 13 EMORY INT'L L. REV. 161, 213 (1999); Sammy Smooha, *The Implications of the Transition to Peace for Israeli Society*, 555 ANNALS 26, 33-34 (1998).

11. See, e.g., Fred W. Riggs, *Globalization, Ethnic Diversity, and Nationalism: The Challenge for Democracies*, 581 ANNALS 35, 42 (2002).

12. See, e.g., Steven G. Calabresi, *Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 54-55 (2001); Heinz Klug, *Model and Anti-Model: The United States Constitution and the Rise of World Constitutionalism*, 2000 WIS. L. REV. 597, 603 (2000); Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 476 (1998); Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L. J. 71, 99 (1997).

13. Some nation-states possess more than three branches of government. See, e.g., CONSTITUTION OF INDIA (1950) (establishing four branches); CONSTITUTION OF COSTA RICA (1949) (creating five branches).

14. See, e.g., CALVIN R. MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 333 (2d ed. 2005); WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 76 (1873); Russell A. Miller, Book Review, *Recent Books on International Law*, 100 A.J.I.L. 980, 985 (2006); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 A.J.I.L. 489, 521 (2001); Erin Daly, *Idealists, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia*, 21 B.C. INT'L & COMP. L. REV. 261, 266-67 (1998).

powers are incompatible, arguing that parliamentary systems cannot separate their governmental powers.<sup>15</sup> But these conventional accounts of presidentialism and parliamentarism fail to appreciate that presidential systems may sometimes fuse—and parliamentary systems may separate—their governmental powers.

A. *Separating Powers in Parliamentary Systems*

I begin with the proposition that there is more than one type of parliamentary system. I will examine two different forms—Westminster parliamentarism and constrained parliamentarism—to show how they actually separate governmental powers *within* their respective regimes of fused governmental powers.

1. Westminster Parliamentarism

The first model is the Westminster parliamentary system, which operates in the United Kingdom. Similar to presidential systems, it is organized into the three traditional branches of government. And like presidential systems, Westminster parliamentarism also separates governmental powers. But it does so in a way that differs from the customary understanding of separated powers. Rather than separating powers among the legislative, executive and judicial branches of government, the Westminster system separates powers between two organs of the state: the Crown, which subsumes the judiciary, and the Parliament.<sup>16</sup>

Burke was an early advocate of applying separation theory in the United Kingdom.<sup>17</sup> The separation of powers between the Crown and Parliament emerged as part of the Revolution Settlement,<sup>18</sup> statutorily enshrined in the Act of Settlement of 1700 that established the primacy of parliamentary democracy.<sup>19</sup> This division was intended to empower Parliament to hold the Crown accountable.<sup>20</sup> Blackstone echoed this Crown-Parliament separation in his treatise on the laws of England, observing that any power exercised by the

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15. Luan-Vu N. Tran, *The Canadian Charter of Rights and Freedoms: Justification, Methods, and Limits of a Multicultural Interpretation*, 28 COLUM. HUMAN RIGHTS L. REV. 33, 46 n.32 (1996).

16. David Jenkins, *Both Ends Against the Middle: European Integration, Devolution, and the Sites of Sovereignty in the United Kingdom*, 16 TEMP. INT'L & COMP. L.J. 1, 3 (2002).

17. Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 411 (2007).

18. Philip A. Joseph, *Scorecard on our Public Jurisprudence*, 3 NEW ZEALAND J. PUB. & INT'L L. 223, 249 (2005); Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 89 (2004).

19. Rett R. Ludwikowski, *Politicization and Judicialization of the U.S. Chief Executive's Political and Criminal Responsibility: A Threat to Constitutional Integrity or a Natural Result of the Constitution's Flexibility?*, 50 AM. J. COMP. L. 405, 407 (2002).

20. Susanna Frederick Fischer, *Playing Poohsticks with the British Constitution? The Blair Government's Proposal to Abolish the Lord Chancellor*, 24 PENN. ST. INT'L L. REV. 257, 285 (2005).

Crown or in its name must first be sanctioned by Parliament.<sup>21</sup>

The leading modern work on English constitutional law, Tomkins' *Public Law*,<sup>22</sup> describes this Crown-Parliament separation using three examples: (1) Acts of Parliament, (2) ministerial responsibility to Parliament, and (3) the authority of courts.<sup>23</sup> First, parliamentary acts become law by virtue of the agreement of the Queen, the House of Commons and the House of Lords, the Queen representing the Crown and the Parliament comprising both Houses. This is a crucial tripartite covenant because it captures the legal moment of concurrence between the two sovereign bodies in Westminster parliamentarism: the Crown and the Parliament.<sup>24</sup> A bill cannot become an Act of Parliament without the consent of both the Crown and the Parliament. Each therefore holds veto power.

Second, Cabinet ministers represent the Crown insofar as they advise the Crown, swear an oath of allegiance to it, and exercise powers on behalf of and in the name of the Crown.<sup>25</sup> By requiring ministers to be members of Parliament and to appear regularly in Parliament to answer for the decisions and actions of the Crown, Parliament is able to perform its supervisory function over the Crown, thus ensuring that the Crown neither arrogates powers to itself contrary to the public will nor performs its functions without oversight.<sup>26</sup>

The final illustration of the Crown-Parliament separation relates to the judiciary. Tomkins argues that courts, and the judges that staff them, derive their authority from the Crown, and are therefore agents of the Crown.<sup>27</sup> The Crown-Parliament separation of powers is sustained by the theory of parliamentary sovereignty, which authorizes Parliament to override judicial decisions.<sup>28</sup> This confers upon Parliament the capacity to check the powers that the Crown exercises through its courts. These three examples show that a regime can separate governmental powers even as it departs from the traditional model of legislative-executive-judicial separation. They furthermore undermine the commonly held notion that parliamentarism does not separate powers.

## 2. Constrained Parliamentarism

The second model is *constrained parliamentarism*, a term coined by Bruce Ackerman to refer to systems that add the following wrinkles to

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21. Christopher A. Chrisman, *Article III Goes to War: A Case for a Separate Federal Circuit for Enemy Combatant Habeas Cases*, 21 J.L. & POL. 31, 37 (2005).

22. ADAM TOMKINS, *PUBLIC LAW* (2003).

23. *Id.* at 47-54.

24. *Id.* at 48.

25. *Id.* at 48-49.

26. *Id.* at 50-51.

27. *Id.* at 53.

28. JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 232-35 (1999).

Westminster parliamentarism: (1) a written constitution and a bill of rights, (2) a supreme or constitutional court endowed with the power to invalidate duly passed acts of the legislature, (3) a bicameral legislature that does not hold conclusive authority, (4) an upper house of the legislature that is not as powerful as the lower house, and (5) independent agencies, for example an independent electoral commission or an auditory body.<sup>29</sup> As I will show with respect to the Indian Constitution, constrained parliamentary systems separate governmental powers between Parliament and the judiciary. They also deploy independent agencies to help the legislature monitor the executive Cabinet, as is the case in Canada and South Africa.

#### i. Separating Judicial and Parliamentary Powers

India is a parliamentary state that fuses its legislative and executive powers yet separates its judicial and parliamentary powers. The Indian Supreme Court has often repeated the claim that the separation of powers is necessary for judicial independence.<sup>30</sup> To its credit, the Court has also acknowledged that the separation of powers protects the legislative sphere from undue judicial intrusion.<sup>31</sup> Nonetheless, the Court has asserted itself against the Parliament and has been very firm in guarding its jurisdiction, boldly declaring that a parliamentary law overriding a judicial decision be a clear violation of the separation of powers.<sup>32</sup>

One case is particularly instructive. In *Union of India*, the Court was asked whether the executive could, consistent with the Indian Constitution, exercise the power to review or revise a decision of a quasi-judicial court.<sup>33</sup> The background is important: the Cinematograph Act had established a tribunal assigned the task of assessing the effect of movies on the public, for instance whether certain movies were likely to provoke or incite responses that might endanger public safety and welfare.<sup>34</sup> The Act provided for an appeal to an

29. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 635-36, 718-20 (2000).

30. See, e.g., People's Union of Civil Liberties (PUCL) & Anor v. Union of India & Anor, [2003] 2 LRI 13, Supreme Court of India (Civil Original Jurisdiction), at para. 9; Gauhati High Court & Anor v. Kuladhar Phukan & Anor, [2002] 2 LRI 253, C.A. No. 2337, Supreme Court of India (Civil Appellate Jurisdiction), at para. 14; State of Bihar & Anor v. Bal Mukund Sah & ORS, [2000] 2 LRI 471, C.A. Nos. 9072 (1996) and 2083 (2000), Supreme Court of India (Civil Appellate Jurisdiction), at para. 57; Registrar (Admn), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy (Deceased) By Lrs & Anor and Other Appeals, [2000] 1 LRI 1145, C.A. Nos. 4751-4753, Supreme Court of India (Civil Appellate Jurisdiction), at para. 1.

31. See, e.g., Chairman & MD, BPL Ltd. V. SP Gururaja & ORS, [2003] 4 LRI 338, C.A. Nos. 2166-67, Supreme Court of India (Civil Appellate Jurisdiction), at para. 32; Guruvayur Devaswom Managing Committee & Anor v. CK Rajan & ORS, [2003] 3 LRI 713, C.A. Nos. 2148-51, Supreme Court of India (Civil Appellate Jurisdiction), at para. 74.

32. See *Indira Sawhney v. Union of India & ORS*, [2000] 1 LRI 390, Supreme Court of India (Civil Appellate Jurisdiction), at para. 25.

33. *Union of India v. KM Shankarappa*, [2001] 4 LRI 903, C.A. No. 3106, Supreme Court of India (Civil Appellate Jurisdiction).

34. *Id.* at para. 6.

appellate tribunal, but it also authorized the executive to issue an order to the appellate tribunal instructing it how to resolve a matter pending before it.<sup>35</sup> The Act was challenged on separation of powers grounds.<sup>36</sup>

The Court invoked judicial independence and the separation of powers to declare the Act unconstitutional: “Once a quasi-judicial body like the appellate tribunal . . . gives its decision that decision would be final and binding so far as the executive and the government is concerned.”<sup>37</sup> The Court added that, “[t]o permit the executive to review and/or revise that decision would amount to interference with the exercise of judicial functions by a quasi-judicial board. It would amount to subjecting the decision of a quasi-judicial body to the scrutiny of the executive.”<sup>38</sup> Important principles are at stake, reasoned the Court, stating that “[t]he executive has to obey judicial orders.”<sup>39</sup> This is a useful illustration of the separation of judicial and parliamentary powers in constrained parliamentary systems.

#### ii. Policing the Border Separating the Executive and Legislature

In addition to separating governmental powers between the judiciary and Parliament, constrained parliamentarism also mitigates the potential hazard posed by merging the legislative and executive branches in Parliament. Constrained parliamentarism endows independent agencies with significant powers to help the legislative branch scrutinize the action and inaction of the executive Cabinet.<sup>40</sup> Agency independence is entrenched in some significant way, either constitutionally or statutorily, which allows independent agencies to discharge their delegated duties without intrusion from the executive.<sup>41</sup> This legislative-executive separation represents the second dimension along which constrained parliamentarism separates powers.

For instance, the Indian Constitution creates an independent Election Commission that is responsible for the conduct of elections.<sup>42</sup> Iraq has also adopted this strategy, creating an independent High Commission for Human Rights, an Electoral Commission, and a Commission for Public Integrity,<sup>43</sup> each of which answers to the legislative Council of Representatives, not to the

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35. *Id.* at paras. 4-5.

36. *Id.* at paras. 2-3.

37. *Id.* at paras. 7.

38. *Id.*

39. *Id.*

40. House of Commons standing committees have also historically played an important role in this respect. *See, e.g.*, Rod B. Byers, *Perceptions of Parliamentary Surveillance of the Executive: The Case of Canadian Defence Policy*, 5 CANADIAN J. OF POL. SCI. 234 (1972).

41. Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953, 978 (2007).

42. Constitution of India, art. 324.

43. Constitution of Iraq, arts. 99-105; Mohamed Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution*, 30 FORDHAM INT'L L.J. 126, 135-36 (2006).

executive Council of Ministers.<sup>44</sup> These institutions are vehicles through which the Parliament may hold the executive accountable and, with particular respect to independent electoral commissions, they provide the legislature with an important tool to ensure the fairness of parliamentary elections. This is especially important in parliamentary systems—regimes where the executive often enjoys the privilege of choosing the date for national elections.

For a clearer illustration of the function of these independent agencies, let us focus on two jurisdictions in somewhat greater detail, beginning with South Africa. The South African Constitution establishes six independent agencies: (1) the Public Protector; (2) the Human Rights Commission; (3) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities; (4) the Commission for Gender Equality; (5) the Auditor-General; and (6) the Electoral Commission.<sup>45</sup> Each of these is expressly designated independent from the executive and directly accountable to the entire Parliament—and not to the head of government nor to the Cabinet.<sup>46</sup>

The South African Constitution requires the state, including both the executive and the legislature, to protect the independence, dignity and effectiveness of these institutions,<sup>47</sup> as well as to refrain from interfering in any way with their operation.<sup>48</sup> Two of these independent agencies merit particular notice. First, the South African Public Protector has the duty to investigate alleged or suspected improprieties in any government sector, and subsequently to report and take remedial action, on its findings.<sup>49</sup> Second, the Auditor-General has a similarly broad mandate: to audit and report on the financial administration of the state, including both national and provincial governmental institutions.<sup>50</sup> Both of these independent agencies have been useful to the legislature in monitoring the conduct of the executive.<sup>51</sup>

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44. Constitution of Iraq, art. 99.

45. Constitution of South Africa, art. 181(1).

46. Constitution of South Africa, art. 181(5).

47. Constitution of South Africa, art. 181(3).

48. Constitution of South Africa, art. 181(4).

49. Constitution of South Africa, art. 182(1).

50. Constitution of South Africa, art. 188(1).

51. See, e.g., Public Protector RSA, Press Release, *Public Protector to Investigate the Deputy Minister of Home Affairs*, Sept. 13, 2007, available at [http://www.publicprotector.org/news/media\\_releases/2007/13092007.htm](http://www.publicprotector.org/news/media_releases/2007/13092007.htm) (announcing investigation into allegations of improper conduct by executive official) (last visited Aug. 1, 2008); Public Protector RSA, Press Release, *Public Protector Finds that the Minister of Minerals and Energy, Ms. Mlambo-Ngcuka, was not Involved in the Awarding of a Contract by PetroSA to a Company in which her Brother-In-Law, Mr. V. Ngcuka, has an Interest*, June 23, 2004, available at [http://www.publicprotector.org/news/media\\_releases/23062004.htm](http://www.publicprotector.org/news/media_releases/23062004.htm) (reporting that investigation found no wrongdoing of improper conduct) (last visited Aug. 1, 2008); Auditor-General, Press Release, *Auditor-General's Performance Audit Highlights Shortcomings in the Import Inspection Services at the Department of Agriculture*, May 31, 2007, available at [http://www.agsa.co.za/Press%20releases/Current/docs/2007/may/DoA\(FormatedFinal\).doc](http://www.agsa.co.za/Press%20releases/Current/docs/2007/may/DoA(FormatedFinal).doc) (last visited Aug. 1, 2008); Auditor-General, Press Release, *Auditor-General Investigation Highlights*

Canada, too, has a number of these independent agencies, whose chief officials are designated as Officers of Parliament.<sup>52</sup> As parliamentary officers, they derive their authority from a parliamentary statute (not from an executive appointment), receive their commissions or appointments from the Parliament (not from the Cabinet), and they report to one or both houses of Parliament (neither to the Prime Minister nor to the Cabinet).<sup>53</sup> There are eight independent Officers of Parliament: (1) the Auditor-General, (2) the Chief Electoral Officer, (3) the Official Languages Commissioner, (4) the Privacy Commissioner, (5) the Access to Information Commissioner, (6) the Conflict of Interest and Ethics Commissioner, (7) the Commissioner of Lobbying, and (8) the Public Sector Integrity Commissioner.<sup>54</sup>

Consider first the Auditor-General. The appointment comes from the Cabinet but statute mandates that the Cabinet consult with the leader of every political party in the Parliament and that both houses of Parliament confirm the nomination.<sup>55</sup> The Auditor-General's duties include facilitating executive accountability to the Parliament by reporting on such matters as whether executive departments have: (1) faithfully accounted for public funds,<sup>56</sup> (2) properly maintained public records,<sup>57</sup> (3) expended public funds in an appropriate fashion,<sup>58</sup> and among others (4) made expenditures without due regard to environmental sustainability.<sup>59</sup> The Auditor-General occupies a central role in the Canadian public consciousness and is viewed as one of the most trustworthy individuals in political life.<sup>60</sup> These thorough investigations into the administration of the state have often equipped the legislature with sufficiently probative evidence to demand inquiries into allegations of executive wrongdoing.<sup>61</sup>

Consider next the position of Chief Electoral Officer in Canada. The House of Commons appoints the Officer to administer the electoral apparatus at the national level. The Officer remains in office until the age of sixty-five,<sup>62</sup>

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*Misappropriation of Funds Totalling Over R8,7 Million at the National Development Agency*, Jan. 17, 2007, available at <http://www.agsa.co.za/Press%20releases/Current/docs/2007/January/NDARelease.doc> (last visited Aug. 1, 2008).

52. Parliament of Canada, Officers and Officials of Parliament, Nov. 15, 2007, available at <http://www2.parl.gc.ca/Parlinfo/compilations/OfficersAndOfficials/OfficersOfParliament.aspx?Language=E> (last visited Aug. 1, 2008).

53. *Id.*

54. *Id.*

55. AUDITOR GENERAL ACT, R.S., 1985, c. A-17, §3(1).

56. *Id.* at 7(2)(a).

57. *Id.* at 7(2)(b).

58. *Id.* at 7(2)(c).

59. *Id.* at 7(2)(f).

60. See, e.g., Steven Chase, *Straight-Talking Fraser Strikes Fear on the Hill*, GLOBE AND MAIL (Toronto, Canada), Feb. 12, 2004, at A4.

61. See, e.g., Thomas S. Axworthy, *The Responsibility Crisis in Canada*, 28 CANADIAN PARLIAMENTARY REVIEW 7 (2005), available at 2005 WLNR 11638664.

62. Canada Elections Act, c. 9, §13(1) (2000).

subject to removal for cause by Parliament.<sup>63</sup> By statute, the Chief Electoral Officer reports not to the Prime Minister nor to the Cabinet, but rather to the Speaker of the House of Commons on such matters as general elections,<sup>64</sup> special elections,<sup>65</sup> election staff,<sup>66</sup> and campaign finance.<sup>67</sup> This is a critical electoral institutional design, and perhaps a necessary one for a constrained parliamentary system like Canada, where the party in power has the ability strategically to engineer its own defeat and therefore to set election dates when most politically expedient.

These and other independent agencies are recent additions to the constitutional and political toolkit of parliamentary democracies in search of innovative ways to confer authority upon the legislative branch. Despite the control that the doctrine of responsible government permits the executive to exercise over the legislature, constrained parliamentarism partners the legislature with independent agencies in order to neutralize and perhaps even counter the overwhelming influence that the executive might otherwise exert over the legislative branch.

### B. *Fusing Powers in Presidential Systems*

Just as parliamentarism refutes the conventional wisdom by separating powers, presidentialism likewise rebuts that same wisdom by fusing powers. Perhaps the best illustration of the fusion of powers in presidential systems is the United States. I will focus on two manifestations of this fusion: (1) the presidential veto power, and (2) the impeachment power. I begin by briefly introducing the American founding theory of the separation of powers.

#### 1. The Founding Theory of Separation

As Neustadt has argued, the Constitutional Convention of 1787 did not create a government of strictly separated powers; it created a government of separate institutions that share powers.<sup>68</sup> The separation of powers was not meant to be enforced exactly. <sup>69</sup> It was instead understood to permit a certain measure of overlap among the branches.<sup>70</sup> This pragmatic approach reflects how government functions in practice<sup>71</sup> because it is not feasible to demand and

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63. *Id.* at §13(2)

64. *Id.* at §534(1).

65. *Id.* at §534(2).

66. *Id.* at §535.2.

67. *Id.* at §536.1.

68. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER* 33 (1960).

69. Brown, *supra* note 3, at 1531-32; William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 994-95 (2001).

70. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1808-10 (1996).

71. Robert J. Pushaw, Jr., *Justiciability and the Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 427-28 (1996); Allan Ides, Essay, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 427-28 (1993).

police a strict separation of powers.<sup>72</sup> The Supreme Court of the United States has itself recognized that the Constitution does not require such a strict separation.<sup>73</sup>

The Framers of the American Constitution set out to intermingle powers among branches.<sup>74</sup> Looking to the state constitutions of the day—which routinely fused governmental powers—the Framers deemed it acceptable to depart from an unforgiving and rigid construction of the separation of powers.<sup>75</sup> There would be no strict division of governmental labors.<sup>76</sup> In this spirit, the branches were given intersecting powers, exemplified by the national legislative and executive branches both being granted a role in the legislative process.<sup>77</sup> The Framers freely acknowledged that this was a deviation from the principle of separated powers.<sup>78</sup> It followed from the theory of the “partial intermixture” of powers that the Framers preferred over strict separation.<sup>79</sup> The intended effect was to create a political culture in which, in Madison’s famous phrase, ambition “would counteract ambition.”<sup>80</sup> Nonetheless, the Framers were cognizant of the dangers of commingling powers in such a way that would defeat the very purpose of their separation in the first place: to prevent the concentration of power.<sup>81</sup>

In this way, American separation theory permits shared powers and even contemplates shifting powers.<sup>82</sup> Still, American separation theory protects the autonomy of the legislature, executive and judiciary.<sup>83</sup> Indeed, ensuring the independence of each was one of the main preoccupations of the Framers.<sup>84</sup> Although, wrote Hamilton, each branch should be endowed with the power to

72. Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C.L. REV. 1037, 1050 (1999); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 590 n.122 (1991).

73. See *Buckley v. Valeo*, 424 U.S. 1, 121 (1976); see also *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (describing as “archaic” the view that the separation of powers requires “three airtight departments of government”).

74. Lloyd N. Cutler, *The American Constitutional Tradition of Shared and Separated Powers: Now is the Time for All Good Men . . .*, 30 WM & MARY L. REV. 387, 387-88 (1989).

75. THE FEDERALIST No. 47, at 264 (James Madison).

76. SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776-2002*, at 37 (2003).

77. Stephen H. Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 691-92 (1995).

78. THE FEDERALIST No. 51, at 280 (James Madison).

79. THE FEDERALIST NO. 66, at 354 (Alexander Hamilton).

80. THE FEDERALIST No. 51, at 322 (James Madison).

81. THE FEDERALIST No. 47, at 261-62 (James Madison).

82. Matthew M. Curley, Note, *Untying a Judicial Knot: Examining the Constitutional Infirmities of Extrajudicial Service and Executive Review in U.S. Extradition Procedure*, 49 VAND. L. REV. 1239, 1272-73 (1996).

83. THE FEDERALIST No. 47, at 263 (James Madison).

84. See, e.g., THE FEDERALIST No. 71, at 383 (Alexander Hamilton); THE FEDERALIST No. 51, at 321-22 (James Madison); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 362 (1999).

rein in other branches,<sup>85</sup> each branch should nonetheless have the capacity to discharge its delegated functions without undue intrusion from the others.<sup>86</sup> The three branches were therefore intended to operate independently of each other, but not entirely without connection.<sup>87</sup>

## 2. Presidential Legislative Power

One example of shared powers in American constitutional government is discernible in the legislative sphere. The United States Congress exercises constitutionally created legislative authority.<sup>88</sup> But the President—in whom the Constitution vests executive authority<sup>89</sup>—also exercises some measure of legislative authority when he deploys the presidential veto.<sup>90</sup> This is a departure from school civics courses, which generally teach that the President executes the laws that the legislature passes.<sup>91</sup> The presidential veto demonstrates the contrary, namely that the President occupies a central role in the legislative process.

This presidential veto power is enshrined in the constitutional text. Note that it is not mentioned in Article II, which lists executive powers, but rather in Article I, which concerns legislative powers.<sup>92</sup> The relevant text provides that a bill must be presented to the President before it becomes law. If the President does not approve of the bill—which by then has proceeded through the congressional legislative process and received the approval of both houses of Congress—he may return the bill to the Congress, which then resumes its deliberations, keeping in mind the objections raised by the President.

It is evident why the presidential veto appears in Article I: although it is a power exercised by an executive official, the presidential veto is a legislative function.<sup>93</sup> It is a useful illustration of how the American presidential system does not in fact separate all governmental powers. In availing himself of the presidential veto and transmitting his objections to a particular bill to Congress, the President participates in the lawmaking process.<sup>94</sup> This exchange between

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85. THE FEDERALIST No. 66, at 354 (Alexander Hamilton).

86. THE FEDERALIST No. 48, at 268 (James Madison).

87. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 197 (1833).

88. Constitution of the United States, art. 1, § 1 (vesting legislative power in the United States Congress).

89. Constitution of the United States, art. 2, § 1, cl. 1 (vesting executive power in the President of the United States).

90. Paul R. Verkuil, Lecture, *A Proposal to Resolve Interbranch Disputes on the Practice Field*, 40 CATH. U. L. REV. 839, 839 (1991). The White House Office of Legislative Affairs assists the President in his legislative role. See KENNETH E. COLLIER, BETWEEN THE BRANCHES: THE WHITE HOUSE OFFICE OF LEGISLATIVE AFFAIRS (1997).

91. HAROLD J. KRENT, PRESIDENTIAL POWERS 17 (2005).

92. Constitution of the United States, art. I, § 7, cl. 2 (capitals in original).

93. DAVID K. NICHOLS, THE MYTH OF THE MODERN PRESIDENCY 59 (1994).

94. Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1615 (2005); Nick Bravin, Note, *Is Morrison v.*

Congress and the President creates a dialogic dynamic in which the two branches collaborate in shepherding a bill through the legislative stages. At the very least, the presidential veto makes the President a partner to Congress in the task of making law.<sup>95</sup> It has even been said that the veto power may make the President the “legislator in chief.”<sup>96</sup>

There is an important distinction between two kinds of vetoes: constitution-based and policy-based presidential vetoes. Exercising the former, the President performs the constitutionally delegated function to faithfully execute the law and to defend the Constitution by blocking a bill on grounds of unconstitutionality or violation of constitutional rights or powers. In the latter, the President wields the veto for no particular *constitutional* reason but rather because he disapproves of the bill on legislative or policy grounds.

This is a material distinction that Broughton has elaborated fluently and persuasively.<sup>97</sup> It is significant because, as Peabody has demonstrated, modern Presidents have used the presidential veto more as an instrument to pursue legislative preferences than to defend their vision of American constitutionalism<sup>98</sup>—the latter being precisely what the President pledges to do when he takes the oath of office on inauguration day.<sup>99</sup> Modern Presidents therefore deploy their veto power to make political statements about policy,<sup>100</sup> rather than to articulate a broader declaration about constitutionality, as was the case under the earliest Presidents.<sup>101</sup> The practical result is that the President now looms very large in the legislative domain, despite being the constitutional embodiment of executive authority. The theoretically interesting result is that, conceptually, the presidential veto transforms the bicameral legislature into a tricameral one, with the President in effect constituting his own legislative branch, albeit one whose legislative powers are purely negative and do not authorize enacting positive law.<sup>102</sup>

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Olson *Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1109 (1998).

95. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENTARY 307, 346 (2006).

96. See FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 348 (1994); Vasani Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM & MARY L. REV. 1, 3 (2002).

97. J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 93-94 (2005).

98. Bruce G. Peabody, *Congress, the Court, and the “Service Constitution”: Article III Jurisdiction Controls as a Case Study of the Separation of Powers*, 2006 MICH. ST. L. REV. 269, 324 (2006).

99. Constitution of the United States, art. 2, § 1, cl. 8.

100. CONGRESSIONAL QUARTERLY INC., *POWERS OF THE PRESIDENCY* 87 (2d ed. 1997); TERRY EASTLAND, *ENERGY IN THE EXECUTIVE* 70-71 (1992).

101. ERWIN C. HARGROVE & MICHAEL NELSON, *PRESIDENTS, POLITICS, AND POLICY* 46 (1984).

102. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 52 (15th ed. 2002); Larry Alexander & Lawrence B. Solum, Book Review, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1611 (2005).

### 3. Congressional Judicial Power

A second example of the fusion of powers in American presidentialism is the congressional impeachment power. The United States Constitution gives the House of Representatives the power to impeach<sup>103</sup> and, to the Senate, the power to convict individuals impeached by the House.<sup>104</sup> The President and other officers are subject to impeachment for “treason, bribery, or other high crimes and misdemeanors.”<sup>105</sup>

There are at least two reasons why these impeachment clauses run counter to the conventional wisdom that presidential systems separate powers. The first is that impeachment subjects the executive to the will of the legislature and in so doing denies the very independence that the separation of powers is intended to extend to each branch.<sup>106</sup> The second is that the impeachment power confers judicial powers upon the legislative branch.

If the purpose of separating powers is to ensure that each branch can exercise its functions independently of, and without intrusion from, the other branches, then the impeachment power appears to put this in peril. Some of the founders adopted this view, contending that the threat of impeachment served only to render the executive subservient to the legislative branch.<sup>107</sup> On this theory, the congressional prerogative to render a permissive interpretation of “high crimes and misdemeanors” undermines the independence of the President and other executive members because it gives expansive authority to control executive action to the impeaching House and the convicting Senate.<sup>108</sup>

But perhaps the more powerful argument that American presidentialism fails actually to separate powers is that the impeachment process grants judicial powers to the legislative branch. Specifically, the power to try and the authority to convict an officer that the House of Representatives has impeached is a judicial power exercised by the Senate. To many constitutional scholars, this is an unmistakable instance of a constitutionally enshrined fusion of powers.<sup>109</sup>

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103. Constitution of the United States, art. I, § 2, cl. 5.

104. Constitution of the United States, art. I, § 3, cl. 6.

105. Constitution of the United States, art. II, § 4.

106. See, e.g., Jonathan Turley, *Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 745 (1999).

107. Laurier W. Beaupre, Note, *Birth of a Third Immunity? President Bill Clinton Secures Temporary Immunity from Trial*, 36 B.C. L. REV. 725, 748 (1995).

108. See, e.g., Stephen M. Griffin, *Scholars and Public Debates: A Reply to Devins and Farnsworth*, 82 B.U.L. REV. 227, 234 (2002); James Randolph Peck, Note, *Restoring the Balance of Power: Impeachment and the Twenty-Second Amendment*, 8 WM. & MARY BILL OF RIGHTS J. 759, 784 (2000); Jonathan Turley, *Reflections on Murder, Misdemeanors, and Madison*, 28 HOFSTRA L. REV. 439, 459 (1999); see also *Nixon v. United States*, 506 U.S. 224, 243 (1993) (“As [the Framers] clearly recognized, the branch of the Federal Government which is possessed of the authority to try impeachments, by having final say over the membership of each branch, holds a potentially unanswerable power over the others.”) (White, J., concurring).

109. See, e.g., Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C.L. REV. 1165, 1187 (2002);

Other scholars have argued the contrary: that the impeachment power is not a judicial function but instead a legislative one.<sup>110</sup> As a consequence, the latter do not regard impeachment as a fusion of governmental powers.

Yet on either view, impeachment cannot escape the charge that it fuses powers, and in either case, one of two of the following statements must be true: either (1) impeachment is a judicial function, in which case the legislature exercises judicial powers in derogation from the conventional wisdom that presidential systems separate powers; or (2) impeachment is a legislative function, in which case the judiciary may be seen to participate in legislative powers because the Constitution instructs the Chief Justice of the United States to preside over impeachment when the President is on trial.<sup>111</sup>

#### 4. The Fusion of Personnel

The previous example of the Chief Justice presiding over presidential impeachment hints at an additional aspect to the American theory of the separation of powers: separating powers also entails separating personnel.<sup>112</sup> The separation of personnel is a constitutional mandate that, at its core, prevents one member of the state apparatus from simultaneously holding legislative and executive office.<sup>113</sup> As Calabresi and Larson have demonstrated, separation of powers theory and practice demands not only a separation of institutions but just as importantly a separation of personnel, which means that one individual cannot discharge functions assigned to more than one branch of government.<sup>114</sup>

But American presidentialism runs afoul of this proscription on possibly as many as three counts.<sup>115</sup> First, the impeachment process may create a fusion

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Jeremy Waldron, *Eisgruber's House of Lords*, 37 U.S.F. L. REV. 89, 97 (2002); James C. Ho, *Misunderstood Precedent: Andrew Jackson and the Real Case Against Censure*, 24 HARV. J.L. & PUB. POL'Y 283, 292 (2000); Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1643 (2000); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132 (2000); Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 409-10 (2000); Paul R. Verkuil, *The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 309-10 (1989); Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1134 n.97 (1985).

110. See, e.g., Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 145 (1999).

111. Constitution of the United States, art. I, § 3, cl. 6.

112. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341 (2002).

113. Constitution of the United States, art. I, § 6, cl. 2.

114. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1048, 1052 (1994).

115. Just as presidentialism does not strictly observe the conventional wisdom that it must separate personnel, parliamentary systems likewise contradict their corresponding conventional wisdom. Traditional parliamentary theory holds that parliamentarism adheres to a fusion of personnel, specifically that members of the executive Cabinet must sit concurrently in the legislature as elected officials. See, e.g., John D. Richard, *Federalism in Canada*, 44 DUQ. L. REV.

of judicial and legislative personnel. Specifically, if one adopts the view that impeachment is a legislative function and not a judicial one, then the Chief Justice breaches this constitutional rule of the separation of personnel when presiding over the impeachment of the President.

Second, possible infringement on the separation of personnel becomes apparent in the context of presidential succession, which arguably fuses legislative and executive personnel. The United States Constitution authorizes the Congress to establish the rules governing succession to the presidency in the event of vacancy,<sup>116</sup> which Congress has indeed done in a statute.<sup>117</sup> This succession statute designates the Speaker of the House of Representatives as acting President if the Vice President is unable or unavailable to succeed to the presidency, and also provided the Speaker resigns from the Congress.<sup>118</sup> Where the Speaker is unable or unavailable to succeed to the presidency, the next in line is the President pro tempore of the Senate.<sup>119</sup> Some have argued that this succession statute fuses personnel because it discards the distinction between executive and legislative officers.<sup>120</sup> The consequence of this fusion would be a violation of the separation of powers and a very close approximation of the merging of powers that is characteristic of parliamentary systems.<sup>121</sup>

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5, 7 (2005); Jamie Cameron, *Federalism, Treaties and International Human Rights Under the Canadian Constitution*, 48 WAYNE L. REV. 1, 36 (2002); Ronald L. Watts, *States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941, 953 (2000). Elected legislators are therefore thought to constitute the finite pool from which the prime minister selects the individuals who will comprise the Cabinet. See, e.g., Angela L. Beasley, Note, *The Ethics in Government Act: The Creation of a Quasi-Parliamentary System*, 5 WIDENER L. SYMP. J. 275, 288 (2000). But this is not always the case because parliamentarism often separates its personnel—the very converse of conventional belief. For instance, the Canadian parliamentary system permits a prime minister to appoint an unelected individual to the Cabinet, as was the case when the sitting prime minister in 1995 tapped an academic to join the federal Cabinet. See E. Kaye Fulton & Mary Janigan, *French Power: Newcomers to Battle the Sovereignists*, MACLEAN'S, Feb. 5, 1996, at 17. The conventional wisdom is mistaken on a related point: that the head of a parliamentary government must also be a member of the legislature. See Michael Skold, Note, *The Reform Act's Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom*, 39 CONN. L. REV. 2149, 2155 (2007). Turning once again to Canadian parliamentarism, it is evident that parliamentary systems do not require the head of government to resign the prime ministership if he loses his seat in the House of Commons. See Emilia Casella, *Coops: Leader by Default?*, SPECTATOR (Hamilton, Ontario), Oct. 23, 1998, at A8.

116. Constitution of the United States, art. II, § 1, cl. 5.

117. See 3 U.S.C. § 19.

118. 3 U.S.C. § 19(a)(1).

119. 3 U.S.C. § 19(b).

120. See, e.g., Sarah Helene Duggin & Mary Beth Collins, 'Natural Born' in the USA: *The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U.L. REV. 53, 88 n.190 (2005); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 156 (1995). But see John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141, 153 (1995) (arguing that Congress should be given the benefit of the doubt in constructing the ambiguous language of the Succession Clause).

121. Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 121 (1995).

The third—and perhaps most compelling—instance of the fusion of personnel in the American presidential system is embodied in the Vice Presidency. On one account, the Vice President could be “a walking violation of the separation of powers doctrine”<sup>122</sup> because the Constitution appoints him—despite being second in the executive hierarchy—to serve as President of the Senate, which of course constitutes part of the legislative branch.<sup>123</sup> This particular fusion of personnel has a fateful consequence because, as Senate President, the Vice President is constitutionally duty-bound to open certificates and count electoral votes in a presidential election.<sup>124</sup> Though it may be odd to imagine, it is nonetheless contemplated by this American constitutional design that a sitting Vice President would tabulate the votes for himself as a presidential candidate and the competition in a presidential race.<sup>125</sup> This has of course happened several times in American history.<sup>126</sup> These three cases of fused personnel in the United States help rebut the established view that presidential systems strictly separate their personnel.

### III. ELECTORAL DESIGN

Scholars have also focused on elections as a way to distinguish presidentialism from parliamentarism. The first prominent electoral difference between them, it is generally thought, involves the timing of elections. Presidential systems are said to adhere to fixed electoral cycles for the legislative and executive branches.<sup>127</sup> Even if a majority of the legislature opposes the President, presidential systems give no recourse to that legislative majority apart from impeachment to remove the President.<sup>128</sup> This rigidity<sup>129</sup> of

122. Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1722 (1988).

123. Constitution of the United States, art. I, § 3, cl. 4.

124. Constitution of the United States, art. II, § 1, cl. 3.

125. James C. Ho, *Running for the White House from the Hill*, 7 GREEN BAG 2D 205, 205 (2004); Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237, 253-54 (2001); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 100 YALE L.J. 1407, 1421 n.55 (2001).

126. See, e.g., Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551, 552 (2004); Christopher Lee, *As Gore Presides, Bush Wins*, DALLAS MORNING NEWS, Jan. 7, 2001, at A1.

127. See, e.g., Manuel Jose Garcia-Mansilla, *Separation of Powers Crisis: The Case of Argentina*, 32 GA. J. INT'L & COMP. L. 307, 359 (2004); Steven L. Winter, *When Self-Governance is a Game*, 67 BROOKLYN L. REV. 1171, 1183-84 (2002); Gabriel L. Negretto & Jose Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797, 1804 n.20 (2000); William C. Banks & Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1, 5 (1993); Juan J. Linz, *The Perils of Presidentialism*, in PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT 118, 120 (Arend Lijphart ed., 1992).

128. See, e.g., José Antonio Cheibub et al., *Government Coalitions and Legislative Success Under Presidentialism and Parliamentarism*, 34 BRITISH J. POL. SCI. 565, 567 (2004).

129. JUAN LINZ & ARTURO VALENZUELA, *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 6 (1994).

presidentialism has drawn piercing criticism because fixed terms in presidential systems are thought to be undemocratic<sup>130</sup> insofar as they compel citizens to remain—for the balance of a given fixed term—under the rule of a leader who may have lost the legitimacy needed to govern effectively.<sup>131</sup> In contrast, parliamentary systems are thought to confer upon the head of government the discretionary power to call an election at the time of his choosing,<sup>132</sup> subject to an intervening vote of no confidence in the legislature.<sup>133</sup> According to conventional thought, fixed terms and parliamentarism are mutually incompatible.<sup>134</sup>

The second conventional electoral difference between parliamentarism and presidentialism has to do with impeachment. Presidential systems are thought to provide only one option—impeachment but not a vote of no confidence<sup>135</sup>—to remove a President before the end of a fixed term. Yet impeachment is a daunting proposition given the difficulty of mustering the requisite majorities or supermajorities to impeach and convict a sitting President—even where he loses the confidence of the legislature, the party, the people, or all three.<sup>136</sup> In contrast, it is often believed that parliamentary systems do not have recourse to impeachment but only to a vote of no confidence to replace a weakened head of government.<sup>137</sup> This makes it relatively easier to replace a head of government who has lost the confidence of the legislature, has become a political liability for the party, or has alienated the people.

This assumption is wide of the mark once again. Not only may parliamentarism operate on a calendar of fixed electoral terms but

130. See, e.g., Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 869-70 (2007).

131. See, e.g., Maxwell O. Chibundu, *Political Ideology as a Religion: The Idolatry of Democracy*, 6 R.R.G.C. 117, 138 n.51 (2006); Ludwikowski, *supra* note 19, at 410; Sanford Levinson, *Transitions*, 108 YALE L.J. 2215, 2233 (1999).

132. See, e.g., Seth Barrett Tillman, Reply, *Defending the (Not So) Indefensible*, 16 CORNELL J.L. & PUB. POL'Y 363, 379 n.56 (2007); Bruce E. Cain, *The Internet in the (Dis)Service of Democracy?*, 34 LOY. L.A. L. REV. 1005, 1010 (2001); John O. McGinnis & Michael B. Rappaport, Essay, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 438 n.171 (2003).

133. See, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. 1451, 1473 n.54 (1997).

134. See, e.g., PATRICK MALCOLMSON & RICHARD MYERS, *THE CANADIAN REGIME* 61 (3d ed. 2005); Arend Lijphart, *Reforming the House: Three Moderately Radical Proposals*, 31 POL. SCI. & POLITICS 10, 12 (1998); Robert A. Goldwin, Comment, *Original Intent and the Constitution*, 47 MD. L. REV. 189, 190 (1987).

135. See, e.g., Jody C. Baumgartner, *Introduction: Comparative Presidential Impeachment*, in *CHECKING EXECUTIVE POWER: PRESIDENTIAL IMPEACHMENT IN COMPARATIVE PERSPECTIVE* 1, 3 (Jody C. Baumgartner & Naoko Kada eds., 2003).

136. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 752-53 (2002).

137. See, e.g., Frank O. Bowman, III & Stephen L. Sepinuck, "High Crimes and Misdemeanors": *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1533-34 (1999).

presidentialism may likewise incorporate the theory of non-confidence votes into its own electoral design. Furthermore, the use of impeachment as a tool to dismiss the head of government or state is not reserved exclusively for presidentialism because parliamentarism also deploys this procedure to sanction heads of government or state. This is a significant point because it undermines the traditional distinctions between presidential and parliamentary systems.

A. *Fixed Terms in Parliamentary Systems*

Parliamentary systems are not confined to open-ended terms during which parliamentarians are uncertain about when they will have to stand a future election. Quite the contrary, parliamentarism is a much more flexible regime than conventional thought would have us believe. I will introduce and illustrate some of the innovative parliamentary designs that have married parliamentarism with fixed electoral terms and show that parliamentary states have borrowed an additional presidential device: impeachment. But let us first consider how parliamentary theory can tolerate these presidential imports.

1. Parliamentary Practice

The keystone of parliamentarism is responsible government. This means that the government, which consists of the prime minister and members of the executive Cabinet, is responsible to the elected House of Commons and must consequently retain its confidence.<sup>138</sup> Responsible government authorizes the Parliament to dismiss the government of the day.<sup>139</sup> In practice, this rule subjects the government to periodic votes of approval in the House of Commons.<sup>140</sup> The theory of responsible government therefore demands that the Parliament possess the power to express its lack of confidence in the government.

When a government fails to retain the confidence of the House of Commons on a parliamentary vote, one of two things must follow: either (1) the Cabinet member whose ministry has lost the confidence of the House of Commons must resign, or (2) the government must request the dissolution of the House of Commons and call for new elections.<sup>141</sup> The mechanism through which the Parliament may withdraw its confidence from the government is

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138. SIR WILLIAM IVOR JENNINGS, *CABINET GOVERNMENT* 13-17 (3d ed. 1959).

139. COLIN TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION* 447 (5th ed. 2002) (citing DOROTHY PICKLES, *DEMOCRACY* 148 (1970)).

140. *Id.*

141. Jason L. Pierce, *A Sketch of Australian Constitutional History*, 10 *GREEN BAG* 2D 327, 338 (2007); L. Kinvin Wroth, *Notes for a Comparative Study of the Origins of Federalism in the United States and Canada*, 15 *ARIZ. J. INT'L & COMP. L.* 93, 113 (1998); Susanna Frederick Fischer, *Rethinking Sullivan: New Approaches in Australia, New Zealand, and England*, 34 *GEO. WASH. INT'L L. REV.* 101, 128 (2002); James A. Thomson, *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law*, 30 *J. MARSHALL L. REV.* 627, 656-57 (1997).

called a vote of no confidence.<sup>142</sup>

Notwithstanding the discretionary decision of the parliamentary head of government to request the dissolution of the Parliament,<sup>143</sup> a vote of no confidence is usually thought to be the only mechanism by which to trigger an election in parliamentary systems before the end of the regular legislative term.<sup>144</sup> Such a vote demonstrates that the head of government no longer commands a majority in the legislature.<sup>145</sup> This forces new elections that reconstitute both the executive and the legislature.<sup>146</sup> Absent a no confidence vote, by convention the head of parliamentary government (for instance in the United Kingdom) has five years from the date of election, at a time of his choosing, to request that the head of state issue writs of election.<sup>147</sup> This gives parliamentarism its distinguishing characteristic of flexibility that fixed-term presidential regimes do not enjoy.<sup>148</sup>

Given the apparent stringency of the constitutive rules of responsible government, one can understand why some scholars believe that fixed terms and parliamentarism are irreconcilable. But fixed terms and parliamentarism are in fact compatible. Parliamentary systems can fold, and have folded, within themselves fixed electoral terms that operate just as they do in presidential systems while also respecting the principle of responsible government and preserving the distinctive flexibility of their electoral calendar.

Parliamentary systems may successfully straddle this boundary simply by adopting a law that mandates a fixed electoral term for parliamentarians but that still leaves in the hands of the lower house the power to withhold its confidence from the government of the day. For instance, a parliamentary democracy could pass a law requiring the government to hold elections every four years while making this fixed term contingent upon the government retaining the confidence of the House of Commons by not succumbing to a vote of no confidence during that four-year term.

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142. John D. Huber & Nolan McCarty, *Cabinet Decision Rules and Political Uncertainty in Parliamentary Bargaining*, 95 AM. POL. SCI. REV. 345, 346 (2001). There also exists such a thing as a vote of confidence in parliamentary systems. See Andrew Heard, *Just What is a Vote of Confidence? The Curious Case of May 10, 2005*, 20 CANADIAN J. OF POL. SCI. 395 (2007).

143. RICHARD ROSE, PRESIDENTS AND PRIME MINISTERS 8 (Richard Rose & Ezra A. Suleiman eds., 1980).

144. See, e.g., Kenneth Anderson, Review Essay, *Goodbye to All That? A Requiem for Neoconservatism*, 22 AM. U. INT'L L. REV. 277, 311 (2007).

145. Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, 65 LAW & CONTEMP. PROBS. 7, 37 (2002).

146. Cindy Skach, *The "Newest" Separation of Powers: Semipresidentialism*, 5 INT'L J. CONST. L. 93, 95-96 (2007). It is a daunting proposition for a legislator to withhold confidence from the government because a successful non-confidence vote typically triggers a new election, which puts into peril the prime objective: to retain membership in the legislature. Ann Seidman & Robert B. Seidman, *Beyond Contested Elections: The Processes of Bill Creation and the Fulfillment of Democracy's Promises to the Third World*, 34 HARV. J. ON LEGIS. 1, 21 (1997).

147. ROBERT BLACKBURN, THE ELECTORAL SYSTEM IN BRITAIN 18 (1995).

148. Juan J. Linz, *Democracy's Time Constraints*, 19 INT'L POL. SCI. REV. 19, 23-24 (1998).

In the event that a government loses a vote of confidence in the House of Commons before the expiration of the four-year term, the prime minister would be expected to request the dissolution of Parliament in order to face the electorate at the polls. As a consequence of departing from the fixed electoral calendar, the forced election would reset the calendar such that future elections would be rescheduled according to a new four-year cycle traced back to the date of the election that had been held as a result of the vote of no confidence. This is precisely what some parliamentary systems have chosen to do.

## 2. Parliamentary Innovation

For instance, Romania adheres to fixed four-year terms but also contemplates the possibility of a forced election during the pendency of that term as a result of a vote of no confidence.<sup>149</sup> Sweden holds parliamentary elections for its national assembly every four years yet also provides for extraordinary elections in the event of a no confidence vote.<sup>150</sup> Finland<sup>151</sup> and the Republic of Estonia<sup>152</sup> both follow the Swedish model in this regard. In Spain, elections are constitutionally required to be held every four years, similarly subject to an intervening vote of no confidence.<sup>153</sup> But Spain adds a twist to its parliamentary rules by requiring that at least one year must pass before a subsequent election may be held.<sup>154</sup> Those are only five examples of parliamentary systems that have adopted fixed electoral terms. Two other instructive examples are Germany and Canada.

The head of the German government, the Chancellor, must be selected by a majority of the Bundestag.<sup>155</sup> German members of the Bundestag—the lower house of Parliament—serve fixed four-year terms.<sup>156</sup> This electoral schedule is subject to disruption by a special measure called a *constructive* vote of no confidence, which requires the Bundestag to identify and express its support by a majority vote for a specific person to replace the Chancellor.<sup>157</sup> If the

149. Constitution of Romania, art. 63(1); Constitution of Romania, art. 110(2).

150. Constitution of Sweden, Ch. 3, art. 3; Constitution of Sweden, Ch. 3, art. 4; Constitution of Sweden, Ch. 6, art. 5.

151. Constitution of Sweden, Ch. 3, § 24(1); Constitution of Sweden, Ch. 5, § 64(2); Constitution of Sweden, Ch. 3, § 26(1).

152. Constitution of the Republic of Estonia, Ch. IV, § 60; Constitution of the Republic of Estonia, Ch. VI, § 97. Significantly, the Republic of Estonia requires at least a three-month period between votes of no confidence on the same subject matter. *See* Constitution of the Republic of Estonia, Ch. VI, § 97. Estonia also contemplates the possibility of a forced election in two specific circumstances: (1) where a proposed referendum fails, and (2) where the government fails to secure parliamentary approval of its budget within a specified period. *See* Constitution of the Republic of Estonia, Ch. VII, § 105; Constitution of the Republic of Estonia, Ch. VIII, § 119.

153. Constitution of Spain, Part III, Ch. 1, § 68(4); Constitution of Spain, Part IV, § 101(1); Constitution of Spain, Part V, § 115(1).

154. Constitution of Spain, Pt. IV, § 115(3).

155. Constitution of Germany, Pt. VI, art. 63(2).

156. Constitution of Germany, Pt. III, art. 39(1); Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L. REV. 477, 480 (2000).

157. Constitution of Germany, Pt. VI, art. 67(1).

constructive vote of no confidence fails to achieve the support of a majority, the enfeebled Chancellor may request the dissolution of the Bundestag, and along with it a new round of elections prior to the end of the four-year term.<sup>158</sup>

As Kommers explains, accelerated elections in Germany are possible only if a number of discrete events unfold in a particular sequence: (1) the Chancellor must request, in a motion of confidence, that the Bundestag express its confidence in his leadership; (2) a majority of the Bundestag must vote against the Chancellor; (3) the defeated Chancellor must then request the dissolution of the Bundestag; and (4) new elections must be held within sixty days.<sup>159</sup> This German innovation has been adopted in other jurisdictions,<sup>160</sup> including Hungary,<sup>161</sup> Lithuania,<sup>162</sup> and Poland.<sup>163</sup> The constructive vote of no confidence stands in contrast to what Lindseth describes as the *destructive* vote of no confidence that is typical of most parliamentary systems.<sup>164</sup>

Another interesting example of a parliamentary system that has adopted fixed electoral terms is Canada. In May 2007, Canada joined other modern parliamentary states that abide by pre-determined election dates. In a series of amendments to the *Canada Elections Act*, the Parliament passed a law establishing a four-year term for the House of Commons.<sup>165</sup> The new law nonetheless preserves the power of the prime minister to request dissolution of the Parliament prior to the expiration of this four-year period.<sup>166</sup>

This new law provoked intense reaction in Canada when the government of the day proposed it.<sup>167</sup> Some of the concern was perhaps driven by the

158. Constitution of Germany, Pt. VI, art. 68(1).

159. Donald P. Kommers, *The Federal Constitutional Court: Guardian of German Democracy*, 603 ANNALS 111, 113 (2006).

160. Inga Markovits, *Exporting Law Reform—But Will it Travel?*, 37 CORNELL INT'L L.J. 95, 98 (2004); Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 462-63 (1991).

161. Jon Elster, Essay, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 380 (1995).

162. Kathryn A. Perales, *It Works Fine in Europe, So Why Not Here? Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885, 887 (1999).

163. Eli M. Salzberger & Stefan Voigt, *Economic Analysis of Constitutional Law: On Constitutional Processes and the Delegation of Power, with Special Emphasis on Israel and Central and Eastern Europe*, 3 THEORETICAL INQ. L. 207, 224 (2002); Hanna Suchocka, *Checks and Balances Under the New Constitution of Poland*, ST. LOUIS-WARSAW TRANS'L L.J. 45, 58-59 (1998).

164. Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1390-91 (2004).

165. An Act to Amend the Canada Elections Act, S.C. 2007, c. 10, § 56.1(2).

166. *Id.* at § 56.1(1).

167. See, e.g., Editorial, *Fixed Election Dates Make a Lot of Sense*, GLOBE AND MAIL (Toronto, Canada), May 31, 2006, at A18 (supporting the move to fixed terms); Murray Martin, Letter to the Editor, *Don't Put the Fix In*, GLOBE AND MAIL (Toronto, Canada), May 31, 2006, at A18 (arguing that fixed terms do not address concerns with the Canadian regime); Jeffrey Simpson, *Mr. Harper is Right: Let's Go for Fixed Terms*, GLOBE AND MAIL (Toronto, Canada), May 20, 2006, at A17 (favoring fixed terms); Reginald Stackhouse, *To Make a Minority Govern*, GLOBE AND MAIL (Toronto, Canada), May 19, 2005, at A19 (arguing in favor of fixed terms).

constitutional requirement in the founding Canadian charter that elections be held within five years of the previous election, consistent with British parliamentary tradition.<sup>168</sup> Nonetheless, as Canada and other parliamentary democracies have demonstrated, parliamentarism may fully respect the principle of responsible government while concurrently following a schedule of fixed election dates.

In addition to the Canadian federal government, the Canadian province of British Columbia—also a parliamentary system—has adopted a fixed election cycle.<sup>169</sup> The provinces of Ontario<sup>170</sup> and Newfoundland and Labrador<sup>171</sup> now operate under a fixed electoral calendar. Note also that the Canadian province of Quebec once proposed a number of constitutional reforms, including fixed election dates, that would have seen Quebec nonetheless retain its parliamentary model of government.<sup>172</sup>

This parliamentary electoral approach appears to have gathered supporters across the community of parliamentary states. For example, the recently elected Australian prime minister has expressed his support for a four-year electoral calendar,<sup>173</sup> and fixed terms are becoming increasingly appealing to political actors and observers in the United Kingdom as well.<sup>174</sup> These examples point to the limitations of the conventional narrative that fixed terms are incompatible with parliamentary systems.

### 3. Parliamentary Impeachment

Beyond fixed terms, parliamentary systems have imported another device from presidential systems: impeachment. This defies the usual definition of parliamentarism because parliamentary systems are thought to rely *only* on a vote of no confidence to replace or sanction the head of government. According to this traditional view, parliamentarism has no use for an impeachment process. Parliament may simply withhold its confidence from the head of

168. Constitution of Canada (Constitution Act, 1867), § 50; Constitution of Canada (Constitution Act, 1982), § 4(1).

169. Constitution (Fixed Election Dates) Amendment Act, 2001, S.B.C. 2001, c. 36.

170. Election Act, R.S.O. 1990, c. E.6, § 9(2).

171. House of Assembly Act, R.S.N.L. 1990, c. H-10, Pt. I, § 3.

172. Guy Tremblay, *La réforme des institutions démocratiques au Québec: commentaires en marge du rapport du Comité directeur*, 44 CAHIERS DE DROIT 207, 215-16 (2003).

173. *Rudd Would Seek Four-Year Fixed Terms*, LIVE NEWS (Australia), Nov. 20, 2007, available at [http://www.livenews.com.au/Articles/2007/11/20/Rudd\\_would\\_seek\\_fouryear\\_fixed\\_terms](http://www.livenews.com.au/Articles/2007/11/20/Rudd_would_seek_fouryear_fixed_terms) (last visited Aug. 1, 2008).

174. See, e.g., Louise Gray, “Young Turks” in the Frame Over Labour’s Election Fiasco, SCOTSMAN (Edinburgh, Scotland), Oct. 8, 2007, available at 2007 WLNR 19691718; *Call for Fixed Terms*, DAILY MAIL (UK), Oct. 8, 2007, available at 2007 WLNR 19725058; *Bid to Stop PM From Deciding on Voting Day*, ABERDEEN PRESS & J. (UK), Oct. 8, 2007, available at 2007 WLNR 19736418; Harry Reid, *Stop this Nonsense and Fix the Term of a Parliament*, HERALD (Glasgow, Scotland), Sept. 27, 2007, available at 2007 WLNR 18945929; see also Fixed-Term Parliament Bill (proposed in Session 2000-20001), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmbills/054/2001054.htm> (last visited Aug. 1, 2008).

government and, as a result, end the mandate and trigger new elections.<sup>175</sup>

But this logic neglects the important qualitative distinction between a vote of no confidence and an impeachment. Consider that, on a vote of no confidence, the head of government will normally petition for the dissolution of the Parliament, which will trigger new elections. If the defeated head of government retains the support of his political party—despite having lost the confidence of the legislature—he may continue lead his party into the new election. The defeated head of government may therefore conceivably be thrust once again back into his the previous role as head of government if that is the will of the electorate. Here is where we see the distinction between a vote of no confidence and an impeachment. The former allows the defeated head of government to remain active in politics. The latter typically prohibits the impeached politician from holding or running for public office, and it may be a prelude to civil or criminal penalties in a competent court of law.<sup>176</sup>

Some modern parliamentary systems have seized upon this critical distinction to provide for impeachment proceedings for the head of government as a supplement to the vote of no confidence. For instance, Thailand has adopted the German model of a constructive vote of no confidence in the prime minister.<sup>177</sup> In addition, the Thai Constitution authorizes the Senate to remove the prime minister for various kinds of improprieties.<sup>178</sup> As a result of his removal, the prime minister not only becomes disqualified from holding office for a period of five years but moreover remains subject to any pending or future judicial action.<sup>179</sup> Likewise, the Constitution of Lebanon allows the legislature to issue a vote of no confidence against the prime minister.<sup>180</sup> But the legislature is also authorized to impeach the prime minister.<sup>181</sup> If the legislature gathers the requisite supermajority to impeach, the prime minister must leave office and may subsequently face civil or criminal charges.<sup>182</sup>

Therefore parliamentary impeachment is indeed possible, both as a matter of theory and practice. Indeed, impeachment is not a new discovery for parliamentarism: impeachment originated in England.<sup>183</sup> The Westminster House of Commons used the impeachment power—beginning as early as the

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175. See, e.g., Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 713 (1999).

176. See, e.g., Constitution of the Philippines, art. XI, § 3(7); Constitution of the Republic of Korea, Ch. III, art. 65(4); Constitution of Paraguay, Ch. I, § VI, art. 225(2).

177. Constitution of Thailand, Ch. VI, Pt. 5, § 185.

178. Constitution of Thailand, Ch. X, Pt. 3, § 303.

179. Constitution of Thailand, Ch. X, Pt. 3, § 307.

180. Constitution of Lebanon, Ch. III, § 3, art. 68; Constitution of Lebanon, Ch. III, § 3, art. 69(1)(f); Constitution of Lebanon, Ch. II, art. 37.

181. Constitution of Lebanon, Ch. III, § 3, art. 70(1).

182. Constitution of Lebanon, Ch. III, § 3, art. 72.

183. W. Hamilton Bryson, *Judicial Independence in Virginia*, 38 U. RICH. L. REV. 705, 713 (2004).

fourteenth century<sup>184</sup>—until it secured the power to remove a sitting prime minister via a vote of no confidence,<sup>185</sup> the centerpiece of the principle of responsible government.<sup>186</sup> English practice conceived of impeachment as both a political and criminal process.<sup>187</sup> Parliament deployed it against ministers of the Crown,<sup>188</sup> for instance in cases of misuse of public funds.<sup>189</sup> Impeachment was also used against individuals whose office complicated the task of prosecuting them in the judicial domain, for instance judges or Crown officials.<sup>190</sup> Impeachment therefore often entailed both removal from office and a criminal punishment.<sup>191</sup> This remains the case today in some modern parliamentary systems—contrary to the conventional account of parliamentarism.

### B. *Forced Elections in Presidential Systems*

Just as some parliamentary systems depart from the conventional account about how they structure their electoral processes, some forms of presidentialism also defy customary assumptions. Contrary to the received wisdom, presidentialism does not always adhere to a fixed electoral cycle. For instance, some presidential systems authorize the President to dissolve the legislature before the expiration of the fixed term of constitutionally specified years. Likewise, presidentialism has devised an interesting way to reproduce the consequence of a vote of no confidence: the popular recall election. I will review both of these presidential innovations and thereby illustrate the great variety of constitutional possibilities, beginning with the presidential power to dissolve the legislature—a power that is normally reserved for parliamentary heads of government.

184. Craig S. Lerner, Review, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2070 (2002).

185. Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 222 (2007); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 23-24 (2001); Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279, 291 (1998).

186. Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2198-99 (1998).

187. Gary L. McDowell, "High Crimes and Misdemeanors": *Recovering the Intentions of the Founders*, 67 GEO. WASH. L. REV. 626, 635 (1999); Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 605 (1999); Mark R. Slusar, Comment, *The Confusion Defined: Questions and Problems in the Aftermath of the Clinton Impeachment*, 49 CASE W. RES. 869, 875 (1999).

188. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1563-64 (2002); Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 GEO. WASH. L. REV. 682, 684 (1999); Michael J. Gerhardt, *Chancellor Kent and the Search for the Elements of Impeachable Offenses*, 74 CHI.-KENT. L. REV. 91, 110 (1998).

189. Kath Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1353-54 n.48 (1988).

190. Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENTARY 479, 485 (1998).

191. Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677, 700 (1999).

### 1. The Dissolution of the Legislature

Presidential systems sometimes confer upon the President the power to dissolve the legislature and consequently force elections ahead of schedule. This creates a much more fluid electoral process that diverges from the perceived rigidity of presidentialism and instead resembles the more volatile parliamentary practice of variable elections. For instance, the Peruvian Constitution authorizes the President to dissolve the legislature,<sup>192</sup> as do the Constitutions of the Slovak Republic,<sup>193</sup> Kazakhstan<sup>194</sup> and, among others, Mongolia.<sup>195</sup>

The presidential power to dissolve the legislature is perhaps most common in semi-presidential systems. These systems began with the French Constitution of 1958.<sup>196</sup> Semi-presidential models usually have a President who is directly elected and a prime minister whose political survival depends on keeping the confidence of the legislature.<sup>197</sup> Presidents are typically endowed with foreign affairs and defense responsibilities,<sup>198</sup> whereas prime ministers operate the government. As a result of the co-existence of both a President and a prime minister in the executive branch, semi-presidentialism is often referred to as a *dual executive* model.<sup>199</sup> This cohabitation may potentially lead to ambiguity in the division of executive authority as well as to conflict in the performance of executive duties.<sup>200</sup> Indeed, this tension is magnified when the party of the

192. Constitution of the Republic of Peru, § IV, Ch. VI, art. 131; Maria McFarland Sanchez-Moreno, Note, *When a "Constitution" is a Constitution: Focus on Peru*, 33 N.Y.U. J. INT'L L. & POL. 561, 614-15 (2001).

193. Constitution of the Slovak Republic, Title Six, § 1, art. 102(e); Eric Stein, *Out of the Ashes of Federation, Two New Constitutions*, 45 AM. J. COMP. L. 45, 51 (1997).

194. Constitution of the Republic of Kazakhstan, § IV, art. 63; Yyliya Mitrofanskaya & Daulet Bideldinov, *Modernizing Environmental Protection in Kazakhstan*, 12 GEO. INT'L ENVTL. L. REV. 177, 190 (1999).

195. Constitution of Mongolia, Ch. Three, Pt. I, art. 22; *see also* Tom Ginsburg & Gombosuren Ganzorig, *When Courts and Politics Collide: Mongolia's Constitutional Crisis*, 14 COLUM. J. ASIAN L. 309 (2001) (describing the Mongolian Constitution and recent amendment efforts).

196. Luis Lopez Guerra, *The Application of the Spanish Model in the Constitutional Transitions in Central and Eastern Europe*, 19 CARDOZO L. REV. 1937, 1946 (1998).

197. Lee Kendall Metcalf, *Presidential Power in the Russian Constitution*, 6 J. TRANSNAT'L L. & POL'Y 125, 125 (1996).

198. Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 A.J.I.L. 86, 95 (2001).

199. Jenny S. Martinez, Essay, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2509 (2006); Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. POL'Y 531, 542 (2002); Ian Richard Brown, Note, *Clinging to Democracy: Assessing the Russian Legislative-Executive Relationship Under Boris Yeltsin's Constitution*, 33 VAND. J. TRANSNAT'L L. 645, 661 (2000); Jack van Doren & Thomas Magstadt, Essay, *Czech Constitutional Democracy: Focus on the Czech Dual Executive Power and the Future Senate*, 20 FORDHAM INT'L L.J. 347, 351 (1996); Peter Kresak, *The Government Structure in the New Slovak Republic*, 4 TULSA J. COMP. & INT'L L. 1, 8 n.29 (1996).

200. Bernard Susser, Essay, *Toward a Constitution for Israel*, 37 ST. LOUIS L.J. 939, 942 (1993).

President does not hold a majority in the legislature, and the prime minister therefore represents an opposing party.<sup>201</sup> In light of this potential constitutional tension, the semi-presidentialist President is often given tie-breaking powers—such as the authority to dissolve Parliament—that allow him to break the deadlock associated with divided government.<sup>202</sup>

Consider first the French model. The President, who is elected to a five-year term,<sup>203</sup> may dissolve the legislature after consultations with the parliamentary officials, including the prime minister.<sup>204</sup> Elections must then be held within forty days.<sup>205</sup> Following this election, the President may not dissolve the legislature for a period of at least one year.<sup>206</sup>

Consider also the Russian model. Like the French President, the Russian President may dissolve the legislature, the Duma.<sup>207</sup> There are two instances in which the President may do so. First, if the Duma rejects three successive presidential nominees to serve as head of government, the President must dissolve the Duma and call new elections.<sup>208</sup> Second, if the government succumbs to two votes of no confidence within a period of three months, the President may choose either to accept the resignation of the government and to appoint a new head of government or to dissolve the Duma.<sup>209</sup> The Constitution grants the President one week to choose between these two options.<sup>210</sup>

Consider next Croatia. Its semi-presidential regime differs from both the French and Russian models. There are two instances in which the legislature may be dissolved. First, a majority of parliamentarians may choose this course,<sup>211</sup> opting to call an election in advance of the expiration of the four-year parliamentary term.<sup>212</sup> Second, the President may take the initiative to dissolve the legislature.<sup>213</sup> But the President may do so only upon the recommendation of the prime minister, and then only if the government has either suffered a

201. Eugene D. Mazo, *Constitutional Roulette: The Russian Parliament's Battles with the President Over Appointing a Prime Minister*, 41 STAN. J. INT'L L. 123, 135-36 (2005); Carlo Dapelo, *The Trends Towards Federalism in Italy*, 15 ST. THOMAS L. REV. 345, 348 (2002).

202. Thomas Weishing Huang, *The President Refuses to Cohabit: Semi-Presidentialism in Taiwan*, 15 PAC. RIM L. & POL'Y 375, 378-79 (2006); Lucio Pegoraro & Angelo Rinella, *Le gouvernement au Parlement selon le modèle semi-présidentiel: l'expérience française et les propositions de la Commission parlementaire pour les réformes constitutionnelles en Italie*, 34 R.J.T. 275, 277 (2000).

203. Constitution of France, Title II, art. 6.

204. Constitution of France, Title II, art. 12.

205. Constitution of France, Title II, art. 12.

206. Constitution of France, Title II, art. 12.

207. Constitution of the Russian Federation, § 1, Ch. 4, art. 84(b).

208. Constitution of the Russian Federation, § 1, Ch. 6, art. 111(4).

209. Constitution of the Russian Federation, § 1, Ch. 6, art. 117(3).

210. Constitution of the Russian Federation, § 1, Ch. 6, art. 117(4).

211. Constitution of the Republic of Croatia, Ch. IV, Pt. 1, art. 77(1).

212. Constitution of the Republic of Croatia, Ch. IV, Pt. 1, art. 72(1).

213. Constitution of the Republic of Croatia, Ch. IV, Pt. 1, art. 77(2).

vote of no confidence or failed to pass its budget.<sup>214</sup> New elections must follow within sixty days of the dissolution of the legislature.<sup>215</sup>

Finally, consider the Pakistani model. The Constitution requires the President generally to act on the advice of the parliamentary government.<sup>216</sup> Therefore the President must dissolve the legislature if the prime minister advises him to do so.<sup>217</sup> But the President also holds the constitutionally delegated discretion to dissolve the legislature before the end of its five-year term.<sup>218</sup> At the dissolution of the legislature, the President may at his discretion select the date for new elections to be held within 90 days<sup>219</sup> and must appoint a caretaker government.<sup>220</sup> The President may issue a dissolution order either following a vote of no confidence against the prime minister or if he believes dissolution is necessary.<sup>221</sup> As between these two discretionary reasons to dissolve the legislature under the Pakistani Constitution, the former is not uncommon among semi-presidential states. The latter is unusual and has prompted one scholar to highlight this discretionary authority as democratically problematic.<sup>222</sup> Alongside the Pakistani model, the Constitutions of France, Russia and Croatia lay bare the shortcomings of the assumption that presidential systems are consigned to unyielding fixed electoral terms.

## 2. Popular Recall

American constitutional scholars have often argued in favor of adopting an instrument like the vote of no confidence as an intermediate position between the rigid fixed four-year presidential term and the divisive use of the impeachment power.<sup>223</sup> This instrument would authorize Congress to voice its disapproval of the President by casting a vote of no confidence—something that the American presidentialist Constitution does not currently allow.<sup>224</sup> For Reuss, the vote of no confidence is a promising possibility because it exhibits four important features: (1) speed, since it does not take long to invoke and consummate; (2) breadth, allowing for a farther-reaching assessment of presidential competence during his term of office than the narrow impeachment standard of “high crimes and misdemeanors”; (3) suprapoliticization, insofar as

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214. Constitution of the Republic of Croatia, Ch.IV, Pt. 2, art. 103(1).

215. Constitution of the Republic of Croatia, Ch. IV, Pt. 1, art. 73.

216. Constitution of Pakistan, Pt. III, Ch. 1, art. 48(1).

217. Constitution of Pakistan, Pt. III, Ch. 2, art. 58(1).

218. Constitution of Pakistan, Pt. III, Ch. 2, art. 52.

219. Constitution of Pakistan, Pt. III, Ch. 1, art. 48(5)(a).

220. Constitution of Pakistan, Pt. III, Ch. 1, art. 48(5)(b).

221. Constitution of Pakistan, Pt. III, Ch. 2, art. 58(2).

222. See Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies Under the Pakistani Constitution and its Discontents*, 23 ARIZ. J. INT'L & COMP. L. 615 (2006).

223. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 114-21 (2006).

224. Paul W. Kahn, *Approaches to the Cultural Study of Law: Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141, 153 (2001).

it can withstand efforts to be commandeered in the interests of party politics; and (4) balance, because it conforms to the American constitutional cornerstone of checks and balances.<sup>225</sup> Others have taken the contrary view, arguing against transplanting the vote of no confidence into the American presidential system.<sup>226</sup>

For enthusiasts of the vote of no confidence, the presidentialist Constitution of the Slovak Republic may perhaps serve as a model for incorporating the device into American presidentialism. The Slovakian Constitution implements the vote of no confidence in an interesting way: rather than importing the actual parliamentary vote of no confidence into its semi-presidential regime, the Slovak Republic subjects its President to the possibility of recall before the end of the term.<sup>227</sup> This popular referendum achieves the very same result as a vote of no confidence: removal from office. But it does so in a different forum (the voting body is the national electorate instead of the legislature) and under a different name (calling it *recall* instead of a no confidence vote). The Slovakian Constitution also provides for a presidential impeachment procedure in addition to this presidential recall mechanism.<sup>228</sup>

The same is true of Venezuela, where the President is subject to recall by a popular vote<sup>229</sup> after fulfilling at least half of the fixed term of office.<sup>230</sup> Yet recall is not the only tool available to sanction a sitting Venezuelan President. He is also subject to the prospect of impeachment.<sup>231</sup> The decision to impeach rests with the Supreme Tribunal of Justice, to which the Venezuelan Constitution assigns the task of determining whether there exist sufficiently compelling grounds.<sup>232</sup>

The presidential popular recall accomplishes a result equivalent to a parliamentary vote of no confidence: if successful, it removes the head of government from his leadership position. Like the vote of no confidence, the popular recall is a means by which the head of government may be temporarily

225. Henry S. Reuss, *An Introduction to the Vote of No Confidence*, 43 GEO. WASH. L. REV. 333, 334 (1975).

226. See, e.g., Louis W. Koenig, *Recipe for the Presidency's Destruction*, 43 GEO. WASH. L. REV. 376, 377 (1975) (arguing that no confidence vote would weaken presidency); John H. Reese, *No Confidence Removal of the President: The Wrong Solution to a Constitutional Problem*, 43 GEO. WASH. L. REV. 416, 435 (1975) (advocating amendments to Impeachment Clause instead of adopting no confidence vote); Allan P. Sindler, *Good Intentions, Bad Policy: A Vote of No Confidence on the Proposal to Empower Congress to Vote No Confidence in the President*, 43 GEO. WASH. L. REV. 437, 458 (1975) (suggesting that should strengthen Congress instead of weakening presidency).

227. Constitution of the Slovak Republic, Title Six, § 1, art. 106(1); Constitution of the Slovak Republic, Title Six, § 1, art. 106(2).

228. Constitution of the Slovak Republic, Title Six, § 1, art. 107.

229. Constitution of the Bolivarian Republic of Venezuela, Title V, Ch. II, § 1, art. 233.

230. Constitution of the Bolivarian Republic of Venezuela, Title III, Ch. IV, § 2, art. 72; Constitution of the Bolivarian Republic of Venezuela, Title V, Ch. II, § 1, art. 228.

231. Constitution of the Bolivarian Republic of Venezuela, Title V, Ch. II, § 1, art. 233.

232. Constitution of the Bolivarian Republic of Venezuela, Title V, Ch. II, § 2, art. 266.

displaced or permanently replaced in mid-stream, before the end of his electoral term. Though a vote of no confidence and presidential impeachment are similar on these grounds, they are distinguishable insofar as the former is generally invoked for political motives, while the latter is summoned in response to alleged criminal, legal or constitutional mischief.

Therefore, presidential systems also undermine the claim that votes of no confidence are incompatible with presidentialism. Parliamentary systems have successfully integrated impeachment with the enduring principle of responsible government and presidential systems have accomplished the converse: complementing their presidential impeachment procedures with a process that is analogous to a parliamentary vote of no confidence.

#### IV. LEGISLATIVE EFFICIENCY

Efficiency in government administration is an indication of the ability of the head of government to successfully and swiftly shepherd his policy agenda through the legislative process.<sup>233</sup> On this premise, one can conceive of the degree of efficiency of a government administration as directly proportional to and reflective of the level of strategic coordination or convergence on priorities between the executive and legislative branches.<sup>234</sup>

The conventional view holds that presidentialism is less efficient than parliamentarism. This argument presupposes that the norm in presidentialism is divided government,<sup>235</sup> an arrangement in which different political parties control the executive and legislative branches. Under divided government, it is more difficult for presidential than parliamentary systems to implement the legislative program of the head of government because presidentialism has more veto gates and players positioned along the legislative process.<sup>236</sup>

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233. Lloyd N. Culter, Address, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 32 (1985).

234. See John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121, 1145 (2001). Efficiency may also refer to competence. But the separation of powers serves the interest of *efficiency as competence* only if governmental powers are assigned to the branch of government most capable of effectively discharging them. See, e.g., JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 289-90 (2006); DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 74-75 (5th ed. 2005); JOHN H. GARVEY & T. ALEXANDER ALENIKOFF, MODERN CONSTITUTIONAL THEORY 335 (1999); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 12 (1987).

235. See, e.g., SIDNEY M. MILKIS, THE PRESIDENT AND THE PARTIES 294 (1993); DEAN MCSWEENEY & JOHN ZVESPER, AMERICAN POLITICAL PARTIES 68-69 (1991); Michael J. Malbin, *Political Parties Across the Separation of Powers*, in AMERICAN POLITICAL PARTIES AND CONSTITUTIONAL POLITICS 75, 84-85 (Peter W. Schramm & Bradford P. Wilson eds., 1993); James L. Sundquist, *Party Decay and the Capacity to Govern*, in THE FUTURE OF AMERICAN POLITICAL PARTIES: THE CHALLENGE OF GOVERNANCE 42, 52-54 (Joel L. Fleishman ed., 1982).

236. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 244 (16th ed. 2007); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 465-67 (1991).

Presidential systems are therefore said to be inefficient,<sup>237</sup> and to sacrifice efficiency in the pursuit of other democratic objectives.<sup>238</sup> One of those democratic objectives is to make it exceedingly difficult for policy proposals to become law without first achieving broad support from political branches.<sup>239</sup> Two others are fostering a deliberative process that produces better and more thoughtful public policy,<sup>240</sup> and preventing the arbitrary exercise of government power.<sup>241</sup>

Presidentialism, according to this view, creates conflict among the branches of government.<sup>242</sup> It is therefore thought to be more vulnerable to stalemate than parliamentarism,<sup>243</sup> and less conducive to speedy and decisive action.<sup>244</sup> This helps explain why some have advocated a parliamentary system for the United States in order to avoid the inefficiencies of separated powers.<sup>245</sup> Such a reform would confer upon the American President the legislative powers of a prime minister to control the legislative process as well as the executive power to control party members.<sup>246</sup>

In contrast, the absence of gridlock in parliamentary policymaking is believed to be a virtue<sup>247</sup> and a reason to favor parliamentarism over presidentialism.<sup>248</sup> Parliamentary efficiency derives from several sources,

237. See, e.g., CHARLES A. SHANOR, *AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* 113 (2006); LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* 161 (6th ed. 2005); THEODORE J. LOWI & JOSEPH ROMANCE, *A REPUBLIC OF PARTIES?: DEBATING THE TWO-PARTY SYSTEM* 43 (1998); JAMES P. PFIFFNER, *THE MODERN PRESIDENCY* 166-71 (1994); Thomas E. Mann, *President Clinton and the Democratic Congress: Promise and Performance, in BACK TO GRIDLOCK? GOVERNANCE IN THE CLINTON YEARS* 9, 13 (James L. Sundquist ed., 1995).

238. See, e.g., DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 1054* (3d ed. 2003); JESSICA KORN, *THE POWER OF SEPARATION* 14 (1996); Frederick R. Anderson, *Revisiting the Constitutional Status of the Administrative Agencies*, 36 *AM. U.L. REV.* 277, 293 (1987).

239. F. Scott Boyd, *Legislative Checks on Rulemaking: Under Florida's New APA*, 24 *FLA. ST. U.L. REV.* 309, 316 (1997).

240. See Arthur M. Schlesinger, Jr., *The Constitution and Presidential Leadership*, 47 *MD. L. REV.* 54, 61-62 (1987).

241. See, e.g., *Meyers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

242. Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 *CASE W. RES.* 1331, 1334 (1997); Louis Fisher, *The Allocation of Powers: The Framers' Intent*, in *SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM* 19, 19 (Barbara B. Knight ed., 1989).

243. See, e.g., Yen-Tu Su, *Beyond Nightmare and Hope: Engineering Electoral Proportionality in Presidential Democracies*, 30 *J. LEGIS.* 205, 231 (2004); Keith E. Whittington, *Yet Another Constitutional Crisis*, 43 *WM & MARY L. REV.* 2093, 2103-04 (2002).

244. See David Golove, Comment, *Exception and Emergency Powers*, 21 *CARDOZO L. REV.* 1895, 1897 (2000).

245. See, e.g., JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 14 (1986).

246. See Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 *YALE L. & POL'Y REV.* 361, 361 (1993).

247. See Tom Farer, *Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure*, 10 *AM. U. J. INT'L L. & POL'Y* 1295, 1326 (1995).

248. See James J. Brudney, *The National Labor Relations Board in Comparative Context*, 26

including the strictures of party discipline, the fusion of executive and legislative offices,<sup>249</sup> and the executive control of the legislative process.<sup>250</sup> The executive therefore enjoys a “de facto monopoly” in introducing legislation, which contributes to the efficiency in achieving its passage.<sup>251</sup>

In light of its fusion of the executive and legislative branches, parliamentarism is thought to provide integrated controls against political division<sup>252</sup> by creating the conditions for cooperative governance precisely because the executive and legislative branches are not separated and each depends upon the other for its political survival.<sup>253</sup> Legislators in parliamentary systems are therefore thought to have an incentive to support the agenda of the governing party.<sup>254</sup> Parliamentary systems also possess an efficient mechanism to break a legislative stalemate: the vote of no confidence.<sup>255</sup> Parliamentary theorists tend to view separated powers as obstructive to governmental efficiency.<sup>256</sup>

#### A. *Inefficiency in Parliamentary Systems*

But closer inspection reveals that the conventional wisdom offers an inadequate account of how parliamentarism actually works. Granted, it is accurate to claim that parliamentary systems are sometimes archetypes of legislative efficiency. But to assert such a claim without acknowledging how parliamentary legislative practice sometimes departs from this convention is to neglect terribly important variations in parliamentarism with respect to minority and coalition governments. Both of these forms of government make parliamentarism look like and operate in similar fashion to presidentialism. I will explore coalition governments under proportional representation and minority governments under first-past-the-post electoral systems.

Minority and coalition governments are inexorably linked to, and are a

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COMP. LAB. L. & POL'Y J. 221, 253-54 (2005).

249. See Matthew S. R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587, 602 (2006).

250. Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, 29 BROOKLYN J. INT'L L. 985, 995 (2004).

251. Elisabeth Zoller, *The Treaty Establishing a Constitution for Europe and the Democracy Legitimacy of the European Union*, 12 IND. J. GLOBAL LEGAL STUD. 391, 401 (2005).

252. See Paul R. Verkuil, *A Proposal to Resolve Interbranch Disputes on the Practice Field*, 40 CATH. U.L. REV. 839, 840 (1991).

253. See Mark Freeman, *Constitutional Frameworks and Fragile Democracies: Choosing Between Parliamentarism, Presidentialism and Semi-Presidentialism*, 12 PACE INT'L L. REV. 253, 257 (2000).

254. Noah Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30 HARV. ENVTL. L. REV. 51, 86-87 (2006).

255. John C. Reitz, *Political Economy and Separation of Powers*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579, 609 (2006).

256. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U.L. REV. 1, 25 (2003).

function of, the electoral systems that give rise to them.<sup>257</sup> First-past-the-post systems often lead to an incongruity between the popular vote of parties and their respective seat totals in the legislature.<sup>258</sup> Consider that the winner in first-past-the-post elections need not earn a majority of the votes cast in an electoral district because victory is won with only a plurality.<sup>259</sup> In contrast, proportional representation endeavors to assign legislative seats among political parties according to the percentage of the popular vote that each party secures.<sup>260</sup> Proportional representation is also subject to criticism. Perhaps the most stinging is that it fragments legislatures and may create deadlock in the legislative process.<sup>261</sup> Proportional representation multiplies political parties, encourages narrow rather than broad based platforms, and typically leads to instability.<sup>262</sup>

### 1. Minority Government

Minority governments—an arrangement in which the party in power does not command a majority of parliamentary seats but instead holds only a plurality of those seats—may arise under first-past-the-post electoral systems. Minority governments resemble divided governments in presidential systems, which arise when the presidency and the legislature are controlled by different parties.<sup>263</sup> Both are generally inefficient when it comes to passing the full and undiluted legislative agenda of the governing party.<sup>264</sup> Both disperse power in a similar fashion and afford governing as well as opposition parties the possibility of participating in shaping policy.<sup>265</sup>

Once formed, minority governments tend to be vulnerable to defeat at the

257. MICHAEL LAVER & NORMAN SCHOFIELD, *MULTIPARTY GOVERNMENT: THE POLITICS OF COALITION IN EUROPE* 204 (2d ed. 1998).

258. See, e.g., MICHAEL D. McDONALD & IAN BUDGE, *ELECTIONS, PARTIES, DEMOCRACY: CONFERRING THE MEDIAN MANDATE* 9 (2005); Dominique Leydet, *Pluralism and the Crisis of Parliamentary Democracy*, 10 *CAN. J.L. & JURIS.* 49, 55 (1997).

259. DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES* 1-9 (1993).

260. MARTIN HARROP & WILLIAM L. MILLER, *ELECTION AND VOTERS: A COMPARATIVE INTRODUCTION* 46-47 (1987).

261. Sanford Levinson, “*Imposed Constitutionalism*”: *Some Reflections*, 37 *CONN. L. REV.* 921, 929-30 (2005).

262. Susan Rose-Ackerman, *Political Corruption and Democracy*, 14 *CONN. J. INT’L L.* 363, 375 (1999); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 *COLUM. L. REV.* 1325, 1363 (1987).

263. See Robert Elgie, *What is Divided Government?*, in *DIVIDED GOVERNMENT IN COMPARATIVE PERSPECTIVE* 1, 6 (Robert Elgie ed., 2001); James A. Thurber, *Representation, Accountability, and Efficiency in Divided Party Control of Government*, 24 *POL. SCI. & POLITICS* 653, 653 (1991).

264. See PAUL CHRISTOPHER MANUEL & ANNE MARIE CAMMISA, *CHECKS AND BALANCES? HOW A PARLIAMENTARY SYSTEM COULD CHANGE AMERICAN POLITICS* 146-47 (1999).

265. G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* 120-21 (2000).

hands of the opposition parties.<sup>266</sup> This leads to a precarious situation of governance. In addition to rendering the governing party susceptible to a vote of no confidence at any moment,<sup>267</sup> a minority government constrains the schedule of the prime minister to short-term commitments.<sup>268</sup> A further consequence of minority governments is that political parties must be in a continuous mode of election readiness.<sup>269</sup> This resulting uncertainty reaches even beyond the legislature and into the government bureaucracy.<sup>270</sup>

We may draw an instructive illustration of minority governments from Canadian parliamentarism. The 2004 federal elections produced a minority government, the first since 1979. The governing party earned thirty-seven percent of the popular vote, which translated into 135 of the 308 seats in the legislature, while the second-place party earned ninety-nine seats with thirty percent of the popular vote.<sup>271</sup> That minority government lasted for only eighteen months, a period marked by political instability, before being replaced by another minority government.<sup>272</sup>

Other Canadian minority governments have been similarly unstable. The minority government in 1972-74 operated in a mode of constant crisis control, fearful that its unsteady support would collapse and send Canadians back to the polls.<sup>273</sup> The minority governments of 1962-63 and 1979-80 were similarly shaky and unable to govern effectively,<sup>274</sup> the former even arousing the attention of the *New York Times* and the *Washington Post*, both of which

266. Erik Damgaard, *Parliament and Government*, in *BEYOND WESTMINSTER AND CONGRESS: THE NORDIC EXPERIENCE* 265, 273 (Peter Esaiasson & Knut Heidar eds. 2000).

267. See, e.g., Bruce Campion-Smith, *Rivals Practise Before Election Kickoff*, *TORONTO STAR* (Canada), Nov. 28, 2005, at A1, available at 2005 WLNR 19119418; Les Whittington, *High-Wire Act Continues for Minority Government*, *TORONTO STAR* (Canada), June 13, 2005, at A6, available at 2005 WLNR 9340259; Tim Naumetz & Allan Woods, *Budget Bill Could Topple Government*, *WINNIPEG FREE PRESS* (Canada), Apr. 1, 2005, at A16, available at 2005 WLNR 8348286.

268. See, e.g., Joe Friesen, *Harper Plays Down Talk of Election*, *GLOBE AND MAIL* (Toronto, Canada), Oct. 6, 2007, at A4, available at 2007 WLNR 19597883.

269. See, e.g., Susan Delacourt & Bob Benzie, *Harper's Team Gears Up for Election*, *TORONTO STAR* (Canada), Sept. 25, 2007, at A1, available at 2007 WLNR 18765843; Jane Taber, *Dion Team Scrambling to Find a Campaign Plane, Inside Reveals*, *GLOBE AND MAIL* (Toronto, Canada), Apr. 5, 2007, at A4, available at 2007 WLNR 6509144; Andrew Dreschel, *Valeri is Out. What About Di Ianni?*, *HAMILTON SPECTATOR* (Canada), Jan. 31, 2007, at A15, available at 2007 WLNR 1825413; John Slykhuis, "Stay on Your Toes" For Next Vote: MP Loan, *GEORGINA ADVOCATE* (Canada), July 1, 2004, at 1, available at 2004 WLNR 6232928.

270. See, e.g., Allan Woods, *Elections Agency Bends Under "Strain"; Agency Bears Burden of Several By-Elections, Uncertainty Posed by Minority Governments*, *TORONTO STAR* (Toronto, Canada), Nov. 6, 2007, at A19, available at 2007 WLNR 21877948.

271. See Inter-Parliamentary Union, *Canada*, 38 *CHRONICLE OF PARLIAMENTARY ELECTIONS* 37, 41 (2005).

272. See Inter-Parliamentary Union, *Canada*, 40 *CHRONICLE OF PARLIAMENTARY ELECTIONS* 30, 32-33 (2007).

273. Lawrence LeDuc, *Political Behaviour and the Issue of Majority Government in Two Federal Elections*, 10 *CANADIAN J. OF POL. SCI.* 311, 312 (1977).

274. Tom Kent, *Making Minority Government Work: The Politics of Purpose*, *POLICY OPTIONS*, Sept. 2004, at 15.

warned of the economic risks associated with electing a minority government in Canada.<sup>275</sup>

Nevertheless, minority governments in Canada have in some instances been very dynamic and socially useful. For instance, the Pearson minority governments of the 1960s are regarded as successful by any reasonable measure.<sup>276</sup> They passed the Canadian Pension Plan and the Canada Student Loan program, modernized immigration policy, created the Canadian-made national flag featuring the maple leaf, renewed national bilingualism, and established national health care—all amid the volatility of minority government politics.<sup>277</sup> In this respect, perhaps Forsey was correct when he observed that minority governments should be regarded neither as a problem nor a threat but instead as an opportunity.<sup>278</sup> This is likely true, but only if the governing party is willing to compromise in the larger interest of political stability.<sup>279</sup>

## 2. Coalition Government

Under proportional representation, elections are unlikely to result in majority governments and instead typically yield minority<sup>280</sup> or coalition governments.<sup>281</sup> Coalition governments in parliamentary systems result when a

275. Dennis H. Wrong, *Canadian Politics in the Sixties*, 78 POL. SCI. Q. 1, 4 (1963).

276. Desmond Morton, *Remembering the Fun of Minority Government?*, POLICY OPTIONS, Sept. 2004, at 33.

277. John English, *Pearson—Amiable But Ambitious, He Governed in Chaos and Confusion, Yet Left a Legacy of Unequalled Achievement*, POLICY OPTIONS, June-July 2003, at 63, 67-68.

278. Eugene Forsey, *The Problem of “Minority” Government in Canada*, 30 CANADIAN J. OF ECON. & POL. SCI. 1, 11 (1964).

279. Barry Kay, *Majority Parliament Nowhere in Sight*, KITCHENER RECORD (Canada), May 4, 2005, at A15, available at 2005 WLNR 6965964. Minority governments have been relatively durable in Ireland. See Peter Mair, *Ireland: From Predominance to Moderate Pluralism, and Back Again*, in UNDERSTANDING PARTY SYSTEM CHANGE IN WESTERN EUROPE 129, 132-33 (Peter Mair & Gordon Smith eds., 1990).

280. VERNON BOGDANOR, WHAT IS PROPORTIONAL REPRESENTATION? 127-28 (1984).

281. Consider the New Zealand experience with proportional representation. Since adopting a mixed member proportional system in 1996, New Zealand has had only coalition or minority governments and has not once been governed by a single-party majority government. See Bureau of Intelligence and Research Electronic Affairs Public Office, U.S. Department of State, *Background Note on New Zealand*, U.S. FED. NEWS, May 1, 2007, available at 2007 WLNR 9080573. Moreover, recent elections in parliamentary systems with proportionate representation have born this out. For instance, in the 2001 Bulgarian parliamentary elections, the National Movement Simeon II Party failed to win an outright majority and therefore partnered with the Turkish Movement for Rights and Freedoms to form a coalition. See Inter-Parliamentary Union, *Turkey*, 35 CHRONICLE OF PARLIAMENTARY ELECTIONS 35, 37 (2002). Four years later in the 2005 Bulgarian parliamentary elections, the coalition government was composed of the Coalition for Bulgaria Party, the National Movement Simeon II Party and the Turkish Movement for Rights and Freedoms. See Inter-Parliamentary Union, *Turkey*, 39 CHRONICLE OF PARLIAMENTARY ELECTIONS 45, 48 (2006). In 2001, none of the political parties in Norway managed to secure a majority. The governing coalition was ultimately composed of the Christian People’s Party, the Conservative Party, the Liberal Party and other conservatives. See Inter-Parliamentary Union, *Norway*, 35 CHRONICLE OF PARLIAMENTARY ELECTIONS 106, 108 (2002). Similarly, the 2005 Danish elections resulted in a coalition government among the Liberal Party, Conservative People’s Party and the Danish People’s Party. See Inter-Parliamentary Union, *Denmark*, 39

minority party that has secured a plurality of seats in an election joins forces with a another minority party or parties in order to form a majority—or less frequently a minority—coalition party.<sup>282</sup> Coalition governments are, on one masterful account, “a reflex of a living and continuous interaction between a party’s natural and hence ultimate quest to come to power by itself and the expedient, perhaps essentially transitional, inter-party collaboration to capture the reins of government.”<sup>283</sup>

One consequence of coalition governments is that party discipline becomes more important than usual in parliamentary systems because the dissenting votes from members of the governing coalition threaten to destabilize the coalition itself.<sup>284</sup> Another, perhaps peculiar, consequence of coalition arrangements is that they sometimes confer greater influence upon small, regional or fringe parties than larger, national or mainstream parties. In an electoral context in which neither of the larger parties has secured a majority of the vote, the key determinant of the influence of the smaller party is whether it is a prospective coalition partner to the larger parties, something that may be gauged by considering whether the smaller party is positioned between the two (or more) larger parties with respect to political ideals and ideology, and whether it was sufficiently successful in the election to garner a critical mass of seats that would push either of the two larger parties into majority territory.<sup>285</sup>

But both the converse and the reverse may also be true. For instance, a small or regional party may believe that it can best represent the interests of its constituents by remaining in opposition instead of joining the governing coalition.<sup>286</sup> Similarly, the largest party in a proportional representation system may have the most influence. For example, a large party that regularly fails to win a majority of seats yet nonetheless achieves a commanding plurality may find itself in the enviable position of mediating a bidding war between smaller

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CHRONICLE OF PARLIAMENTARY ELECTIONS 79, 82 (2006). But it is not impossible for a party to achieve an outright majority under a proportional representation electoral system. *See, e.g.*, Inter-Parliamentary Union, *Turkey*, 36 CHRONICLE OF PARLIAMENTARY ELECTIONS 200, 202 (2003) (reporting that the Justice and Development Party garnered a majority of seats under Turkey’s proportional representation electoral system in the 2002 parliamentary elections).

282. Kaare Strøm & Benjamin Nyblade, *Coalition Theory and Government Formation*, in THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 782-83, 786 (Carles Boix & Susan C. Stokes eds., 2007). The first leading study of coalition government is WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962).

283. Iqbal Narain, *Coalitional Politics and the Indian Political System—The Crisis of Compatibility*, in THE COALITION GOVERNMENT 124, 126 (Sarat K. Chatterji ed., 1974) (internal citations omitted).

284. Vernon Bogdanor, *Conclusion*, in COALITION GOVERNMENT IN WESTERN EUROPE 263, 271 (Vernon Bogdanor ed., 1983).

285. Gordon Smith, *In Search of Small Parties: Problems of Definition, Classification and Significance*, in SMALL PARTIES IN WESTERN EUROPE: COMPARATIVE AND NATIONAL PERSPECTIVES 23, 30 (Ferdinand Müller-Rommel & Geoffrey Pridham eds., 1991).

286. Christian Tuschhoff, *The Compounding Effect: The Impact of Federalism on the Concept of Representation*, in COMPOUNDED REPRESENTATION IN WEST EUROPEAN FEDERATIONS 16, 22 (Joanne B. Brzinski et al. eds., 1999).

prospective coalition partners who are willing to make enticing compromises in return for the chance to govern, as has been the case in Belgium and the Netherlands for much of the last century.<sup>287</sup>

The various steps and stakes involved in building and sustaining coalitions conspire to diminish the legislative efficiency of coalition governments because those governments have to invest their resources in processes that would not otherwise require attention under majority governments. Coalition governments face several challenges, including creating a coalition, managing the allocation of Cabinet portfolios, consulting with coalition parties and their respective pressure or interest groups, managing intra-coalition and inter-party disagreements, or shoring up legislative coalitions.<sup>288</sup>

Perhaps the most complex element to navigate in coalition governments is the initial stage of building the coalition. Coalition-building begins in earnest after the election,<sup>289</sup> a process that can be very lengthy, lasting upwards of several months<sup>290</sup> because of the intense negotiations required.<sup>291</sup> These negotiations entail significant costs, including bargaining costs (the time required to build the coalition and to resolve all subsidiary coalition matters), policy costs (compromise and concession in developing a governing program) and office costs (the payout or distribution of portfolios).<sup>292</sup> Their cumulative impact is considerable. Sometimes the costs of coalition-building and coalition-sustaining may be so great as to compel the leader of the plurality party to give up on those efforts and instead attempt to govern as a minority government. This is precisely what occurred following the 2002 Swedish parliamentary elections, when the prime minister refused to enter into a coalition because his prospective coalition partners had opposed Swedish membership in the European Union, one of his principal policies.<sup>293</sup>

287. Renaat Hoop, *Social Policy in Belgium and the Netherlands: Third Way or Not?*, in *SOCIAL DEMOCRATIC PARTY POLICIES IN CONTEMPORARY EUROPE* 66, 67 (Giuliano Bonoli & Martin Powell eds., 2004).

288. Jonathan Boston & Andrew Ladley, *Efficient Secrets: The Craft of Coalition Management*, 4 *N.Z. J. PUB. & INT'L L.* 55, 59-87 (2006).

289. PIPPA NORRIS, *ELECTORAL ENGINEERING: VOTING REGIMES AND POLITICAL BEHAVIOR* 70 (2004).

290. Arco Timmermans, *Cabinet Ministers and Policy-Making in Belgium: The Impact of Coalitional Constraints*, in *CABINET MINISTERS AND PARLIAMENTARY GOVERNMENT* 106, 106-07 (Michael Laver & Kenneth A. Shepsle eds., 1994); *see, e.g.*, Inter-Parliamentary Union, *Israel*, 40 *CHRONICLE OF PARLIAMENTARY ELECTIONS* 124, 127 (2007) (one month to negotiate coalition after 2006 Israeli parliamentary election); Inter-Parliamentary Union, *Netherlands*, 40 *CHRONICLE OF PARLIAMENTARY ELECTIONS* 173, 175-76 (2007) (three months to negotiate coalition after 2006 Dutch parliamentary election); Inter-Parliamentary Union, *Germany*, 39 *CHRONICLE OF PARLIAMENTARY ELECTIONS* 102, 106 (2006) (two months to negotiate coalition after 2005 German parliamentary election).

291. Ólafur R. Grímsson, *Iceland: A Multilevel Coalition System*, in *GOVERNMENT COALITIONS IN WESTERN DEMOCRACIES* 142, 157-84 (Eric C. Browne & John Dreijmanis eds., 1982).

292. CAROL MERSHON, *THE COSTS OF COALITION* 100-24 (2002).

293. *See* Inter-Parliamentary Union, *Sweden*, 36 *CHRONICLE OF PARLIAMENTARY ELECTIONS* 182, 184 (2003).

The product of this interparty bargaining is usually a formal agreement to which the coalition partners are signatories, outlining the policy priorities, rules of conduct and, among others, the allotment of ministerial and other offices.<sup>294</sup> One particularly instructive illustration of the conditions that may be attached to coalition-building and coalition-sustaining comes from Iceland, where the Progressive Party agreed in May 2003 to form a coalition government with the Independence Party on the condition that the prime minister—who was a member of the Independence Party—resign the post by September 2004 in order to allow a member of the Progressive Party to become prime minister.<sup>295</sup>

This is not to understate the inefficiencies associated with governing a coalition after it has successfully cleared the hurdles to coalition formation. On the contrary, coalitions typically become more fragile as the legislative session progresses because the coalition members discover fewer and fewer matters upon which they may make gainful compromises, which consequently destabilizes the coalition and weakens its cohesion as the divergent preferences of coalition members are not met.<sup>296</sup> Furthermore, the legislative inefficiency of coalition governments exacts a significant cost on another dimension of governance: political ideology. The political parties constituting a coalition must dilute their preferred partisan policies in order to successfully pass their bills through the legislature—and even then the resultant bill, which members of the governing alliance would unlikely support were they in control of a majority government, may not find favor with the broader legislative assembly.<sup>297</sup>

Indeed, it was the difficulty associated with forging sustainable coalition governments that led Israel to adopt a new premier-parliamentary system that freed the prime minister of what critics believed was the burden of establishing and preserving a coalition government.<sup>298</sup> Much has been written about the

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294. GREGORY S. MAHLER, *POLITICS AND GOVERNMENT IN ISRAEL: THE MATURATION OF A MODERN STATE* 158-59 (2004).

295. See Inter-Parliamentary Union, *Iceland*, 37 *CHRONICLE OF PARLIAMENTARY ELECTIONS* 74, 76 (2004).

296. Timothy M. Hennessey & Jeanne Martin, *Exchange Theory and Parliamentary Instability*, in *LEGISLATURES IN COMPARATIVE PERSPECTIVE* 182, 196 (Allan Kornberg ed., 1973).

297. Wilfried Dewachter, *Changes in a Particratie: The Belgian Party System from 1944 to 1986*, in *PARTY SYSTEMS IN DENMARK, AUSTRIA, SWITZERLAND, THE NETHERLANDS, AND BELGIUM* 285, 351 (Hans Daalder ed., 1987).

298. Avraham Brichta, *The New Premier-Parliamentary System in Israel*, 555 *ANNALS* 180, 182, 190 (1998). The new model that Israel adopted in 1996 borrows from both parliamentary and presidential systems to create a structure that has the following characteristics: (1) like the chief executive in a presidential system but unlike the chief executive in a parliamentary system, the chief executive in Israel's new system is popularly elected; (2) as in both presidential and parliamentary systems, Israel's chief executive appoints members of the cabinet; (3) just as the chief executive in a parliamentary system but unlike the chief executive in a presidential system, the chief executive in Israel must retain the confidence of the legislature in order to avert new elections. *Id.* at 188-89. Israel has since abandoned this new electoral model. See Yoav Dotan, *The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel*, 53 *AM. J. COMP. L.* 293, 299 n.23 (2005).

challenges to coalition-building and coalition-sustaining in Israel.<sup>299</sup> Germany is another fascinating manifestation of coalition politics because of the interaction between national and state officials after elections to the Bundestag. Specifically, the prominent role of the German states in implementing social policy requires as a matter of practice that coalition talks involve not only national party leaders but also their state equivalents, even though the latter do not hold seats in the Bundestag nor do they ultimately join the Cabinet.<sup>300</sup>

In Italy, some are calling for a move to the more stable semi-presidential French model to replace the weak form of coalition government that has become the norm.<sup>301</sup> Building a coalition government in Italy involves such complexity that policy is often relegated to secondary importance relative to the principal concern of political survival.<sup>302</sup> As a final example, consider Portugal. It has also lived through short and unstable parliamentary coalitions: the Portuguese Parliament has often failed to reach its constitutionally defined legislative term of four years, instead collapsing well short of that period.<sup>303</sup>

It is therefore apparent that coalition governments are both fragile and volatile.<sup>304</sup> One comparative study of parliamentary democracies from 1918 to

299. See, e.g., GREGORY M. LUEBBERT, *COMPARATIVE DEMOCRACY: POLICYMAKING AND GOVERNING COALITIONS IN EUROPE AND ISRAEL* (1986); Douglas M. Stinnett, *International Uncertainty, Foreign Policy Flexibility, and Surplus Majority Coalitions in Israel*, 51 J. OF CONFLICT RESOLUTION 470 (2007); Itai Sened, *A Model of Coalition Formation: Theory and Evidence*, 58 J. OF POLITICS 350 (1996); Judith Bara, *Party Policy and Coalition Bargaining in Israel*, in *PARTY POLICY AND GOVERNMENT COALITIONS* 346 (Michael J. Laver & Ian Budge eds., 1992).

300. Thomas Saalfeld, *The German Bundestag: Influence and Accountability in a Complex Environment*, in *PARLIAMENTS AND GOVERNMENTS IN WESTERN EUROPE* 44, 55-57 (Philip Norton ed., 1998).

301. Laura Nader & Mariane Ferme, Book Review, *Transplants, Innovation, and Legal Tradition in the Horn of Africa*, 45 AM. J. COMP. L. 209, 216 (1997).

302. Alfio Mastropaolo & Martin Slater, *Party Policy and Coalition Bargaining in Italy, 1948-87: Is There Order Behind the Chaos?*, in *PARTY POLICY AND GOVERNMENT COALITIONS*, supra note 299, at 312, 335.

303. Ken Gladdish, *Portugal: An Open Verdict*, in *SECURING DEMOCRACY: POLITICAL PARTIES AND DEMOCRATIC CONSOLIDATION IN SOUTHERN EUROPE* 104, 115 (Geoffrey Pridham ed., 1990). But see Inter-Parliamentary Union, *Portugal*, 39 CHRONICLE OF PARLIAMENTARY ELECTIONS 193, 196 (2006) (reporting that the Socialist Party won an outright majority of parliamentary seats in the 2005 elections).

304. See, e.g., RON GOULD ET AL., *STRENGTHENING DEMOCRACY: A PARLIAMENTARY PERSPECTIVE* 123-24 (1995); Adam M. Smith, *Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 236 (2006); Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 AM. U. INT'L L. REV. 585, 632 (2003); Kent Benedict Gravelle, *Islamic Law in Sudan: A Comparative Analysis*, 5 ILSA J. INT'L & COMP. L. 1, 4 (1998); Paul J. Magnarella, *The Legal, Political and Cultural Structures of Human Rights Protections and Abuses in Turkey*, 3 D.C.L. J. INT'L L. & PRAC. 439, 444 (1994); Irwin P. Stotzky, Essay, *The Fragile Bloom of Democracy*, 44 U. MIAMI L. REV. 105, 121 (1989). But see GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 113 (1994) (arguing that stability is not a function of time but rather the capacity to govern); ANDREW REEVE & ALAN WARE, *ELECTORAL SYSTEMS: A COMPARATIVE AND THEORETICAL INTRODUCTION* 122 (1992) (stating that some coalition governments in proportional representation systems are stable). But note that some parliamentary leaders mitigate the instability of coalition governments by requiring coalition partners to agree to support the coalition for a specified period of time, as was

1974 concluded that majority governments survive for an average of fifty-five months whereas coalition governments last for less than half that length of time: an average of twenty-six months.<sup>305</sup> This difference may be explained by several related reasons: (1) given that Cabinet ministers in the governing coalition may come from different political parties, they have different constituencies and different interests that may cause them to take conflicting positions; (2) ministers may take positions that undermine the stability of the coalition in the interest of demonstrating their autonomy; and among others (3) government and party leaders in the coalition face the complex task of managing what may be an uneasy alliance whose creation was based on convenience and the possibilities of power.<sup>306</sup> These and other considerations combine to create a government that does not exhibit the legislative efficiency enjoyed by a parliamentary majority government. Quite the contrary, a coalition parliamentary government displays the very legislative inefficiency that is usually ascribed to presidential systems.

*B. Efficiency in Presidential Systems*

The American Founding Fathers adopted the separation of powers in an effort to avoid what they perceived to be the dangers of parliamentarism.<sup>307</sup> But even the American model of separated powers is not impervious to the creeping tendencies of parliamentarism. One such parliamentary quality that we may discern in American presidentialism at various points throughout history is legislative efficiency. The very same measure of legislative efficiency that characterizes parliamentary systems—in which the head of government finds very few impediments to implementing his legislative program with a majority in the legislature—is achievable in presidential systems during periods of unified government. Unified government exists when the same political party holds the presidency and controls a majority of seats in each of the houses of the legislature.<sup>308</sup>

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the case following the 2002 New Zealand parliamentary elections when the Labour Party invited the United Future Party to join its governing coalition on the condition that it support the coalition for three years. *See* Inter-Parliamentary Union, *New Zealand*, 36 CHRONICLE OF PARLIAMENTARY ELECTIONS 152, 154 (2003). It is equally important to note that some proportional representation electoral systems are expressly designed to foreclose the possibility of coalition government. For instance, under the Greek proportional representation electoral model the political party earning the highest popular vote total is awarded bonus parliamentary seats that allow it to govern with an absolute parliamentary majority—even if its popular vote total is lower than fifty percent. *See* Inter-Parliamentary Union, *Greece*, 34 CHRONICLE OF PARLIAMENTARY ELECTIONS 58, 60 (2001) (reporting that the Panhellenic Socialist Movement Party won the highest popular vote total of all political parties with 43.79% in the 2000 parliamentary election but was awarded supplemental parliamentary seats that allowed it hold a majority in the Parliament: 158 out of 300 seats).

305. LAWRENCE C. DODD, COALITIONS IN PARLIAMENTARY GOVERNMENT 10-11 (1976).

306. NAUNIHAL SINGH, A SYSTEM OF GOVERNANCE: PARLIAMENTARY OR PRESIDENTIAL 70-71 (1998).

307. Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquicentennial Reflection*, 16 CONST. COMMENTARY 51, 58 (1999).

308. James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of*

The executive may freely pursue its legislative program in times of unified government<sup>309</sup> because it is less likely that the legislature will check the executive as vigorously as it would under a divided government.<sup>310</sup> Given their common political party membership, the executive head and the legislative majority are more likely to converge on political ideology, interests and priorities.<sup>311</sup> They are also less likely to clash over institutional authority and jurisdiction.<sup>312</sup> Unified government undermines the presidentialist structure of interlocking supervisory checks among branches of government because it often results in diminished legislative oversight of the executive<sup>313</sup> and an eager willingness of the legislature to accede to executive requests.<sup>314</sup>

This state of affairs resembles the free reign that majoritarian heads of government enjoy in parliamentary systems. Unified government reduces legislative obstacles and exhibits enhanced productivity,<sup>315</sup> and it undermines the traditional view that the American Constitution prevents the President from pushing through his legislative programs.<sup>316</sup> This therefore gives rise to conditions comparable to those under which a prime minister governs: power becomes concentrated in the executive rather than dispersed between the executive and the legislature—the very opposite of the conventional account of presidential power.<sup>317</sup> Accordingly, in times of unified government, the President enjoys a measure of legislative success that eludes Presidents in periods of divided government.<sup>318</sup>

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*the Ongoing Debate in Congress*, 53 CATH. U.L. REV. 1049, 1071 (2004).

309. Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 795 (2000).

310. Eric A. Posner & Adrian Vermuele, *The Credible Executive*, 74 U. CHI. L. REV. 865, 887-88 (2007). *But see* CHARLES O. JONES, SEPARATE BUT EQUAL BRANCHES: CONGRESS AND THE PRESIDENCY 12-13 (2d ed. 1999) (illustrating that divided government does not always foretell an adversarial relationship).

311. Paul J. Quirk & Bruce Nesmith, *Divided Government and Policy Making: Negotiating the Laws*, in THE PRESIDENCY AND THE POLITICAL SYSTEM 565, 580 (Michael Nelson ed., 5th ed. 1998).

312. STEVEN A. SHULL, PRESIDENTIAL-CONGRESSIONAL RELATIONS: POLICY AND TIME APPROACHES 15 (1997); Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61, 107 (2006).

313. David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1125 (2007); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 520 n.113 (2006); Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 657 (2006).

314. Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1594 n.292 (2007).

315. *See, e.g.*, John J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821, 832 (1999).

316. *See* George C. Edwards III, *Director or Facilitator?: Presidential Policy Control of Congress*, in THE MANAGERIAL PRESIDENCY 285, 285 (James P. Pfiffner ed., 2d ed. 1999).

317. *See, e.g.*, Richard Rose, *The Job at the Top: The Presidency in Comparative Perspective*, in THE PRESIDENCY AND PUBLIC POLICY MAKING 3, 6 (George C. Edwards III et al. eds., 1985).

318. James A. Thurber, *An Introduction to Presidential-Congressional Rivalry*, in RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS 1, 10-12 (James A. Thurber ed., 2d ed.

An unsurprising consequence of unified government is a decline in the frequency of presidential vetoes.<sup>319</sup> Another consequence is that delegations of power to administrative agencies tend to be very broad, for instance during the period of consolidated authority in the 1930s, and less so under divided government, as was the case in the 1970s.<sup>320</sup> Relatedly, it has been demonstrated that the President has historically been granted greater control over administrative agencies when those agencies were created during periods of unified, rather than divided, government.<sup>321</sup>

Yet another important historical consequence of unified government has been the expansion of the size of federal appellate courts. One study illustrated that during the period of thirty-six unified governments, Congress increased the size of federal appellate courts twenty-one times as opposed to the twenty-five periods of divided government, when this happened only four times.<sup>322</sup> On a related point, of the forty-five Supreme Court nominations made during periods of unified government, only two were rejected by the Senate. In contrast, of the fifteen nominations made during periods of divided government, the Senate

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2002); James A. Thurber, *Conclusions about Congressional-Presidential Rivalries*, in RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS, *supra*. Consider that the Clinton Administration entered office in a period of unified government which lasted for two years. In those two years, the Clinton Administration enjoyed the third highest rate of legislative success since *Congressional Quarterly* began tracking this indicator. See JAMES W. DAVIS, *THE AMERICAN PRESIDENCY* 327 (2d ed. 1995). In a study of presidential-congressional relations from 1953 to 1984, the presidential success on Senate and House roll call votes was 76.3% and 74.7%, respectively, in periods of unified government. In contrast, during period of divided government, presidential success on the same measure was 53.7% and 54.1%, respectively. JON R. BOND & RICHARD FLEISCHER, *THE PRESIDENT IN THE LEGISLATIVE ARENA* 74-75 (1990). But see DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS*, 1946-2002, at 3 (2d ed. 2005) (claiming that unified government is no more productive than divided government); MICHAEL FOLEY & JOHN E. OWENS, *CONGRESS AND THE PRESIDENCY: INSTITUTIONAL POLITICS IN A SEPARATED SYSTEM* 412-13 (1996) (defending the virtues of divided government); CHARLES O. JONES, *THE PRESIDENCY IN A SEPARATED SYSTEM* 195-201, 287-88 (1994) (contending that divided governments are not consigned to deadlock); Roberta Q. Herzberg, *Unity Versus Division: The Effect of Divided Government on Policy Development*, in *DIVIDED GOVERNMENT: CHANGE, UNCERTAINTY, AND THE CONSTITUTIONAL ORDER* 173, 174 (Peter F. Galderisi et al. eds., 1996) (arguing that divided government is only one of several factors in explaining the success or failure of policy); Michael J. Malbin, *Was Divided Government Really Such a Big Problem?*, in *SEPARATION OF POWERS AND GOOD GOVERNMENT* 219, 220-21 (Bradford P. Wilson & Peter W. Schramm eds., 1994) (stating that divided governments do not necessarily lead to stalemate). Interestingly, one scholar has argued that gridlock is more likely when different parties control each congressional chamber than when different parties control the presidency and the Congress. See JEN REITH SCHROEDEL, *CONGRESS, THE PRESIDENT, AND POLICYMAKING* 133-34 (1994).

319. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 953 (2005).

320. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 784 n.28 (1999).

321. Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 290 (2006).

322. Emerson H. Tiller & Frank B. Cross, *Colloquy, A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 219-20 (1999).

rejected three.<sup>323</sup> There is perhaps a simple explanation for these two divergent findings: congressional action during periods of unified government may be bolder and more aggressive in the face of weak opposition than during periods of divided government where entrenchment efforts are more difficult to realize.<sup>324</sup> It is therefore evident that unified government dramatically increases the power of the President to control political and legislative outcomes in a receptive majority legislature.<sup>325</sup>

In their important article recasting separation of powers theory, Levinson and Pildes suggest innovative strategies to moderate the might of unified governments and to equip the minority congressional party with legislative tools to counteract the power of a unified government and to hold accountable the majority presidential and congressional party—something that the majority party cannot be expected to do in periods of unified government, particularly in times of real or imagined constitutional crisis.<sup>326</sup> They propose a set of parliamentary opposition rights for the minority party, for instance, auditing and investigative powers that may help the minority to hold the majority accountable. This would also be accomplished with minority party veto rules like supermajority voting requirements, and by insulating administrative agencies from political control by giving them the powers to discharge their duties independently of the party in power.<sup>327</sup> These recommendations are all the more useful in presidential systems when we consider what Mark Tushnet calls the “one-way ratchet,” a term he uses to describe the difficulty of repealing or revising laws passed under unified government: “what is done under unified government cannot be undone under divided government.”<sup>328</sup>

Nonetheless, it is important to recognize that unified government does not always lead to the equivalent of a majority parliamentary government. One need only look to the most recent unified government in the United States when the Republican Party held not only the presidency but also the House of Representatives and the Senate. Even under those conditions, the legislative process continued to be slowed by obstruction and delay.<sup>329</sup> Only a filibuster-

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323. Kevin J. McMahon, *Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model*, 32 LAW & SOC. INQUIRY 919, 922 (2007); see also Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 411-33 (illustrating different success rates for Supreme Court nominations under divided and unified government).

324. John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J. LAW & ECON. 435, 451-52 (1996).

325. Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 239 (2003).

326. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2352 (2006).

327. *Id.* at 2370-78.

328. Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 64 (2003).

329. Michael J. Gerhardt, Essay, *The New Religion*, 40 CREIGHTON L. REV. 399, 405 (2007);

proof unified government could circumvent these built-in barriers to legislative efficiency in presidential systems. But even then, as one scholar notes, such supermajority governments have been rare in American history.<sup>330</sup> Moreover, transformational changes under unified government may also face resistance from non-legislative actors, for instance bureaucrats as well as political interest and pressure groups.<sup>331</sup> Still, unified presidential government is an inviting framework within which the governing party may pursue its legislative agenda on a path of lessened resistance that approximates the conditions facing majority parliamentary governments.

#### V. CONCLUSION

Presidential and parliamentary systems exhibit many more functional parallels than their distinctive structural features might otherwise suggest. This observation underscores the limitations of existing constitutional theory and makes plain that conventional constitutional conceptions of presidentialism and parliamentarism are not only limited but quite often mistaken. The immediate implication of this conclusion is significant: the distinction between presidentialism and parliamentarism is not as clear as once thought. The larger implication is intriguing: as political culture becomes normalized across constitutional states, whether a state has adopted presidentialism or parliamentarism may become less important than whether that state has assimilated fundamental democratic mechanisms within its constitutional structure.

Modern statecraft demonstrates that the caricatures of presidentialism and parliamentarism are rarely enshrined wholesale in constitutional charters. States instead often introduce indigenous wrinkles to traditional models of presidentialism and parliamentarism in order to achieve objectives that are anchored in politically and culturally specific contexts. These presidential and parliamentary innovations signal that presidentialism and parliamentarism are receptive to modern renovations, and lay bare the richness of constitutional possibilities that these two systems offer the democratic and democratizing citizens of the world.

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Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 235 (2006); David S. Law & Lawrence B. Solum, *Positive Political Theory and the Law: Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 89 (2006); Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 29 U. RICH. L. REV. 871, 898 (2005); see also Mark Silverstein & William Haltom, *You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J.L. & POLITICS 459, 472 (1996) (discussing hindrances posed by unified government during the Clinton Administration).

330. David Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 512 (2005).

331. Mark Tushnet, *The Supreme Court 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 74 (1999).