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# PANEL V: WHAT CAN WE LEARN FROM OTHER NATIONS’ EXPERIENCES?

## DEMOCRATIC DYSFUNCTION AND CONSTITUTIONAL DESIGN

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*Is America’s political dysfunction connected to the design of the Constitution? This Essay argues that it is the interaction of various factors – constitutional, political, institutional, and civic – that produces dysfunction in governance. Part I of this Essay develops a typology of dysfunction that distinguishes among constitutional, political, institutional, and civic dysfunction. It draws on a number of examples from U.S. politics to illustrate each category of dysfunction, and also considers the available empirical evidence. Part II examines the comparative literature on presidential and parliamentary systems, and concludes that, while presidential systems are less robust than parliamentary ones, there is little consensus in the empirical literature about the reasons for this. Part III proposes an “optimal constraint theory of governance” to explain why some governmental systems function more effectively than others. The basic idea is that democratic governance involves a trade-off between mechanisms that constrain governmental action, on the one hand, and mechanisms that either allow for governmental action or that relieve constraints via “anti-deadlock” mechanisms, on the other. When*

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*applied to the United States, the optimal constraint theory suggests that a number of factors generate too great a constraint on governmental action, thereby producing dysfunction.*

#### INTRODUCTION

The government shutdown of 2013 has prompted fears that the United States is facing a deep-seated crisis of governance. The dispute over the Affordable Care Act, and the consequent gridlock over the budget and debt ceiling, were described by some as a hostage taking by a radical Tea Party minority in Congress.<sup>1</sup> Was this recent crisis caused by partisan redistricting, the campaign finance regime, toxic partisanship, or the design of the Constitution? While there are competing theories over what caused the crisis, the issue of political dysfunction undoubtedly presents a considerable challenge to democratic governance. A record-high one-third of Americans think that governmental dysfunction is the most serious problem facing the country, even more serious than the economy and unemployment.<sup>2</sup> Not surprisingly, the approval rating of Congress has sunk to an all-time-low of five percent.<sup>3</sup>

This Essay addresses the following questions: Is governmental dysfunction connected to the design of the Constitution? Do constitutional structures matter for the performance of democratic governments? Or do other factors, such as political, institutional, and civic characteristics or defects, produce dysfunction? In a system of governance, it is difficult to pinpoint a single cause of any given phenomenon. Nevertheless, it is worth observing that the current level of political dysfunction has not been constant over time. The ebbs and

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<sup>1</sup> Thomas L. Friedman, *Our Democracy Is at Stake*, N.Y. TIMES, Oct. 2, 2013, at A23 (“What is at stake in this government shutdown forced by a radical Tea Party minority is nothing less than the principle upon which our democracy is based: majority rule.”).

<sup>2</sup> Frank Newport, *Dysfunctional Gov’t Surpasses Economy as Top U.S. Problem*, GALLUP (Oct. 9, 2013), <http://www.gallup.com/poll/165302/dysfunctional-gov-surpasses-economy-top-problem.aspx>, archived at <http://perma.cc/GPV9-FCKX> (showing that one-third of Americans think that dysfunctional government is the most important problem facing America today, as compared to nineteen percent of Americans thinking that unemployment/jobs, as well as twelve percent of Americans thinking that the economy in general is the most important problem facing America).

<sup>3</sup> Calvin Woodward & Jennifer Agiesta, *AP-GfK Poll: Republicans Get Most Blame for Shutdown*, ASSOCIATED PRESS (Oct. 9, 2013), <http://ap-gfkipoll.com/featured/our-latest-poll-findings-23>, archived at <http://perma.cc/E435-SP4N> (“Congress is scraping rock bottom, with a ghastly approval rating of 5 percent.”).

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flows of dysfunction suggest that the structural features of the Constitution do not alone account for the dysfunction in governance that we see today.

This Essay makes three main claims. First, it argues that the *interaction* of various factors – constitutional, political, institutional, and civic – produce dysfunction in governance.<sup>4</sup> That is, the design of the constitutional framework does not alone account for dysfunction. To support this claim, this Essay develops a typology of dysfunction. This typology elaborates and distinguishes four main categories of dysfunction: (1) constitutional dysfunction, (2) political dysfunction, (3) institutional dysfunction, and (4) civic dysfunction.<sup>5</sup> Drawing examples of each kind of dysfunction from U.S. politics, this Essay also considers the arguments, counterarguments, and empirical evidence with respect to the contribution of each factor to governmental dysfunction. It addresses a wide array of issues, including constitutional structures, partisan redistricting, campaign finance regulation, the role of political parties, the rise of partisan polarization and extremism, open and closed primaries, gridlock in Congress, the Senate filibuster, senatorial holds on presidential nominees, the breakdown of civility and political norms, and the failure to engage in cooperation and compromise.

Second, this Essay examines the comparative literature on presidential and parliamentary systems, and concludes that while presidential systems are less robust than parliamentary ones, the reasons for this are unclear. Although constitutional structures do matter for the performance of democratic regimes, the empirical evidence does not provide a definitive answer about which structures matter and why. The research does seem to suggest, however, that dysfunction is connected to the particular combination of factors at work.

Third, this Essay proposes a preliminary theory about why some governmental systems are better positioned to function in the face of various constitutional, political, institutional, and civic factors. I refer to this proposal as an “optimal constraint theory of governance.” The basic claim is that democratic governance involves a tradeoff between mechanisms that constrain governmental action, on the one hand, and mechanisms that either allow for governmental action or that relieve constraints via “anti-deadlock” mechanisms, on the other. Political systems that strike an optimal balance between these competing impulses are best positioned to govern effectively. Although such optimally constrained systems are relatively less vulnerable to

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<sup>4</sup> The focus of this Essay is on *dysfunction* in governance, rather than failure in governance. Arguments about dysfunction can be distinguished from arguments about failure. See James E. Fleming, *Successful Failures of the American Constitution*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 29, 33 (Jeffrey K. Tulis & Stephen Macedo eds., 2010) (describing Professor Sanford Levinson’s book as being concerned with dysfunction rather than failure).

<sup>5</sup> This typology is based on Professor James Fleming’s distinction between constitutional, political, institutional, moral, or policy failures. See *id.* at 30 (“We might also ask, how does a constitutional failure differ from or relate to other types of failure—for example, a moral, political, or institutional failure or a failure of policy?”).

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constitutional, political, institutional and civic dysfunction, they pose other risks including reduced political accountability. The Essay draws on various examples, including the United States and Canada, to illustrate this idea.

When applied to the United States, the optimal constraint theory suggests that a number of interacting factors generate too great a constraint on governmental action, thereby producing dysfunction. These interacting factors include (1) the constitutional structures of presidentialism, (2) political factors such as the rise of highly disciplined and highly ideological political parties, (3) institutional factors such as the deadlocks created by the filibuster, and (4) civic factors such as the rise of hyperpartisanship and the decline in compromise and cooperation. During times of politically divided government, these factors interact with one another to produce dysfunction in governance. In sum, the design of the U.S. constitutional system does not alone account for the dysfunction in governance; instead, the interaction of constitutional, political, institutional, and civic factors significantly constrains governmental action, with dysfunction as a consequence.

This Essay is divided into three sections. Part I develops a typology of dysfunction: constitutional, political, institutional, and civic dysfunction. Part II turns to a comparative examination of the connection between constitutional design and the performance of democratic regimes. Part III proposes an optimal constraint theory of governance to explain why some constitutional structures are better positioned to function in the face of various constitutional, political, institutional, and civic factors.

#### I. A TYPOLOGY OF DYSFUNCTION

This Part sets out a typology of dysfunction: constitutional, political, institutional, and civic dysfunction. This typology is not meant to be comprehensive; instead it provides illustrative examples of various kinds of dysfunction from U.S. politics. In addition, the categories are not rigidly demarcated, and some examples of dysfunction could easily fit under more than one category. For each category I canvass some of the arguments, counterarguments, and empirical evidence with respect to dysfunction.

##### A. *Constitutional Dysfunction*

Sanford Levinson has argued that the “Constitution is both insufficiently democratic, in a country that professes to believe in democracy, *and* significantly dysfunctional, in terms of the quality of government that we receive.”<sup>6</sup> Levinson has criticized various “hard-wired” aspects of the Constitution on the grounds that they are either undemocratic, dysfunctional, or both. For example, Levinson argues that the malapportioned Senate is not only democratically illegitimate, but its unequal representation results in

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<sup>6</sup> SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 9 (2006).

various policy distortions such as the redistribution of resources from large states to small states.<sup>7</sup> The Constitution's multiple veto points – including bicameralism and the presidential veto power – create serious obstacles to policy formation and implementation.<sup>8</sup> Presidents wield too much power, particularly in the context of emergencies.<sup>9</sup> To make matters worse, Presidents cannot be removed from office even when they are incompetent.<sup>10</sup> The process by which the President is selected – via the Electoral College – is undemocratic because it can produce a President who did not win a majority of votes. In addition, the life tenure of Supreme Court Justices serves to entrench the political leanings of the appointing Presidents.<sup>11</sup>

In addition to the hard-wired aspects of the Constitution, we can also identify various rules that might be described as “subconstitutional.” These subconstitutional rules establish the structures of the political process. Two sets of rules – those that regulate electoral redistricting and those that regulate campaign finance – are often associated with dysfunction. Partisan redistricting, for instance, often produces election districts that fall securely in the hands of one political party. This electoral safety creates few incentives for representatives to tuck to the center. For this reason, some view partisan redistricting as resulting in the election of extremist candidates who are unwilling to engage in compromise during the legislative process. The available evidence, however, does not seem to show that partisan redistricting is the cause of the rise of partisan polarization. Redistricting has some effect on increasing partisan polarization because it results in more homogenous districts, but the overall impact is relatively minor.<sup>12</sup> In addition, gerrymandering does not explain the rise of partisanship in the Senate given that senators are elected in statewide elections.<sup>13</sup>

With respect to campaign finance regulation, critics argue that money is the “curse of our politics”<sup>14</sup> and that campaigns are “expensive and nasty.”<sup>15</sup>

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<sup>7</sup> *Id.* at 49, 59.

<sup>8</sup> *Id.* at 38.

<sup>9</sup> *Id.* at 107 (“[T]he present Constitution does not offer a clear understanding of the limits of presidential power, particularly during times of presidentially perceived emergencies.”); see also BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 266 (2005) (“The Framers’ misunderstanding of the presidency was the biggest of their mistakes.”).

<sup>10</sup> LEVINSON, *supra* note 6, at 79.

<sup>11</sup> *Id.* at 127-35.

<sup>12</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 46 (2012).

<sup>13</sup> Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 *DRAKE L. REV.* 989, 1013 (2013) (“Partisan gerrymandering, too, seems to be exaggerated as a source of extreme partisanship, and district lines do nothing to explain increasing partisanship in the Senate, where all Senators are elected in statewide elections.”).

<sup>14</sup> RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?* 128 (2006).

<sup>15</sup> ALAN WOLFE, *DOES AMERICAN DEMOCRACY STILL WORK?* 14 (2006).

Politicians spend an inordinate amount of time and effort raising money, and consequently, they have less time for developing policy. There are competing views, however, as to whether campaign finance regulation is the cause of dysfunction in governance. The evidence of roll call votes does not show a connection between campaign finance contributions and legislative influence,<sup>16</sup> or between campaign finance regulation and distrust in government.<sup>17</sup> Critics argue in response that legislative influence is more indirect and invisible since it involves access to elected officials and changes to the legislative agenda. Lawrence Lessig argues, for instance, that the most powerful form of corruption in Washington is so-called “dependence corruption” in which the institutions themselves have become corrupted “because the pattern of influence operating upon individuals within that institution draws them away from the influence intended.”<sup>18</sup> Dependence corruption occurs as a result of a gift economy based on the giving and receiving of political favors, without actual bribery or quid pro quo exchanges.<sup>19</sup> Dependence corruption leads to distortions in policy because the objectives of donors are most likely different than the objectives of the general electorate.<sup>20</sup>

According to Richard Hasen, the problem with the current campaign finance model is the rise of inequality and the decline in national economic welfare that results from the rent seeking orchestrated by lobbyists.<sup>21</sup> Hasen argues, in addition, that the causal relationship between campaign finance regulation and a dysfunctional political system is overblown. Even if the campaign finance regime were reformed, the political system would not be fixed.<sup>22</sup> The problem with Washington is not money in politics, but a host of other issues including a toxic partisan dynamic and resulting political gridlock, a culture of ideological warfare, the decline in civility, the emergence of deeply polarized views on the public interest, and structural obstacles such as the Senate filibuster.<sup>23</sup>

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<sup>16</sup> Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 116 (2003).

<sup>17</sup> Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 568 (2012) (citing Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004)).

<sup>18</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 231 (2011).

<sup>19</sup> *Id.* at 107, 110 (“A gift economy is grounded upon relationships, not quid pro quo.”).

<sup>20</sup> *Id.* at 232-33 (“‘The funders’ are not ‘the People’; why would you expect the dance necessary to attract ‘the funders’ to be the same dance necessary to attract ‘the People’?”).

<sup>21</sup> Hasen, *supra* note 17, at 551-52 (stating that the real concern should be “with the decline in national economic welfare that occurs thanks to lobbyist-facilitated rent-seeking” (citing Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 193-94 (2012))); Hasen, *supra*, at 193-94 (detailing the left and right’s criticisms of lobbyists and the role of campaign contributions in Washington politics).

<sup>22</sup> See Hasen, *supra* note 17, at 552 (“Even if the authors’ complete reform agendas were enacted and the amount of rent-seeking legislation procured by lobbying significantly curbed, it is far from clear that Washington would be ‘fixed.’”).

<sup>23</sup> *Id.*

B. *Political Dysfunction*

Although the Framers, in particular Madison, were animated by fears of faction, the Constitution does not mention political parties.<sup>24</sup> Yet political parties have transformed the constitutional order.<sup>25</sup> During times of one-party dominance – where one party controls both Houses of Congress and the presidency – the governing party is in a position to govern effectively but there is no serious oversight of the executive branch.<sup>26</sup> During times of divided government – where one party controls the presidency and the other party controls one or both houses of Congress – the main disadvantage is gridlock.<sup>27</sup> As Daryl Levinson and Richard Pildes have argued, the Madisonian “separation of powers” has been replaced by a “separation of parties.”<sup>28</sup>

Not only have political parties changed the operation of politics, but also their effect has changed over time with the rise in political partisanship.<sup>29</sup> As a number of studies have concluded, political parties today are far more ideologically unified and cohesive than they were in the past.<sup>30</sup> There is no longer any ideological overlap between the most conservative Democrats and the most liberal Republicans.<sup>31</sup> Political scientists have argued that various realignments and political developments in the South led to the rise of partisanship.<sup>32</sup> Because the House lost almost all of its Southern conservative Democrats, the Democratic Party became more homogenous and left of

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<sup>24</sup> See THE FEDERALIST NO. 10, at 72-73 (James Madison) (Clinton Rossiter ed., 2003).

<sup>25</sup> SANFORD LEVINSON, FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 233 (2012) (stating that the rise of political parties as seen in the United States today transcends Madison’s arguments).

<sup>26</sup> LEVINSON, *supra* note 6, at 66 (“The capture of both houses of Congress and the presidency by the same party significantly diminishes the possibility of serious legislative oversight of the executive branch.”).

<sup>27</sup> See Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2065-68 (2013) (describing gridlock as an absence of legislative action).

<sup>28</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (stating that the separation of powers doctrine is anachronistic and has been replaced by competition between the parties).

<sup>29</sup> For a discussion of the democratic legitimacy of partisanship, see Yasmin Dawood, *Democracy and the Problem of the Partisan State*, in LOYALTY: NOMOS LIV 257, 258-59 (Sanford Levinson et al. eds., 2013).

<sup>30</sup> See MANN & ORNSTEIN, *supra* note 12, at 44-45 (stating that all the evidence indicates that there is high unity within the parties today).

<sup>31</sup> *Id.* at 45 (“[F]or the first time in modern history, in both the House and Senate, the most conservative Democrat is slightly more liberal than the most liberal Republican.”).

<sup>32</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 11-12 (2006) (stating that political developments in the South over the past fifty years changed the partisan dynamic in Congress and the ideological composition of the parties); see also NELSON W. POLSBY, HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE 80-96 (2004) (detailing the rise of the Republican Party in the South).

center.<sup>33</sup> Meanwhile the Republican Party, partly in response to the realignment in the South, became even more conservative.<sup>34</sup> The creation of majority-minority districts was also a factor in creating more ideological parties.<sup>35</sup> In addition, various House rules that privileged the majority party and shut out the minority party contributed to the rise in partisanship,<sup>36</sup> as did changes to the committee structure which gave rise to greater party discipline.<sup>37</sup> Primaries might also play an important role in increasing partisanship.<sup>38</sup> Republican candidates, for instance, tack to the right to avoid losing to Tea Party candidates in the primaries.<sup>39</sup> It should be noted, however, that the available evidence does not support the view that open primaries lead to greater moderation,<sup>40</sup> or that closed primaries lead to partisan polarization.<sup>41</sup>

### C. *Institutional Dysfunction*

There is a general lament that Congress is a “broken branch.” The rise in partisan polarization has had a notable impact on congressional dysfunction. Hyperpolarized parties lead either to unified government without meaningful checks or divided government that is deadlocked.<sup>42</sup> In addition, as Richard Pildes argues, the disappearance of the center in Congress means that we should expect to see more stalemates in the future than in the past during times of divided government.<sup>43</sup>

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<sup>33</sup> MANN & ORNSTEIN, *supra* note 32, at 11.

<sup>34</sup> *Id.* at 11-12.

<sup>35</sup> See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 292 (2011) (“As one major study puts it, ‘[c]onscious reapportionment in the 1990s then pushed both black and white Southerners out to the extremes.’”).

<sup>36</sup> *Id.* at 319 (stating that formal rules and informal practices have enabled party leaders to get lock-step voting out of party members, resulting in polarization).

<sup>37</sup> *Id.* at 320 (describing how structural changes to the committee meant committee chairs had to gain and maintain approval of their party’s leadership).

<sup>38</sup> Pildes, *supra* note 35, at 284 (“One of the principal mechanisms prohibiting the emergence of centrists is the party primary.”).

<sup>39</sup> See, e.g., *Republicans Dominate Campaign Fundraising in Texas*, YOUR HOUS. NEWS (Feb. 3, 2014, 9:39 AM), [http://www.yourhoustonnews.com/magnolia/news/republicans-dominate-campaign-fundraising-in-texas/article\\_f5e38974-8ce8-11e3-ad34-001a4bcf887a.html](http://www.yourhoustonnews.com/magnolia/news/republicans-dominate-campaign-fundraising-in-texas/article_f5e38974-8ce8-11e3-ad34-001a4bcf887a.html), archived at <http://perma.cc/4P5A-Z6DN> (remarking that Republican “candidates take ever-more hard-right positions to win over tea party activists”).

<sup>40</sup> Hasen, *supra* note 13, at 1012 (citing studies finding little evidence that open primaries produced moderation by legislatures).

<sup>41</sup> Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology*, AM. J. POL. SCI. 1, 1 (2013) (“We find that the openness of a primary election has little, if any, effect on the extremism of the politicians it produces.”).

<sup>42</sup> Pildes, *supra* note 35, at 327.

<sup>43</sup> *Id.* at 326 (“If we enter into periods of divided government again, I expect government to be far more paralyzed and stalemated than in the past.”).



The counterargument is that congressional dysfunction has been overstated. David Mayhew argues that even during periods of divided government, Congress has passed significant legislation.<sup>44</sup> An analysis of the long-run performance of Congress shows that the House and Senate have not been predominantly antimajoritarian institutions.<sup>45</sup> According to Mayhew, many of the alleged major and systemic problems of both chambers have proven to be short-term, limited, or correctable.<sup>46</sup>

Legislative paralysis on certain issues, however, does have the effect of shifting decisionmaking power to other bodies, such as the Supreme Court and the President.<sup>47</sup> For example, the Supreme Court's recent decision in *Shelby County* striking down section 4 of the Voting Rights Act is an example of how the Court gains power when Congress is unable to act.<sup>48</sup> It is unlikely that Congress will agree upon a new coverage formula. Consequently, Congress's failure to act effectively means that the Supreme Court's verdict on section 4 of the Voting Rights Act will be the final word, with the result that the preclearance process is unlikely to be reinstated.

Another prominent example of institutional dysfunction is the use of the filibuster in the Senate. The filibuster, which is a right to unlimited debate, is used to stall the passage of legislation. The debate can be brought to an end only when cloture is invoked, which requires sixty votes under Senate rules.<sup>49</sup> It is no longer necessary for the debate to even take place; a filibuster essentially triggers a sixty-vote supermajority requirement to pass a piece of legislation in the Senate.<sup>50</sup> In November 2013 the Senate decided in a fifty-two to forty-eight vote to end the filibuster for most executive and judicial nominees.<sup>51</sup> Supreme Court nominees and ordinary legislation, however,

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<sup>44</sup> DAVID R. MAYHEW, *DIVIDED WE GOVERN* 206 n.19 (2d ed. 2005) (discussing, for instance, how the 1993 budget and economic plan – one of the four most significant legislative acts of Clinton's presidency – overcame unanimous Republican opposition).

<sup>45</sup> *Id.* at 168-69 (describing how Republican Congressman John B. Anderson said that he “had switched sides on the consumer agency because of what constituents told him when he visited his district”).

<sup>46</sup> *Id.* at 189-90.

<sup>47</sup> Robert B. Reich, *The Real Price of Congress's Gridlock*, N.Y. TIMES, Aug. 14, 2013, at A23 (stating that Congress's paralysis has encouraged the Supreme Court and the President to enter the fray).

<sup>48</sup> See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (finding unconstitutional the Voting Rights Act provision setting forth the coverage formula).

<sup>49</sup> *Filibuster and Cloture*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Clature.htm](http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm) (last visited Feb. 4, 2014), *archived at* <http://perma.cc/3DTR-DSKL> (“In 1975, the Senate reduced the number of votes required for cloture from two-thirds to three-fifth, or 60 of the current one hundred senators.”).

<sup>50</sup> Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1003 (2011) (arguing that the filibuster “is best understood in terms of a sixty-vote requirement to pass most bills and other measures through the Senate”).

<sup>51</sup> Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES,

would still be subject to the filibuster.<sup>52</sup> In addition to the filibuster there is also the practice of allowing individual senators to place holds on presidential nominees for judicial and executive branch positions.<sup>53</sup> The practice of blocking nominees for these positions has noticeable effects on the functioning of government. Some scholars have argued, however, that various practices such as the filibuster and closed primaries are not the cause of dysfunction but rather its manifestation.<sup>54</sup> Hasen argues, for instance, that if the Court were to strike down the filibuster, it might only shift the dysfunction to another area rather than ameliorate it.<sup>55</sup>

#### D. *Civic Dysfunction*

Civic dysfunction refers to the politics of partisan extremism, the breakdown of civility and political norms, the decline of deliberation, and the failure to engage in cooperation and compromise. Some would argue that civic dysfunction is the real cause of dysfunctional governance. Sotirios Barber argues, for instance, that “constitutional failure is at bottom as much or more an attitudinal than an institutional matter.”<sup>56</sup> As Amy Gutmann and Dennis Thompson observe, “governing a democracy without compromise is impossible.”<sup>57</sup> The intensely partisan and ideological nature of political competition means that politicians will block the passage of legislation in the public interest in order to prevent the other party from enjoying an electoral advantage.<sup>58</sup> This failure to compromise is characteristic of the current mindset of politicians – a mindset that is fostered by the demands of a permanent campaign.<sup>59</sup>

The rise in civic dysfunction no doubt has many complex causes, some of which relate to the same forces that have led to increasing levels of partisan polarization. As Richard Pildes observes, extreme partisan polarization is now the “defining attribute” of the U.S. political system.<sup>60</sup> The current political

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Nov. 21, 2013, at A1 (stating that the Senate ended the minority party’s ability to filibuster most presidential and judicial branch nominees).

<sup>52</sup> *Id.*

<sup>53</sup> LEVINSON, *supra* note 25, at 159 (stating that individual senators sometimes place “holds” on presidential nominees, and that the Senate will not consider actual confirmation until the hold is lifted).

<sup>54</sup> Hasen, *supra* note 13, at 1009.

<sup>55</sup> *Id.* at 1011.

<sup>56</sup> Sotirios A. Barber, *Constitutional Failure: Ultimately Attitudinal*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY*, *supra* note 4, at 13, 13-14.

<sup>57</sup> AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE 1* (2012).

<sup>58</sup> *Id.* at 23 (“[U]ncompromising pressures are persistent in a democratic process in which campaigning dominates governing.”).

<sup>59</sup> *Id.* at 2.

<sup>60</sup> Pildes, *supra* note 35, at 273 (“Over the last generation, American democracy has had one defining attribute: extreme partisan polarization.”).

climate is marked by the hatred, stereotyping, and contempt that each side shows for the other, as well as the “lack of any decent argument in American political life.”<sup>61</sup> In addition, a partisan media also serves to fuel the politics of contempt.<sup>62</sup> The recent government shutdown exemplifies the effect of toxic partisanship on governance.

In sum, there are a number of factors that appear to contribute to the dysfunction in U.S. governance. Of all the factors examined above in the typology, the most relevant factors appear to be the rise of highly ideological political parties, the use of the filibuster, the increase in partisanship, and the decline of compromise in the legislature. The next Part considers the connection between the overall institutional form – the presidential system in the United States – and dysfunction in governance.

## II. DO CONSTITUTIONAL STRUCTURES MATTER?

This Part places the U.S. example within a larger comparative literature that examines the comparative strengths and limitations of presidential and parliamentary systems.

### A. *The Advantages and Disadvantages of Presidential Systems*

Under the classical debate, presidential systems were said to have the following three advantages: (1) executive stability due to the President’s fixed term, (2) greater democracy because of the popular election of the President, and (3) more limited government and greater protection for liberty because of the separation of powers doctrine.<sup>63</sup> The three main disadvantages of presidential systems were said to be: (1) executive-legislative gridlock, (2) temporal rigidity, and (3) a winner-take-all government.<sup>64</sup> Of those three disadvantages, scholars have most heavily criticized the problem of executive-legislative gridlock.<sup>65</sup> Deadlock and paralysis inevitably result when the executive and legislative bodies are in disagreement because no institutional mechanism for resolving the impasse exists.<sup>66</sup> Faced with deadlock, Presidents

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<sup>61</sup> DWORKIN, *supra* note 14, at 4.

<sup>62</sup> Hasen, *supra* note 17, at 582-83 (“Adding to the partisan flames is the newly emergent role of the partisan media.”).

<sup>63</sup> Arend Lijphart, *Introduction*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 1, 11-14 (Arend Lijphart ed., reprinted 2004) (“Presidentialism is said to have the advantages of executive stability, greater democracy, and more limited government . . .” *Id.* at 11.).

<sup>64</sup> *Id.* at 11, 15-20 (discussing how presidentialism is said to have the “disadvantages of executive-legislative deadlock, temporal rigidity, and less inclusive, ‘winner-take-all’ government,” *id.* at 11).

<sup>65</sup> *Id.* at 15 (stating that executive-legislative deadlock in presidential systems “has been the main ground on which presidentialism has been criticized”).

<sup>66</sup> *Id.* (stating that when disagreement between the executive and legislature occurs, “there is no institutional method of resolving it”).

often have resorted to increasing their power.<sup>67</sup> For this reason, presidential systems tend to swing between “normal” situations of deadlock and “crisis” situations marked by surges of presidential power and activism.<sup>68</sup>

Juan Linz’s study of presidential systems focuses on this dynamic of presidential power. Linz’s main argument is that presidentialism suffers from the problem of “dual democratic legitimacy,” which refers to the fact that “no democratic principle exists to resolve disputes between the executive and the legislature about which of the two actually represents the will of the people.”<sup>69</sup> The absence of any principled method to resolve this problem results in institutional rivalry between the two popularly elected branches of government that may eventually trigger a social and political crisis.<sup>70</sup> Linz focused his analysis on Latin America, and the evidence suggested that presidential systems could lead to regime failure when Presidents seize power to break the executive-legislative deadlock.<sup>71</sup>

Linz thus disputes the classical view that presidential systems are more stable, arguing instead that presidential rule is often less predictable.<sup>72</sup> By contrast, prime ministers can, in moments of trouble, shore up their legitimacy by holding either a vote of confidence or new elections.<sup>73</sup> In addition, a prime minister can be replaced without triggering a political crisis.<sup>74</sup> The winner-take-all aspect of presidentialism, however, turns politics into a zero-sum game.<sup>75</sup> The temporal rigidity of the presidential term demarcates the winners and losers for the entire period of the presidency.<sup>76</sup> By contrast, parliamentary systems often lead to power sharing and coalition forming in the event the governing party does not enjoy a majority in the legislature.<sup>77</sup> Linz argues that with the exception of the United States, most of the stable democracies in the Commonwealth and Europe are parliamentary (or semipresidential or

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<sup>67</sup> *Id.* at 16 (“One solution is to keep the two powers separated but to unbalance them; in particular, to increase presidential power . . .”).

<sup>68</sup> Harold J. Laski, *The President and Congress*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT*, *supra* note 63, at 75, 75 (stating that in times of “crisis,” the President’s position is so important that Congress must follow the President’s lead, but in a “normal” situation, the President’s position is much weaker).

<sup>69</sup> Juan J. Linz, *The Perils of Presidentialism*, 1 *J. DEMOCRACY* 51, 63 (1990).

<sup>70</sup> *Id.* at 64 (“[I]nstitutional rivalry may thus assume the character of potentially explosive social and political strife.”).

<sup>71</sup> *See id.* (stating that instability may ensue when the President tries to discredit those who oppose him).

<sup>72</sup> *Id.* at 55 (“[P]residential rule [is] less predictable and often weaker than that of a prime minister.”).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 56.

<sup>76</sup> *Id.* (“The danger that zero-sum presidential elections pose is compounded by the rigidity of the president’s fixed term in office.”).

<sup>77</sup> *Id.*

semiparliamentary), while most of the presidential systems have been unstable or authoritarian.<sup>78</sup> Parliamentary systems are more conducive to stable democracies particularly in those nations with deep political cleavages.<sup>79</sup>

B. *Do Institutions Matter? Critiques and Extensions of Linz*

A number of scholars have questioned Linz's claims about presidential systems. Donald Horowitz, for instance, contests Linz's theory on the grounds that it is based on a skewed and narrow sample of countries, mostly from Latin America.<sup>80</sup> Moreover, Seymour Martin Lipset has argued that the variation between presidential and parliamentary systems is a function of culture, not institutions.<sup>81</sup> According to Lipset, the reason why many Latin American presidential systems have failed, and the U.S. system has not, is a result of economic and cultural factors, and not presidentialism.<sup>82</sup> Other scholars have criticized Linz for relying only on the Latin American countries, which may be unstable for other reasons.<sup>83</sup> Linz's argument has also been challenged by research focusing on the military. On this view, presidential democracies are unstable because they often emerge in countries where the military plays an important political role.<sup>84</sup> Another study shows that poverty is equally important as presidentialism in explaining regime stability.<sup>85</sup>

The "second wave" of presidential/parliamentary studies has focused on other institutional variables (such as the powers of the president, the electoral system, and the party system) and on the differences among presidential systems.<sup>86</sup> The particular balancing of constitutional powers, and the specifics of electoral rules, play a critical role in determining the prospects for

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<sup>78</sup> Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY 3, 4 (Juan J. Linz & Arturo Valenzuela eds., 1994).

<sup>79</sup> Linz, *supra* note 69, at 52.

<sup>80</sup> Donald L. Horowitz, *Comparing Democratic Systems*, 1 J. DEMOCRACY 73, 74 (1990).

<sup>81</sup> Seymour M. Lipset, *The Centrality of Political Culture*, 1 J. DEMOCRACY 80, 82-83 (1990).

<sup>82</sup> *Id.* at 82 (stating that the reason why most Latin American polities have not functioned like the U.S. political system lies in economic and cultural factors).

<sup>83</sup> See JAN-ERIK LANE & SVANTE ERSSON, THE NEW INSTITUTIONAL POLITICS 135 (2000).

<sup>84</sup> JOSÉ A. CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 3 (2007) (arguing that presidential democracies are unstable because they "tend to exist in countries that are also more likely to suffer from dictatorships led by the military").

<sup>85</sup> LANE & ERSSON, *supra* note 83, at 141 ("We have ample evidence that economic factors play an even greater role when accounting for democratic instability.").

<sup>86</sup> Robert Elgie, *From Linz to Tsebelis: Three Waves of Presidential/Parliamentary Studies?*, 12 DEMOCRATIZATION 106, 107 (2005) ("The two defining features of the 'second wave' are that there is more than one explanatory variable (the regime type, usually, plus the party system and/or leadership powers) and often a different dependent variable ('good governance' as opposed to democratic consolidation).").

cooperation and conflict between presidents and legislatures.<sup>87</sup> For example, one scholar showed that the combination of presidentialism and a multiparty system leads to regime instability.<sup>88</sup> Another study demonstrated that those regimes in which the President has greater legislative powers are the most problematic.<sup>89</sup> Factors other than the separation of powers influence the functioning of the political system.<sup>90</sup> One study concluded, for instance, that divided government does not necessarily lead to stalemate and gridlock. Instead, gridlock occurs only when cross-institutional or cross-party coalition formation is costly or difficult.<sup>91</sup> Other studies have focused on factors that affect both presidential and parliamentary systems. For example, one study concluded that a greater number of veto players leads to policy that is more private regarding than public regarding because each veto is able to demand narrowly targeted policies in the bargaining process.<sup>92</sup> The veto player framework explains governmental instability in parliamentary systems and regime instability in presidential systems.<sup>93</sup>

In sum, constitutional structures do matter, but there is little consensus about which structures matter and why. On one side is the argument that the institutional form – presidential or parliamentary – has pervasive consequences for all aspects of democratic governance.<sup>94</sup> It is worth noting that between

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<sup>87</sup> See Scott Mainwaring & Matthew S. Shugart, *Juan Linz, Presidentialism, and Democracy: A Critical Appraisal*, 29 COMP. POL. 449, 452, 463 (1997) (stating that some constitutions make it easier for the president to dominate the political process, and that some election systems prohibit re-election, even of good presidents).

<sup>88</sup> Scott Mainwaring, *Presidentialism, Multipartyism, and Democracy: The Difficult Combination*, 26 COMP. POL. STUD. 198, 223 (1993) (“Multipartyism may not adversely affect prospects for democracy in parliamentary systems, but it appears to with presidentialism. Institutional combinations make a difference.”).

<sup>89</sup> MATTHEW S. SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES 156 (1992); Timothy Frye, *Presidents, Parliaments, and Democracy: Insights from the Post-Communist World*, in THE ARCHITECTURE OF DEMOCRACY 81, 82-83 (Andrew Reynolds ed., 2002).

<sup>90</sup> José A. Cheibub & Fernando Limongi, *Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered*, 5 ANN. REV. POL. SCI. 151, 176 (2002) (stating that the main difference between parliamentary and presidential regimes “lies in the way the decision-making process is organized”).

<sup>91</sup> Stephan Haggard et al., *Conclusion: Policy Making in Presidential Systems*, in PRESIDENTS, PARLIAMENTS, AND POLICY 319, 320-21 (Stephan Haggard et al. eds., 2001) (“More veto players . . . mean that decisions entail higher transaction costs, and so are more difficult to make.”).

<sup>92</sup> Gary W. Cox & Mathew D. McCubbins, *The Institutional Determinants of Economic Policy Outcomes*, in PRESIDENTS, PARLIAMENTS, AND POLICY, *supra* note 91, at 21, 28 (“The greater the number of effective vetoes, the more private regarding will be the policies enacted.”).

<sup>93</sup> George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 289 (1995).

<sup>94</sup> Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic*

1946 and 1999, one in every twenty-three presidential regimes failed and became a dictatorship, whereas only one in every fifty-eight parliamentary regimes collapsed.<sup>95</sup> There are some, including Linz, who attribute the difference to the basic constitutional principle of the regime: separation of powers in presidential systems versus combined powers in parliamentary systems.<sup>96</sup>

Other scholars, however, argue that the empirical data is less clear cut. One study that examined all presidential democracies that existed between 1946 and 1996 found that minority presidents, minority governments, and deadlock do not affect the survival of presidential democracies.<sup>97</sup> That is, while presidential systems are considerably more prone to failure than parliamentary ones, this weakness is not caused by the separation of powers.<sup>98</sup> Instead, there are other institutional factors that matter for the performance of both parliamentary and presidential democracies, and these factors may counteract the tendencies typically associated with the regime's basic constitutional principle.<sup>99</sup> In addition, institutional rules are not the only relevant factors. For example, one study shows that with respect to policy choice and policy change, it is not possible to draw valid inferences from institutional rules alone.<sup>100</sup> The variation in these empirical studies has led some to conclude that it is difficult to assess which system works best.<sup>101</sup>

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*Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECONOMIES 171, 192 (1994) (“[E]very institutional form of democracy, whatever it might be, generates its own political dynamic – its own politics of structural choice – which in turn generates the basic structures that fill out the rest of government.”).

<sup>95</sup> Cheibub & Limongi, *supra* note 90, at 151-52.

<sup>96</sup> See, e.g., Giovanni Sartori, *Neither Presidentialism nor Parliamentarism*, in 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY, *supra* note 78, at 106, 109 (“The conclusion that might suggest itself . . . is that if presidentialism has virtues, they are to be sought in the semi- or quasi-presidential systems based on power sharing (as in the French Fifth Republic), not on power separation.”).

<sup>97</sup> José A. Cheibub, *Minority Governments, Deadlock Situations, and the Survival of Presidential Democracies*, 35 COMP. POL. STUD. 284, 302, (2002) (“[T]he idea that the survival prospects of presidential democracies are compromised when presidential parties do not hold a majority of seats in congress, or when deadlock situations exist, is refuted by both descriptive and statistical evidence.”).

<sup>98</sup> *Id.* at 307.

<sup>99</sup> Cheibub & Limongi, *supra* note 90, at 152-53.

<sup>100</sup> Thomas H. Hammond & Christopher K. Butler, *Some Complex Answers to the Simple Question ‘Do Institutions Matter?’: Policy Choice and Policy Change in Presidential and Parliamentary Systems*, 15 J. THEORETICAL POL. 145, 145 (2003).

<sup>101</sup> Kaare Strøm, *Parliamentary Democracy and Delegation*, in DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES 55, 55 (Kaare Strøm et al. eds., 2006).

## III. DEMOCRATIC GOVERNANCE AND INSTITUTIONAL DESIGN

While there is substantial agreement that constitutional structures matter,<sup>102</sup> there is little consensus about which matter and why. Current research also emphasizes the variety of practices and institutional forms existing within both presidential and parliamentary systems.<sup>103</sup> In addition, current research focuses not only on regime stability but also on governmental effectiveness.<sup>104</sup> For example, a study using a global data set found a strong relationship between parliamentary rule and good governance, particularly with respect to economic development and human development.<sup>105</sup> There are significant advantages to parliamentary systems; indeed the study demonstrated that parliamentary rule does not detract from good governance in any of the countries examined.<sup>106</sup>

In this Part, I sketch a preliminary theory for why some constitutional structures are better positioned to function even in the face of various dysfunctionalities. I refer to this preliminary proposal as the optimal constraint theory of governance. The basic idea is that there are tradeoffs between mechanisms that constrain governmental action, on the one hand, and mechanisms that either allow for governmental action or that relieve constraints on action by breaking deadlocks, on the other. Systems that have an optimal balance of these competing impulses are best positioned to govern effectively. These factors also make a political system relatively less vulnerable to constitutional, political, institutional, and civic dysfunction.

A. *Constraints on Action*

Presidential systems provide structural constraints on action because of the separation of powers. Arguably, the purpose of the separation of powers is to hamper governmental action in order to prevent tyranny. As Madison observed, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>107</sup> As discussed in Part I, the constraint on action is particularly acute in the United States during times of divided government.

Not only does the separation of powers impose constraints on action, but also the combination of the separation of powers with a highly ideological and

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<sup>102</sup> John Gerring et al., *Are Parliamentary Systems Better?*, 42 COMP. POL. STUD. 327, 335 (2009) (“In sum, academics and policy makers who are working in this area seem to agree on one thing and one thing only: Constitutional structures matter.”).

<sup>103</sup> Elgie, *supra* note 86, at 112.

<sup>104</sup> José A. Cheibub, *Making Presidential and Semi-Presidential Constitutions Work*, 87 TEX. L. REV. 1375, 1377 (2009) (stating that current research focuses on such areas as the impact of democratic forms of government on economic policy, budget deficits, economic performance, and ethnic conflict, just to name a few).

<sup>105</sup> Gerring et al., *supra* note 102, at 327.

<sup>106</sup> *Id.* at 353.

<sup>107</sup> THE FEDERALIST NO. 47, *supra* note 24, at 301 (James Madison).



competitive party system can levy too great a constraint on action, particularly in times of divided government. Political scientists, most notably Thomas Mann and Norman Ornstein, have argued that a “mismatch” between highly adversarial political parties and a system of government makes it very difficult for majorities to act.<sup>108</sup> The combination of a separation of powers government and parliamentary style parties is a “formula for willful obstruction and policy irresolution.”<sup>109</sup>

By contrast, the pure form of parliamentary government, which is centered on the idea of parliamentary supremacy, has few if any constraints on governmental action. In practice, however, many parliamentary systems have a host of mechanisms that can check the exercise of power.<sup>110</sup> These mechanisms include competitive parties, a written constitution, a bill of rights, a constitutional court, bicameral legislatures, and federalism.<sup>111</sup> For example, in France the prime minister can lose a vote of confidence in the legislature and be forced to resign.<sup>112</sup> Additionally, the parliamentary system in France is balanced by a parallel but independent presidency.<sup>113</sup> Moreover, although one supposed disadvantage of parliamentary systems is the absence of limited government, some parliamentary systems pose less danger to individual liberty because of the existence of these mechanisms. For instance, the constitution adopted by Poland in 1921 incorporated a parliamentary system and provisions for strong local government, along with “the notion that government power derived from the people and that the government in turn owed the people basic rights, and an elaborate framework of individual liberties.”<sup>114</sup> In parliamentary systems, minority political parties play an important role as the “loyal opposition,” charged with holding the governing party to account.<sup>115</sup> The

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<sup>108</sup> MANN & ORNSTEIN, *supra* note 12, at xiii (identifying the “mismatch” between the political parties as one of the two overriding sources of dysfunction).

<sup>109</sup> *Id.*

<sup>110</sup> See Torbjörn Larsson & Guenther F. Schaefer, *The Problem of Democratic Legitimacy in a Supranational Government*, in EU ADMINISTRATIVE GOVERNANCE 541, 548 (Herwig C.H. Hofmann & Alexander H. Türk eds., 2006) (listing power sharing, no-confidence votes, and dissolution among such mechanisms).

<sup>111</sup> See Carl T. Bogus, *A Radical Decision by the R.I. Supreme Court*, R.I. B.J., Nov. 1999, at 13, 13 (“[W]hile modern parliamentary systems do not have co-equal branches of government, they have other mechanisms to check and balance power: robust political party competition, a strong cabinet, the ability to bring an administration to an end at any time through a vote of no confidence, to name a few.”).

<sup>112</sup> Barbara Crossette, *Globally, Majority Rules*, N.Y. TIMES, Aug. 4, 1996, § 4, at 1.

<sup>113</sup> *Id.*

<sup>114</sup> Mark F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, 77 VA. L. REV. 49, 78 (1991).

<sup>115</sup> See Connor Phillips, *The Disloyal Opposition*, DUKE POL. REV. (Feb. 1, 2014, 9:21 PM), <http://dukepoliticalreview.org/the-disloyal-opposition>, archived at <http://perma.cc/87G5-JDY9> (“Although democracy is based on the principle of majority rule, the minority also plays a crucial role, which in parliamentary systems is referred to as that of the ‘loyal

existence of a question period in Parliament provides minority parties with the opportunity to challenge the ruling party.<sup>116</sup> An important check on the power of the governing party is the vote of no confidence, which if passed, triggers a new election.<sup>117</sup>

Parliamentary systems can embody some of the values – such as preventing governmental tyranny and legislative supremacy – of the separation of powers.<sup>118</sup> Bruce Ackerman argues in favor of the constitutional practices of Canada, India, and South Africa, which represent “constrained parliamentarism.”<sup>119</sup> Ackerman argues that these constrained parliamentary systems satisfy various rationales for the separation of powers, including democratic legitimacy, functional specialization, and minority rights.<sup>120</sup>

#### B. *De-Constraints on Action and Anti-deadlock Mechanisms*

Competing sets of forces either allow for action or relieve constraints on action. In the *Federalist Papers*, Alexander Hamilton argued for a one-person executive on the basis that a plural executive would face difficulty in acting coherently since a plural executive would inevitably result in disagreement and differences of opinion.<sup>121</sup> In addition, a plural executive would conceal faults and lessen accountability. For Hamilton, “[e]nergy in the executive is a leading character in the definition of good government.”<sup>122</sup> He also stated that it is beyond dispute that “unity is conducive to energy.”<sup>123</sup>

The advantage of parliamentary systems is that decisions can be quickly made and executed. The cabinet can devise legislation as required, provided, of

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opposition.”).

<sup>116</sup> See JOHN J. PATRICK ET AL., *THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT* 474 (2001) (stating that parliamentary systems typically provide for a question period in which members may address questions directly to the prime minister and cabinet members, who answer the questions in-person).

<sup>117</sup> See, e.g., *Canadian Government Collapses in No-Confidence Vote*, *GUARDIAN* (Mar. 25, 2011, 10:17 PM), <http://www.theguardian.com/world/2011/mar/26/canadian-government-no-confidence-vote>, archived at <http://perma.cc/B6AR-E7WN>.

<sup>118</sup> See Richard Albert, *Presidential Values in Parliamentary Democracies*, 8 *INT’L J. CONST. L.* 207, 208 (2010).

<sup>119</sup> Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 633, 640 (2000) (stating that the constitutions of India, Canada, and South Africa fit within the model of constrained parliamentarism). For Ackerman’s critique of the U.S. system, see also BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 1-12 (2010).

<sup>120</sup> Ackerman, *supra* note 119, at 727 (explaining how from the sides of democratic legitimacy, functional specialization, and liberal rights, the center is constrained).

<sup>121</sup> *THE FEDERALIST NO. 70*, *supra* note 24, at 425-26 (Alexander Hamilton) (“Whenever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion.”).

<sup>122</sup> *Id.* at 423.

<sup>123</sup> *Id.* at 424.

course, that the governing party enjoys majority support in the legislature.<sup>124</sup> There is also greater accountability because the people can blame the governing party for any problems in governance.<sup>125</sup> Parliamentary systems often give rise to stronger political parties, which have the advantages of efficiency and accountability.<sup>126</sup> The threat of early elections and the consequent dissolution of government lead to greater party discipline in parliamentary systems.<sup>127</sup> The costs of undisciplined parties include the defeat of government bills, the failure to obtain the support of a majority in parliament, and even the fall of the government.<sup>128</sup>

There is some preliminary empirical support for the argument offered here. A recent study argues that the real difference between presidential and parliamentary systems is the way that decisionmaking is organized.<sup>129</sup> A decentralized decisionmaking process leads to a lack of coordination and deadlock, as often seen in presidential systems with little executive-legislative cooperation.<sup>130</sup> By contrast, the executive in a parliamentary system often has a monopoly on the policy agenda (but not necessarily, as in Italy and France).<sup>131</sup>

Presidential systems with more centralized and streamlined decisionmaking structures tend to perform better. As a general rule, presidential systems tend to function more effectively when (1) presidents have weak legislative powers both during ordinary times and during emergencies; (2) when parties are moderately disciplined, not highly fragmented, and engage in coalition formation; and (3) a representative assembly is endowed with stronger legislative powers relative to the president.<sup>132</sup> Another study found that, when drawing comparisons among presidential systems, the functioning of government seems to turn on the “presence or absence of factors that allow

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<sup>124</sup> 2 JAMES BRYCE, *MODERN DEMOCRACIES* 465 (William. S. Hein & Co. 2007) (1921) (“This system is therefore calculated to secure swiftness in decision and vigour in action, and enables the Cabinet to press through such legislation as it thinks needed, and to conduct both domestic administration and foreign policy with the confidence that its majority will support it against the attacks of the Opposition.”).

<sup>125</sup> *Id.* (“For any faults committed the Legislature can blame the Cabinet, and the people can blame both the Cabinet and the majority.”).

<sup>126</sup> CHEIBUB, *supra* note 84, at 9-10 (stating that presidentialism gives rise to fragile and undisciplined parties, while the incentive structure in parliamentary systems encourages party discipline and consolidation of party organizations).

<sup>127</sup> *Id.* at 10.

<sup>128</sup> *Id.*

<sup>129</sup> Cheibub & Limongi, *supra* note 90, at 176.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> SHUGART & CAREY, *supra* note 89, at 277-81, 286; Mainwaring & Shugart, *supra* note 74, at 449 (“Other things being equal, presidentialism tends to function better where presidencies have weak legislative powers, parties are at least moderately disciplined, and party systems are not highly fragmented.”).

presidents with very little legislative support to work with congress.”<sup>133</sup> The centralization of decisionmaking power in Brazil, for instance, explains the legislative success of Brazilian presidents.<sup>134</sup>

These institutional factors in presidential systems, when taken together, mimic the concentrated and centralized decisionmaking in parliamentary systems. That is, presidentialism works best when it is in combination with certain institutional features that allow for action on the part of government. In times of unified government, for instance, the U.S. political system is usually highly effective.<sup>135</sup> There is also a wide range of hybrid regimes, such as semipresidential systems, which allow for more centralized decisionmaking.<sup>136</sup> In France, for example, the head of state is a popularly elected president but the government needs the confidence of the legislative majority to function.<sup>137</sup>

Another important aspect of the possibility for governmental action is the availability of what I call “anti-deadlock” mechanisms, which allow deadlocks, stalemates, and gridlocks to be broken.<sup>138</sup> Governmental function is aided by the presence of anti-deadlock mechanisms. One example of an anti-deadlock mechanism is the ability in a parliamentary system to call a general election at any time (either by the governing party or in the event the governing party has lost the confidence of the legislature).<sup>139</sup> I claim that the unpredictability of an

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<sup>133</sup> Cheibub, *supra* note 97, at 304.

<sup>134</sup> Argelina C. Figueiredo & Fernando Limongi, *Presidential Power, Legislative Organization, and Party Behavior in Brazil*, 32 COMP. POL. 151, 168 (2000) (explaining the benefits that have arisen from the president of Brazil’s control over the legislative agenda).

<sup>135</sup> For instance, under President Woodrow Wilson’s leadership, the Democrats captured the White House as well as control of the House and Senate, and the newly unified government enacted Wilson’s “New Freedom” program, “generally regarded as the most constructive period of domestic legislation between the abolition of slavery and the New Deal.” Lloyd N. Cutler, *Now Is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387, 396 (1989).

<sup>136</sup> Semipresidential systems can be distinguished in various categories as well: parliamentary systems with presidential dominance; parliamentary systems with a presidential corrective; and parliamentary systems with figurehead presidents. Alan Siaroff, *Comparative Presidencies: The Inadequacy of the Presidential, Semi-Presidential and Parliamentary Distinction*, 42 EUR. J. POL. RES. 287, 287 (2003).

<sup>137</sup> Cheibub, *supra* note 104, at 1396.

<sup>138</sup> In Canada, the section 33 override clause, also known as the “notwithstanding clause,” enables the provinces to opt out of the decisions of the Supreme Court of Canada with respect to a number of Charter rights. ROBERT J. SHARPE & KENT ROACH, *THE CHARTER OF RIGHTS AND FREEDOMS 90-95* (4th ed. 2009).

<sup>139</sup> Robert Blackburn, *The Dissolution of Parliament: The Crown Prerogatives (House of Commons Control) Bill 1988*, 52 MOD. L. REV. 837, 838 (1989) (stating that a great source of concern over the dissolution practice “has been the freedom of action possessed by a Prime Minister to decide the timing of dissolution and a general election at whatever moment he or she wishes”).

unfixed election, even in a scheme that otherwise relies on fixed elections, has a tempering effect on political excess.

Presidential systems also can have anti-deadlock mechanisms. For example, presidential systems in which the legislature has stronger powers and the president has correspondingly weaker powers tend to function better, particularly when the political parties in the legislature are cooperative.<sup>140</sup> The stronger power of the legislature can effectively prevent deadlock between the legislative and executive branches. One study found that governmental effectiveness in premier-presidential regimes is positively correlated with the conditional power to dissolve the legislature and hold new elections.<sup>141</sup>

A comparison between the shutdown in the United States and the recent prorogation in Canada illustrates the role of anti-deadlock mechanisms. The architects of the shutdown in the United States did not have to worry that their actions might have triggered an election and the subsequent loss of their office. As compared to Members of Parliament in Canada (MPs), elected representatives in Congress are insulated from the risks posed by elections at any time. In addition, the temporal rigidity of the U.S. system means that there is little room for flexibility or adjustments to unfolding events.<sup>142</sup> That rigidity also means that executive-legislative deadlock cannot be resolved.<sup>143</sup>

Although Prime Minister Stephen Harper has used the power of prorogation – another anti-deadlock mechanism – to close Parliament, and although he has used prorogation in a controversial and undemocratic way to avoid accountability, prorogation is not the equivalent of the shutdown.<sup>144</sup> Prorogation ends a session of Parliament, but the federal government and the bureaucracy continue to operate.<sup>145</sup> In the shutdown, by contrast, Congress is

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<sup>140</sup> SHUGART & CAREY, *supra* note 89, at 286 (explaining that one of the keys to crafting a system with a popularly elected executive with respect to conflict regulation is to have superior legislative powers relative to the executive).

<sup>141</sup> *Id.* (advocating for an executive with “conditional power to dissolve the assembly and call new elections, but only if the regime is premier-presidential”).

<sup>142</sup> Linz, *supra* note 69, at 54 (stating that the President’s relatively fixed term in office “breaks the political process into discontinuous, rigidly demarcated periods, leaving no room for the continuous readjustments that events may demand”).

<sup>143</sup> *Id.*

<sup>144</sup> See Murray Brewster, *Harper Intends to Prorogue Parliament, Will Deliver Throne Speech in October*, HUFFINGTON POST (Aug. 19, 2013, 2:03 PM), [http://www.huffingtonpost.ca/2013/08/19/harper-prorogue\\_n\\_3780873.html](http://www.huffingtonpost.ca/2013/08/19/harper-prorogue_n_3780873.html), archived at <http://perma.cc/WX9K-TE8D> (reporting that Prime Minister Harper will ask the Governor General to prorogue Parliament).

<sup>145</sup> Alison Loat, *Why a Government Shutdown Would Never Happen in Canada*, HUFFINGTON POST (Oct. 4, 2013, 1:20 PM), [http://www.huffingtonpost.ca/alison-loat/government-shutdown-canada\\_b\\_4039762.html](http://www.huffingtonpost.ca/alison-loat/government-shutdown-canada_b_4039762.html), archived at <http://perma.cc/69XH-CMWC> (“During prorogation, MPs are not at work in the House of Commons – though they are in their constituencies – but the rest of the federal government is still working and being paid.”).

still at work, but the bureaucracy is not.<sup>146</sup> An additional difference is that in the event Parliament is dissolved, the executive can ask for a special warrant from the Governor General in order to secure the funds necessary to run the government.<sup>147</sup> In addition, if the MPs in Parliament withhold approval on a budget, they risk triggering a new election.<sup>148</sup> This is a costly event that may not result in re-election for those MPs.

When it comes to constitutional design, however, virtues can transform into vices, and vices into virtues, depending on the political context. The advantage of parliamentary systems – centralized decisionmaking – is also its greatest drawback. In a parliamentary system there exists a concentration of power in the cabinet that cannot be checked.<sup>149</sup> With disciplined political parties, however, the executive is virtually unconstrained.<sup>150</sup> Parliamentary systems offer the fewest checks on executive power.<sup>151</sup> In Canada, Prime Minister Harper is routinely criticized for the “extraordinary concentration of power” in the Prime Minister’s Office (PMO).<sup>152</sup> According to critics, Mr. Harper has made “a mockery of parliamentary democracy, using the PMO to micromanage public affairs and elevating the use of bullying tactics and the suppression of dissent to an unprecedented degree.”<sup>153</sup> Not only does the Canadian Prime Minister wield immense political power, as David Schneiderman observes, Harper and his allies have even “foster[ed] the perception that the Prime Minister, like the U.S. President, is a separate and distinct branch of government that is elected by the citizens and constitutionally insulated from the entreaties of Parliament, including motions of no confidence.”<sup>154</sup>

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<sup>146</sup> *Id.* (“Despite a shutdown of federal government services, Congress is still in session – and elected representatives are still at work, though the non-essential bureaucracy itself is unpaid and not working.”).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> BRYCE, *supra* note 124, at 468 (“Lastly, the very concentration of power and swiftness with which decisions can be reached and carried into effect is a source of danger. There is no security for due reflection, no opportunity for second thoughts. Errors may be irretrievable.”).

<sup>150</sup> Mainwaring & Shugart, *supra* note 87, at 453 (stating that parliamentary systems with disciplined parties and a majority party offer the fewest checks on executive power).

<sup>151</sup> *Id.* (stating that parliamentary systems with disciplined parties and a majority party offer the fewest checks on executive power).

<sup>152</sup> Deborah Coyne, *Five Steps to Restoring Democracy in Canada*, HUFFINGTON POST (Oct. 31, 2013, 6:35 PM), [http://www.huffingtonpost.ca/deborah-coyne/senate-reform-canada\\_b\\_4179496.html](http://www.huffingtonpost.ca/deborah-coyne/senate-reform-canada_b_4179496.html), archived at <http://perma.cc/FR7C-6BY2> (stating that at the root of the Senate scandal is the “extraordinary concentration of power in the executive branch of the Government of Canada, namely, the Prime Minister’s Office”).

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

<sup>154</sup> David Schneiderman, *Constitutional Divide? Prime Minister Stephen Harper and the Transformation of Canadian Constitutional Culture* ch. 2 (May 26, 2013) (unpublished

The recent Senate expenses scandal in Canada has revealed the extent to which the PMO orchestrates the activities not only of the House of Commons, but also of the supposedly independent Senate. In the scandal, three prominent senators, who claimed questionable living and travel expenses, were suspended from the Senate (via a Senate vote).<sup>155</sup> As one commentator put it, the PMO's "failure to provide full accounting, the drip-drip assault on institutions and individuals that can check the government, the bulldozing of parliamentary scrutiny, the constant attempt to manipulate images, the obsessive spin" demonstrate a "disrespect toward Canadian democratic values."<sup>156</sup> Another commentator lamented that Canada's "systems of accountability have grown so weak that it is unlikely those in power will ever be made to answer for their actions."<sup>157</sup>

These charges are somewhat overdrawn since the Harper government will, at some point, be answerable at the ballot box, and, in any event, there are a host of constraining mechanisms including judicial review and federalism that continue to operate. Yet these criticisms shed light on a pressing problem. A more centralized decisionmaking process is generally less prone to dysfunctionality, and less likely to grind to a halt in response to political, institutional, and civic failures, but it is also significantly more likely to be unchecked and even uncheckable, particularly in times of majority government. While parliamentary systems provide more immunity from constitutional, political, institutional, and civic failures, they do so at the cost of insulating an executive. Systems that provide effective governance thus raise concerns about democratic representation and political accountability. In other words, there are tradeoffs between democratic governance and democratic accountability.<sup>158</sup> Accordingly, the ideal state in some parliamentary systems may very well be a minority government, which forces the governing party to compromise with the other parties.

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manuscript) (on file with the author).

<sup>155</sup> Jeffrey Simpson, *The Supreme Irony of the Senate Scandal*, GLOBE & MAIL, Oct. 30, 2013, at A15 (reporting that a vote on the suspension of three senators was scheduled).

<sup>156</sup> *Id.*

<sup>157</sup> Andrew Coyne, *In the Duffy Affair, There's Just No Honour Among Liars Any More*, NAT'L POST (Oct. 28, 2013, 8:58 PM), <http://fullcomment.nationalpost.com/2013/10/28/andrew-coyne-in-the-duffy-affair-theres-just-no-honour-among-liars-any-more>, archived at <http://perma.cc/JT5P-4QDF>.

<sup>158</sup> By contrast, Pippa Norris argues for a unified theory of democracy and governance that holds that both representative institutions and state capacity must be simultaneously developed. PIPPA NORRIS, *MAKING DEMOCRATIC GOVERNANCE WORK* 7 (2012) ("[T]he unified theory at the heart of this book predicts that the institutions of both liberal democracy *and* state capacity need to be strengthened in parallel for the most effective progress deepening human security . . .").

## CONCLUSION

This Essay has investigated the issue of whether constitutional structures matter for dysfunction in governance. It has argued that the interaction of various factors – constitutional, political, institutional, and civic – produces dysfunction in governance. In addition, it has proposed a preliminary theory about why some governmental systems are better positioned to function in the face of various constitutional, political, institutional, and civic factors. Under the “optimal constraint theory of governance,” a democratic system of government involves a tradeoff between mechanisms that constrain governmental action, on the one hand, and mechanisms that either allow for governmental action or that relieve constraints on action. Effective governance requires an optimal balance between these competing impulses. An examination of the U.S. political system shows that various factors interact with one another and produce too great a constraint on governmental action, particularly during times of divided government. These factors include (1) the constitutional structures of presidentialism, (2) political factors such as the rise of highly disciplined and highly ideological political parties, (3) institutional factors such as the deadlocks created by the filibuster, and (4) civic factors such as the rise of hyperpartisanship and the decline in compromise and cooperation. Although constitutional structures do matter for the performance of democratic government, it is the interaction of constitutional, political, institutional, and civic factors that creates dysfunctional governance.

One puzzle endures. Why is the United States an exception to the general tendency of presidential systems to be vulnerable to regime failure? While Linz does not explain why the United States is an exception, he does point to the role of the “uniquely diffuse character of American political parties.”<sup>159</sup> Another scholar identifies features of the United States system that contribute to its stability, such as systematic constraints on Presidents regarding policy implementation, the Electoral College which amplifies victories, the lack of party discipline which allows some members of the opposition to support legislation, voter apathy, and low levels of election turnout.<sup>160</sup> This theory raises the troubling paradox that those factors that produce dysfunction might be indispensable to the prevention of regime failure. That is, the vices of the system with respect to effective governance are in fact virtues with respect to stability and longevity.

The news from many parts of the world is decidedly gloomier about democracy’s prospects. For instance, data from Freedom House, which tracks social, political, and economic freedom in each nation, indicates that a number of newer democracies have become increasingly authoritarian.<sup>161</sup> By 2010, nearly fifty-three of 128 countries assessed by the Bertelsmann Foundation’s

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<sup>159</sup> Linz, *supra* note 69, at 53.

<sup>160</sup> See Fred W. Riggs, *The Survival of Presidentialism in America: Para-Constitutional Practices*, 9 INT’L POL. SCI. REV. 247, 258-63 (1988).

<sup>161</sup> JOSHUA KURLANTZICK, *DEMOCRACY IN RETREAT* 7 (2013).



transformation index, which measures the state and quality of democracy in developing nations, were categorized as “defective democracies.”<sup>162</sup> Likewise, the Economist Intelligence Unit’s worldwide index of democracy, which assesses the electoral process, pluralism, political participation, government functioning, and civil liberties, found that “democracy was in retreat across nearly the entire globe.”<sup>163</sup> As disheartening as the recent shutdown may be for those who admire democracy, it is worth noting that, compared to much of the world, the United States has enjoyed a long and stable democracy.

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<sup>162</sup> *Id.* at 9 (“By 2010, in fact, nearly 53 of the 128 countries assessed by the index were categorized as ‘defective democracies.’”).

<sup>163</sup> *Id.* at 10.