

# Constitutions, Elections, and Election Law

Peter C. Ordeshook\*

## I. Introduction

The issue that concerns us is what constitutions should and should not say about elections and election law. Our core argument is that even if we limit matters to the form and function of elections, then constitutional directives about the precise formulas whereby votes are translated into legislative seats or aggregated to determine the winner in the competition for executive office are of less consequence than what is said, implicitly or explicitly, about the timing of elections, terms of office, and the encouragement of democratic governance at regional and local levels. If, without attempting here to offer precise definitions of terms, our general focus is how elections impact the stability of a democratic state and mesh with whatever separation of powers we seek to establish, it matters little whether, for instance, we initially require that legislative seats be filled by proportional representation (PR) versus single-member districts—or some combination of the two; whether, if PR is employed, seats are awarded on the basis of simple ratios, d'Hondt, or some other scheme; and whether other offices are filled by simple plurality or majority rule with a runoff. Such things may be of concern to political elites, but they are best left to statute with the expectation that details will be adjusted in a generally satisfactory way if other constitutional provisions encourage a participatory polity and a coherent, competitive party system. We argue, in fact, that provisions not commonly viewed as pertaining to national election law will generally be of greater significance in determining the form and function of elections and the long-run performance of the state than details of provisions specifically focused on election systems.

In making this argument, then, we take issue with Russian President Dmitry Medvedev who, in his State of the Federation speech, proposed that presidential and parliamentary terms be extended from four years to six and five years respectively, averring that “we are not talking about constitutional reform but about adjustments to the Constitution, about adjustments that are important but are nonetheless no more than clarifications and do not change the political and legal essence of the current institutions.”<sup>1</sup> Neither Medvedev nor the legislators who approved these changes are so naive as to

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\* Mary Stillman Harkness Professor of Political Science at The California Institute of Technology, Division of the Humanities and Social Sciences.

1. Dmitry Medvedev, President of Russ., Address to the Federal Assembly of the Russian Federation (Nov. 5, 2008), *available at* [http://kremlin.ru/eng/speeches/2008/11/05/2144\\_type70029\\_type82917type127286\\_208836.shtml](http://kremlin.ru/eng/speeches/2008/11/05/2144_type70029_type82917type127286_208836.shtml).

believe these words or to presume that their actions are not intended to extend “Putinism” into the indefinite future.<sup>2</sup> But in properly countering the assertion that such changes are irrelevant to core institutions, we must contend with the essential difficulty of mapping the consequences of alternative provisions and reaching definitive conclusions about what constitutions should require: namely, our lack of a compelling theory of constitutional design and a generally accepted paradigm of a constitution’s role in a democracy. When building bridges, by analogy, we may not have a “theory of bridge design,” but we do have principles of mechanics and materials with varying strengths that dictate the parameters of what is feasible. Thus, although a number of alternative designs may do the job—suspension, cantilever, continuous truss, and so on—viable alternatives must abide by those principles. Moreover, even if one designer is an advocate of, say, suspension structures, while another feels that cantilever forms are best, there is no disagreement as to what those mechanical principles say and when and where they are relevant. Thus, the final design often depends not on arguments over structural viability—by that time such concerns have been largely dispensed with—but rather on the basis of some combination of aesthetics and mundane economics.

Things are different with respect to political constitutions. First, those who would write them, instead of referring to some universally acknowledged set of first principles, must make do with a variety of ad hoc rules of thumb such as “Keep it simple” or, with respect to entitlements, “Don’t promise what you can’t deliver.” Second, with scholars continuing to debate whether constitutions are best thought of as social *contracts* or social *coordination mechanisms*,<sup>3</sup> whether different rules apply to the drafting of constitutions for federal versus unitary states,<sup>4</sup> whether the public should have a direct role in the drafting process,<sup>5</sup> and whether constitutions are best modeled as a set of hard and fast rules or merely as templates for the evolutionary development of institutions,<sup>6</sup> fundamentally different

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2. Medvedev’s address “led to rumors that Mr. Medvedev was laying the groundwork for his mentor, Vladimir V. Putin, . . . to return as president, perhaps as early as next year.” Ellen Barry, *Russian Rumor Mill Sees Medvedev Easing the Way for Another Putin Presidency*, N.Y. TIMES, Nov. 7, 2008, at A15.

3. See *infra* note 18 and accompanying text.

4. See, e.g., MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS 55–61 (2004) (discussing design problems particular to federal states); Ruth Gavison, *What Belongs in a Constitution?*, in CONSTITUTIONS, MARKETS AND LAW 1, 4 (Stefan Voigt & Hans-Jürgen Wagener eds., 2002) (arguing that constitutions of federal, but not unitary, states must include governmental structure).

5. See, e.g., James Thuo Gathii, *Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1109, 1124 (2008) (calling the pursuit of an autochthonous constitution “with widespread public participation in its drafting and approval . . . an important goal”).

6. See, e.g., GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES 196, 196–97 (2d ed. 1997) (asserting that “constitutions are a plan or frame for *free government*” and that “all-regulating” constitutions are

prescriptions for design are proposed depending on the conceptual scheme adhered to. Finally, since, as we argue here, the consequences of constitutional provisions cannot be determined without viewing such documents as organic wholes wherein seemingly unrelated parts can interact to yield potentially unanticipated outcomes, debates over the relative merits of broadly conceived institutional structures—presidential versus parliamentary or federal versus unitary—are commonly based not on how closely they adhere to some generally accepted theory of design but rather on simple prejudice of the governmental forms most familiar to proponents. We have not, in short, resolved the debate between William Riker, who asserted that “the fundamental method to preserve liberty is to preserve ardently our traditional constitutional restraints,”<sup>7</sup> and Robert Dahl, who argued that “constitutional rules are not crucial, independent factors in maintaining democracy”<sup>8</sup> and that “[t]o assume that [the United States] remained democratic because of its Constitution seems . . . an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic.”<sup>9</sup>

This is a curious state of affairs if we acknowledge that the framers of the U.S. Constitution seemed firmly on the path to developing a general theory of constitutional design, or at least to identifying first principles of design. For example, Franklin, when discussing the manner of selecting federal judges, offered delegates in Philadelphia the example of Scotland wherein the barristers themselves elected a judge from their own ranks “in order to get rid of him, and share his practice.”<sup>10</sup> Franklin’s comment did more than inject a bit of levity into an otherwise contentious debate. It reminded the delegates of their task: designing what in today’s academic jargon is labeled an “incentive compatible mechanism,” whereby individuals, in pursuit of their own myopic self-interest, yield the desired social outcome

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more likely to be infringed upon); Aleksander Peczenik, *Why Constitution?*, in *WHY CONSTITUTIONS MATTER* 17, 24 (Niclas Berggren et al. eds., 2002) (claiming that “constitutional constraints must be justifiable and difficult to change”).

7. WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 252 (1982).

8. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 137 (1956).

9. *Id.* at 143.

10. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 67–68 (Bicentennial ed., W.W. Norton & Co. 1987) (1920). Madison, recalling various framers’ opinions on how judges should be chosen, provided a detailed account of Franklin’s view:

Franklin observed that two modes of chusing the Judges had been mentioned, to wit, by the Legislature and by the Executive. He wished such other modes to be suggested as might occur to other gentlemen; it being a point of great moment. He would mention one which he had understood was practiced in Scotland. He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves. It was here he said the interest of the electors to make the best choice, which should always be made the case if possible.

*Id.* at 67–68.

as a by-product of their actions.<sup>11</sup> This perspective carries over into the *Federalist Papers* when they tell us that “the latent causes of faction are thus sown in the nature of man,”<sup>12</sup> that “[a]mbition must be made to counteract ambition,”<sup>13</sup> and that “you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>14</sup> Imbedded in these oft-cited passages alongside Madison’s discourse on the extended republic is an emerging theory of design that parallels the rationalist perspective of contemporary economic theory and the “new institutionalism” in political science, and that also abandons utopian schemes and the notion of the public interest as the motive of political actors.<sup>15</sup> In the spirit of a true science as embodied by the Enlightenment of the eighteenth century,<sup>16</sup> these passages abstract away contemporary political issues and push us in the direction of first principles. We can forgive the framers for not completing their theoretical exercise since it was impossible for them to anticipate, for example, the exigencies of a federal state on a continental scale or the essential role of political parties. Unfortunately, in failing to elaborate and develop the theory the framers initiated, we have no such excuses.

My own view of constitutions is, first, to side with Riker<sup>17</sup> and, second, to conceptualize them as social coordination mechanisms and generalized constraints on the evolutionary development of institutions and political norms.<sup>18</sup> Viewing them as contracts leaves the essential question of their enforcement unanswered and even unanswerable; assuming that they should

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11. See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 96, 95–128 (1999) (developing a model of constitutional interpretation that draws from the economic “incentive compatible” arrangement).

12. THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

13. THE FEDERALIST NO. 51 (James Madison), *supra* note 12, at 322.

14. *Id.*

15. The *Federalist Papers* tie-in to Franklin’s admonition is perhaps no better stated by Madison than in the following excerpt: “[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and *personal motives* to resist encroachments of the others.” *Id.* at 321–22 (emphasis added).

16. See THOMAS L. HANKINS, SCIENCE AND THE ENLIGHTENMENT 188 (1985) (discussing the views of enlightenment philosopher Condorcet, who stated to his contemporaries at the Society of 1789 that, “We regard the social art as a true science, founded like all the others on facts, experiment, reasoning and calculation . . .”).

17. See *supra* note 7 and accompanying text.

18. For an elaboration of my argument, see Peter C. Ordeshook, *Are Western Constitutions Relevant to Anything Other than the Countries They Serve?*, in CONSTITUTIONS, MARKETS AND LAWS, *supra* note 4, at 165, 170–74; Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 151–55 (1992); Peter C. Ordeshook, *Institutions and Incentives*, 6 J. DEMOCRACY 46, 47–48 (1995) and Peter C. Ordeshook, *Some Rules of Constitutional Design*, in LIBERALISM AND THE ECONOMIC ORDER 198, 199–202 (Ellen Frankel Paul et al. eds., 1993). For the precursor to this view, see Russell Hardin, *Why a Constitution*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100, 100–02 (Bernard Grofman & Donald Wittman eds., 1989). And for the tie-in of this argument to the notion of constitutions as guides to the evolutionary development of institutions, see Stephan Voigt, *Breaking with the Notion of Social Contract: Constitutions as Based on Spontaneously Arisen Institutions*, 10 CONST. POL. ECON. 283, 294–96 (1999).

set forth hard and fast rules of governance is unwarranted hubris in light of the impoverishment of the theories and principles that ought to guide their design. And as for the debate between Riker and Dahl,<sup>19</sup> if we accept Dahl's argument,<sup>20</sup> then we must relegate the framers' efforts to irrelevance and perhaps abandon a science of political design altogether. It remains true, nevertheless, that even with our perspective, we remain poorly equipped to define how constitutions coordinate, what they coordinate on, how their coordinating function is impacted by exogenous things such as culture and a society's historical experiences, and what rules are essential and effective guides to "proper evolutionary development." Nevertheless, because a benefit of academic writing is that our errors will be largely forgotten and our arguments generally ignored, let me proceed with some speculations about what constitutions ought to say and ought to avoid.

I begin with some initial assumptions. The first is that we are speaking of democratic constitutions, and, without making much effort at defining "democratic," I assume that at periodic intervals the sovereign—the people—is empowered to pass formal judgment on those who hold public office or who hold the authority to dictate the appointment or continued employment of others holding such offices: "Democracies may be parliamentary or presidential or a combination thereof, but they must have regular elections for the legislature and an effective multi-party system."<sup>21</sup> In other words, at some point, the people, acting in concert and in accordance with acknowledged rules, have the authority to throw the bums out.<sup>22</sup> Thus, in setting standards for deciding what ought to be and what ought not to be in a constitution, we require that our objectives include the encouragement of free and fair elections (leaving the words "free" and "fair" imprecise). The questions that confront us, then, when referring to the authority of the sovereign, are the following: Which bums? Under what rules? And where should those rules be specified? Moreover, with Franklin in mind,<sup>23</sup> we can add the question: Wherein are the opportunities and incentives to keep good rules and to change bad ones?

As for "Which bums?," the answer depends in part on whether we are designing a presidential or a parliamentary system, although in both cases the answer presumably includes all members of a national legislature. Here, though, we should look beyond the offices usually referred to in a national constitution and take cognizance of a commonly underappreciated clause of the U.S. Constitution: "The United States shall guarantee to every State in

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19. See *supra* notes 7–10 and accompanying text.

20. See *supra* notes 8–10 and accompanying text.

21. Gavison, *supra* note 4, at 2.

22. See *id.*

23. See *supra* note 10 and accompanying text.

this Union a Republican Form of Government . . . .”<sup>24</sup> At the time of its drafting this clause may have weighed most heavily on the role of the federal government in regulating slavery,<sup>25</sup> and it is unclear what impact (if any) it had on the development of the electoral systems and governmental structures of the individual states. However, this clause needs to be read in the context of a quasi-constitutional document, the Northwest Ordinance of 1787, which mandated a civil government in the relevant territory subject to congressional oversight that would ultimately transition to full republican governance.<sup>26</sup> The Ordinance thus served as a template for the organization of America’s westward expansion, with a critical component being the provision that as soon as a territory held a population of 5,000 “free male inhabitants of full age,” the inhabitants could, as part of the provisional government, elect representatives to a general assembly with essentially all the rights and prerogatives of a traditional legislature.<sup>27</sup> More famous still (aside from banning slavery from the territory)<sup>28</sup> is the following provision:

[W]henever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government: Provided, the constitution and government so to be formed, shall be republican.<sup>29</sup>

This provision has the evident expectation that any state so formed would parallel the construction of the original thirteen, including the autonomy to which they were accustomed.

It would take more than a single article to trace the consequences of the Northwest Ordinance, but we do know the nature of the status quo that evolved under it and Article IV, Section Four: namely, state (and local)

24. U.S. CONST. art. IV, § 4, cl. 1. The German Basic Law contains a similar provision. See 7 GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 28 (F.R.G.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Woltrum & Rainer Grote eds., 2009) (“The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law.”).

25. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 264–70 (2005).

26. Northwest Ordinance of 1787, 1 Stat. 50, 51 (1789).

27. *Id.* The precise wording of the Ordinance here is as follows:

[T]he governor, legislative council, and house of representatives, shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever, shall be of any force without his assent.

*Id.* at 52. The governor of this provisional government was to be appointed by Congress whereas the legislative council was to consist of five persons selected by Congress from a list of ten names submitted by the directly elected house of representatives of the territory. *Id.* at 51–52.

28. *Id.* at 53.

29. *Id.*

governments in which great numbers of offices are filled by direct election rather than by federal directive or legislative and executive appointment.<sup>30</sup> If, for example, we look solely at the executive branches of state governments, we find that the median number of offices filled by direct election is between six and ten—governor, lieutenant governor, attorney general, and secretary of state, along with a selection of executive positions such as inspector of mines, commissioner of agriculture, labor commissioner, state treasurer, insurance commissioner, commissioner of the general land office, state auditor, superintendent of education, railroad commissioner, commissioner of elections, and so on.<sup>31</sup> If we then add elections for the state legislature, city and county elections, school boards, and special district elections, as well as judicial seats filled by direct vote, we arrive at approximately 500,000 offices nationwide that are filled by direct election.<sup>32</sup> This fact compels us to appreciate one implication of the American notion of republican governance: the burden placed on voters who wish to cast “informed” votes. Along with the improbability that any one vote will be pivotal in any mass election, the proliferation of elected offices increases information costs and minimizes the incentives for voters to learn much about the multitude of choices they confront on a typical ballot.<sup>33</sup> But while the framers understandably failed to anticipate this evolution and, consequently, the solution to the resulting “informational dilemma,” we now know what that solution is: the political party, wherein people cast votes for candidates about whom they know little other than their party affiliations, with the assumption that those affiliations convey some of the information required to cast a vote in one’s self-interest.<sup>34</sup> Partisan labels, then, short-circuit a voter’s otherwise considerable information costs, and although they are imperfect guides, especially in systems wherein parties must form broad majoritarian coalitions and eschew issue-specific platforms that can fracture their electoral alliances, they are useful enough. Given the improbability of casting a pivotal vote, whatever error arises from an incorrect choice is inconsequential when compared to the costs of gathering more accurate information.

If we now simplify causal relationships, we can say that when candidates share and rely on party labels, they treat those labels in much the

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30. See FILIPPOV, ORDESHOOK & SHVETSOVA, *supra* note 4, at 238 (“[A] vast array of offices [are] filled by direct election.”).

31. *Id.*

32. *Id.* at 237 tbl.7.1.

33. See *id.* at 184 (noting that “[p]olitical information is not costless” and individual voters “can reasonably assume that it is impractical, even irrational” to learn much about the ballot choices presented to them).

34. Even state supreme court justices are not exempt from partisan electoral processes. After initial appointment by the governor upon the recommendation of various types of judicial councils, “justices must secure reappointment in general elections in thirty-nine states, of which more than half (twenty-three) run with their party affiliations listed on the ballot.” *Id.* at 238 n.7.

same way as Campbell, Toyota, and Heinz protect and nurture their brands across the multitude of products they sell—by discarding alternatives that tarnish a label’s reputation and by raising in public visibility those things that enhance it (or, as is often the case in politics, by failing to openly critique the pratfalls of others who compete under the same labels). This sharing and nurturing of labels horizontally and vertically across branches and levels of government then becomes the critical element in establishing a symbiotic relationship among political elites wherein the fates of elites at different levels are interdependent in such a way as to encourage intergovernmental cooperation (and thus stability).<sup>35</sup> We hasten to add, moreover, that although this argument applies with particular force in federal systems, the concept of the federal state is ambiguous. Any state we might label *federal* shares institutional characteristics with those we call *unitary*, just as those we label *unitary* necessarily possess federal characteristics to the extent that regional and local officials enjoy a degree of autonomy.<sup>36</sup> There are no pure forms, and our argument about the importance of party and partisan labels in facilitating cooperation and institutional stability applies to all democratic states. Thus, even if we conclude that the *details* of electoral form and administration do or do not warrant constitutional language, the encouragement of a vertical proliferation of elective offices throughout a polity by constitutional means and the subsequent evolution of a party system that encourages symbiotic relationships among political elites will be critical to the performance of the democratic state generally.<sup>37</sup>

## II. Russia and Ukraine

One bold illustration of this fact is provided by circumstances in Russia today. Ostensibly a federal state, one of the “reforms” implemented by Vladimir Putin in October 2004 was the elimination of directly elected regional governors in favor of presidential appointment.<sup>38</sup> We can ignore Putin’s excuse for this change (posed as an antiterrorist measure following the September 2004 Beslan school massacre)<sup>39</sup> and instead focus on its consequences. As is now widely acknowledged, elections in Russia are

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35. For details of this argument as it applies to federal constitutional design, see *id.* at 182–96.

36. *Id.* at 11.

37. See *id.* at 336 (“[N]o process of federal design can be considered complete until and unless full consideration is given to those things that might encourage or discourage the development of a federally integrated political party system.”).

38. Clifford J. Levy, *Putin’s Iron Grip on Russia Suffocates His Opponents*, N.Y. TIMES, Feb. 24, 2008, at A1.

39. See Steven Lee Myers, *Lawmakers Back Putin Plan for New Political Structure*, N.Y. TIMES, Oct. 30, 2004, at A3 (“Mr. Putin and his allies have justified the proposals . . . by arguing that they would strengthen executive power across a vast and at times unruly country.”).

anything but free and fair, with vote fraud rampant throughout the polity.<sup>40</sup> What we also know is that this fraud did not metastasize as an incremental process.<sup>41</sup> Although it pervaded voting for regional and national offices in the ethnic republics throughout the 1990s (e.g., Tatarstan, Bashkortostan, and Dagestan), it spread at virtual light speed between 2004 and 2008 to overtake even “reformist” places such as Nizhny Novgorod<sup>42</sup> and Moscow.<sup>43</sup> This spread can be tied directly to Putin’s “reform.” Although skulduggery in both presidential and parliamentary elections is hardly discouraged by the powers that be in the Kremlin, there is scant evidence that its spread was implemented under central directive.<sup>44</sup> Indeed, we might even suppose that the Kremlin sought to reduce instances of fraud in 2004, if only to confer legitimacy on Putin’s inevitable reelection. However, what we see now is a system of appointed regional political bosses playing a prisoners’ dilemma, where each, to sustain his position, must demonstrate fealty to Moscow on par with everyone else, and where each knows that prosecution for fraud is unlikely provided it is committed for the benefit of the “right” candidate or party. The symbiotic relationship that characterizes political competition in a democracy, then, is absent in Russia, since any corresponding relationship is but a “one-way street” running from the Kremlin down. Put bluntly, one consequence of Putin’s abrogation of regional executive elections is not only the transformation of Russia from a federal to a unitary state but also the denigration of its electoral processes, wherein Russia as a whole is rendered a Potemkin democracy.

Ukraine presents a useful contrast to this state of affairs and suggests, given the connected history of both countries, that it is not the imponderables of culture alone but also constitutional language and the imperatives of institutional structure that dictate political character. We appreciate that elections in Ukraine have hardly been free and fair, with its 2004 presidential contest and the country’s “Orange Revolution” cogent reminders of that fact.<sup>45</sup> Nevertheless, the level of fraud that we find there following the

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40. See Levy, *supra* note 38 (acknowledging that election tactics, such as smothering the political opposition, are “widely recognized” in Russia and are “especially heavy-handed at the local level”).

41. MIKHAIL MYAGKOV, PETER C. ORDESHOOK & DMITRY SHAKIN, *THE FORENSICS OF ELECTION FRAUD: RUSSIA AND UKRAINE* (forthcoming 2009) (manuscript at 131, on file with authors). See generally *id.* for an extensive analysis of election fraud in Russia and Ukraine.

42. *Id.* at 8.

43. *Id.* at 141.

44. *Id.* at 94.

45. Steven R. Weisman, *Powell Says Ukraine Vote Was Full of Fraud*, N.Y. TIMES, Nov. 25, 2004, at A14; see also Marie A. Failing, “No More Deaths”: *On Conscience, Civil Disobedience, and a New Role for Truth Commissions*, 75 UMKC L. REV. 401, 430 n.168 (2006) (“The Orange Revolution of 2004–05 was a series of protests and political events in the Ukraine in response to corruption, voter intimidation and 2004 electoral fraud.”).

negation of its November 2004 presidential runoff vote,<sup>46</sup> including its most recent parliamentary elections, pales in comparison to what we see in Russia. It might seem, though, that Ukraine serves as a counterexample to our assessment of the ultimate source of electoral malfeasance in Russia: Ukraine's regional governors are appointed as well.<sup>47</sup> However, there are fundamental differences in constitutional language that bear on regional electoral competitiveness and the incentives of regional elites to commit fraud on behalf of some central authority. First, while a Russian President can appoint or dismiss governors at will,<sup>48</sup> a Ukrainian President must share that power with a national parliament and regional administrations that are often controlled by the President's political opponents: "Heads of local state administrations are appointed to office and dismissed from office by the President of Ukraine upon the submission of the Cabinet of Ministers of Ukraine."<sup>49</sup> Nor does Ukraine's Constitution contain the following provision, which empowers a Russian President to act in both a legislative and judicial capacity with respect to regional and local governments so as to render regional governments and judiciaries impotent:

The President of the Russian Federation has the right to suspend acts by organs of executive power of the subjects of the Russian Federation if such acts contravene the Constitution of the Russian Federation and federal laws, the international obligations of the Russian Federation, or violate human and civil rights and liberties, pending the resolution of the issue in an appropriate court.<sup>50</sup>

With its President failing to enjoy both this authority and the ability to dismiss governors unilaterally, the prisoners' dilemma that directs the incentives of regional elites in Russia is absent in Ukraine.

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46. See Steven Lee Myers, *Ukrainian Court Orders New Vote for Presidency*, N.Y. TIMES, Dec. 4, 2004, at A1 (reporting the Ukrainian Supreme Court's invalidation of the November 21, 2004 presidential runoff election because of "systematic and massive violations" of election laws).

47. See Victor Luhovyk, *Ukraine*, in EUROPE REVIEW 2003/04: THE ECONOMIC AND BUSINESS REPORT 378, 381 (15th ed. 2003) (stating that the President of Ukraine nominates regional governors "whose appointment[s] are subject to the approval of parliament").

48. Formally, gubernatorial appointments in Russia require approval of regional legislatures. CAMERON ROSS, FEDERALISM AND LOCAL POLITICS IN RUSSIA 106 (2008). However, with the establishment of a one-party state under Putin in which that party not only controls the national parliament but also regional assemblies, any restraint on the president is a fiction and not a fact. See Levy, *supra* note 38 (asserting "a new autocracy now governs Russia" that has "deployed a nationwide cadre of loyalists that is not recalcitrant to swat down those who challenge the ruling party").

49. KONSTYTUTSIIA UKRAINY [KONST. UKR.] [Constitution] art. 118, *translated in* 19 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 24.

50. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [Constitution] art. 85 (Russ.), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 24; see also U.S. CONST. art. I, § 9 (establishing a variety of limits on the powers of Congress); Commonwealth of Australia Constitution Act, 1900, §§ 99, 100 ("The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.").

Of course, one cannot credit the relative performance of Russia and Ukraine as democracies uniquely to the presence or absence of these constitutional provisions. Nevertheless, it is foolhardy to suppose that they have no effect on the character of regional governments and political party formation. In Russia there are few incentives for the creation of regional parties or even protoparties.<sup>51</sup> In Ukraine, in contrast, such incentives persist: directly elected mayors, city council members, legislators, and even appointed governors not only wield considerable power locally but, in the context of a nationally competitive political system, also play an important role in the conduct of elections of Ukraine's President and national parliament.<sup>52</sup>

If we accept the preceding argument along with the proposition that the character of political competition nationally—the structure of parties and the role they play in facilitating or hindering political stability—is impacted by forms of regional governance, then constitutional provisions that do not appear to bear directly on election systems can nevertheless impact the performance of those systems. This lesson, in turn, underscores the fact that we must view a constitution as an organic whole and that, in deciding what a constitution says about elections and electoral systems, we need to look beyond the articles and clauses explicitly reserved for such topics. The alternatives we confront extend beyond a specification of the structure of representation in a national legislature or the rules under which votes will be aggregated to yield an outcome for president or representative. Among other things, we must also consider the degree of regional and local autonomy a document encourages, the extent to which the implemented political system approximates a federal design, and the indirect incentives it engenders for the development of political parties that self-organize at all levels of government.

To tighten up our argument and see what other “constitutionally relevant” provisions impact the “republican character” of a state, let us continue with the comparison of Russia and Ukraine. As noted, Ukraine's elections, while hardly fraud free, nevertheless stand in sharp contrast to Russia's.<sup>53</sup> We attribute this difference in part to the fact that Ukraine, from its very inception as an independent state in 1991, witnessed competitive

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51. *Russian Politics: The Kremlin's New Cookbook*, ECONOMIST, Mar. 17, 2007, at 55 (describing Kremlin-designed political machinations that keep all but “sycophantically loyal” parties from even running candidates for regional office).

52. See Sean O'Connell & Deborah Wetzel, *Systemic Soft Budget Constraints in Ukraine*, in FISCAL DECENTRALIZATION AND THE CHALLENGE OF HARD BUDGET CONSTRAINTS 353, 369 (Jonathan Rodden et al. eds., 2003) (noting that “[b]ecause the mayor and city council are directly elected” in Ukraine, “they are much more attentive to their constituents’ demands, and the two generally tend to have a collegial relationship”); *id.* at 370 (observing that the intense lobbying to become an appointed governor is indicative of the powers held by those in that position; selection requires “the ability of the governor to deliver votes to the president during the presidential elections”).

53. See *supra* notes 45–50 and accompanying text.

national parliamentary elections.<sup>54</sup> Russia, in contrast, has evolved into a one-party state where that party (United Russia), headed by Vladimir Putin, is a virtual clone, absent the ideological cover, of the old Communist Party of the Soviet Union (CPSU).<sup>55</sup> Competition, however, is itself more a consequence than a cause, and here, in explaining the difference between Russia and Ukraine, we must cite some nonconstitutional parameters as well as constitutional ones.

One fact is that, unlike in Russia, no part of Ukraine's government controls *all* arms of state coercion—the courts, the army, the police, and the internal security forces.<sup>56</sup> Thus, a chief executive must make careful accommodations of political opponents and cannot easily suppress that opposition. Even in 2004, then-President Kuchma, opposed to the Orange Revolution and the demonstrators at Kyiv's Independence Square protesting the fraudulent November runoff, found it impossible to control events.<sup>57</sup> Officials of Ukraine's secret service, Sluzhbra Bespeky Ukrayiny (SBU), often refused to follow orders to fire on protesters because they knew members of the crowd.<sup>58</sup> A second fact is that Ukraine is a divided society, geographically and ideologically, with one-half more sympathetic to strong ties to the West and the other half more sympathetic to strong ties to Russia.<sup>59</sup> A head of state, then, must balance strongly felt opposing interests and preferences without recourse to something that office does not have—a monopoly on physical coercion. There is, though, something else a

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54. See PAUL D'ANIERI, UNDERSTANDING UKRAINIAN POLITICS: POWER, POLITICS, AND INSTITUTIONAL DESIGN 82–83 (2006) (indicating that the 1994 parliamentary elections, a relative high point for Ukrainian democracy, were both “free and fair,” led to a great number of parties winning seats in parliament, and even led to the ouster of many incumbents).

55. See MYAGKOV, ORDESHOOK & SHAKIN, *supra* note 41 (manuscript at 125–26) (discussing “Putin’s full control of Russia’s political economic system,” including the 2007 election’s objective to “control any succeeding president” and ensure “the resurrection of the CPSU in form and function under a different label”).

56. See Peter Ackerman & Jack DuVall, *The Right to Rise Up: People Power and the Virtues of Civic Disruption*, FLETCHER F. WORLD AFF., Summer 2006, at 33, 39 (noting that it was “no wonder that when an order came to crack down [on the 2004 Orange Revolution protests], the army and the secret service refused” in light of a Ukrainian general’s confession that many soldiers, upon leaving work, joined the protests themselves); Steven Lee Myers, *Ukraine Leader, Attacking Rival, Won’t Halt Vote*, N.Y. TIMES, Dec. 6, 2004, at A1 (reporting that then-President Kuchma, despite his opposition to the Ukraine Supreme Court’s 2004 ruling that a second runoff was required in presidential elections, would abide by the decision, implying that he did not control the court).

57. See Myers, *supra* note 56 (noting that Kuchma agreed that a second presidential runoff election would “be done in full compliance with the laws” despite his support of the first runoff’s victor); see also C.J. Chivers, *Pro-West Leader Appears to Win Ukraine Election*, N.Y. TIMES, Dec. 27, 2004, at A1 (reporting the subsequent victory of Viktor Yushchenko, the rival of Kuchma’s selected candidate).

58. See Ackerman & DuVall, *supra* note 56 at 39 (finding that because so many members of the military were also participating in the revolution, it was “no wonder that when an order came to crack down, the . . . secret service refused” to do so).

59. See Myers, *supra* note 46 (reporting that Ukraine’s 2004 presidential election threatened to spawn unrest “between the country’s starkly divided regions, dominated by ethnic Ukrainians in the west and ethnic Russians in the east”).

Ukrainian leader does not possess that his Russian counterpart has in abundance—a ready means with which to buy off enemies and competitors. Here we refer to the resources of oil and natural gas.<sup>60</sup> If Putin can buy off members of the European Union such as former German Chancellor Gerhard Schröder,<sup>61</sup> then it is surely no more difficult to buy off those who would usurp his authority in domestic affairs. With a constant flow of fungible dollars and euros, Putin can distribute the country's windfall among a coterie of apparatchiks, all of whom have little incentive to see any other arrangement. As any number of dismissed, indicted, or imprisoned regional governors and opponents of the Kremlin can testify, there is a unique route to political survival in Russia—strict subservience to the powers that be in Moscow.<sup>62</sup> A Ukrainian leader, in contrast, must govern with no such authority or constellation of resources.<sup>63</sup> Surely the country's presidents have all bemoaned the fact that rusting steel mills, sunflower seeds, and sugar beets do not yield the same economic returns as oil and natural gas. But such is the lot of any head of state in Kyiv, which leaves that office vulnerable to opposing economic and political interests and to competition in both the political and economic spheres.

Of course, none of these factors pertain to constitutional provisions. But there is one additional institutional (i.e., constitutional) difference that impacts their operation—the timing of national elections. Prior to a constitutional amendment recently signed into law by Medvedev,<sup>64</sup> Russia's president and parliament served four-year terms, with parliamentary elections occurring a few months prior to the presidential contest (December, then March).<sup>65</sup> In Ukraine, in contrast, with its five-year term for president and a

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60. See ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, OIL AND GAS RESOURCES OF THE WEST SIBERIAN BASIN, RUSSIA 24 (1996), <http://tonto.eia.doe.gov/FTPROOT/petroleum/0617.pdf> (concluding that Russia's West Siberian basin holds some of the world's largest natural gas and oil reserves).

61. See Andrew E. Kramer, *From Russia to Europe with a Natural Gas Pipeline*, N.Y. TIMES, Dec. 10, 2005, at C3 (reporting that, "as a sign of the deepening ties between Russia and Germany," former Chancellor Schröder was named chairman of the pipeline-building subsidiary of Russia's Gazprom after working with Putin to push through a deal for the company to construct a natural gas pipeline between their two countries).

62. See, e.g., Steven Lee Myers, *Jailed Russia Tycoon Mourns Liberty's Losses*, N.Y. TIMES, Mar. 30, 2004, at A9 (reporting the lament of a jailed Russian oil executive about "the decline of liberal democracy" in Russia, even while he acquiesced to "President Vladimir V. Putin's political authority generally" and agreed with the need for large companies to "accept higher taxes," measures he had lobbied against prior to his arrest for tax evasion and related offenses).

63. See CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: UKRAINE (2009), <https://www.cia.gov/library/publications/the-world-factbook/geos/up.html> (estimating that Ukraine depends on imports to meet three-fourths of its oil and natural gas requirements annually); *supra* notes 48–50, 55–58 and accompanying text.

64. Philip P. Pan, *Russia Lengthens Presidential Tenures*, WASH. POST, Dec. 31, 2008, at A12.

65. Clifford J. Levy, *Russian Lawmakers Back Longer Presidency*, N.Y. TIMES, Dec. 23, 2008, at A10; see also KONST. RF art. 81 (limiting Russian presidential terms to four years); *id.* art. 96 (limiting the terms of members of the State Duma to four years).

four-year term for the Verkhovna Rada<sup>66</sup> (unless, as in 2007, special elections are called by the President after he dissolves parliament),<sup>67</sup> we necessarily see only the incidental concurrence or near concurrence of the vote for parliament and president (which did in fact occur in 1994).<sup>68</sup> The immediate consequence of Russia's pre-amendment electoral calendar, in combination with those constitutional provisions that render the presidency dominant over the parliament in legislative matters, was to make its parliamentary elections serve largely as primaries for the presidential contest, with a focus on personalities as opposed to on parties and party platforms. Indeed, even at the height of his popularity, Putin sought an overwhelming mandate for his party, United Russia, in the December 2007 elections in part to solidify his hold on the presidency via the election of his puppet protégé.<sup>69</sup> The true character of Russia's parliamentary elections, though, was never more clearly revealed than in 1999. Of the three strongest competitors—the Communist Party of the Russian Federation (CPRF), Otchestvo (established to promote the national aspirations of Moscow Mayor Yuri Luzhkov and former Prime Minister Yevgenii Primakov), and Edinstvo (the Kremlin's "party of power" at the time, established to promote Putin as Yeltsin's successor)—only one, the CPRF, existed prior to the electoral campaign and survived to compete in the 2003 contest.<sup>70</sup> Indeed, as if to underscore the irrelevance of parties, both Otchestvo and Edinstvo were formed mere months before the election and then quickly dissolved thereafter.<sup>71</sup>

Once it was evident that Putin would control the Kremlin for the foreseeable future, Otchestvo and Edinstvo morphed into United Russia, which survived through the 2003 and 2007 parliamentary contests because Putin stacked the deck in its favor so that he, as the party's head, could

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66. KONST. UKR. art. 103 (limiting the presidential term to five years); *id.* art. 76 (limiting the term of members of the Verkhovna Rada to four years).

67. Steven Lee Myers, *Ukraine Adversaries Agree on Early Election, Defusing Crisis*, N.Y. TIMES, May 27, 2007, at A9.

68. Sarah Birch, *The Ukrainian Parliamentary and Presidential Elections of 1994*, 15 ELECTORAL STUD. 93, 93 (1995).

69. See Clifford J. Levy, *Putin's Party Wins in Russia, but Leadership Is Still Clouded*, N.Y. TIMES, Dec. 2, 2007, at A1 (describing United Russia's landslide victory in the 2007 parliamentary elections, after a campaign in which Putin's Kremlin "consistently hobbled the opposition").

70. See Michael Wines, *Russia Voting After Rancorous Campaign, but All's Just Prelude to Main Bout Next Year*, N.Y. TIMES, Dec. 19, 1999, at A30 (identifying Luzhkov and Primakov as Yeltsin's "most powerful opponents" in the 1999 elections but also describing them as "straw men" and noting that "neither of the parties that represents these two camps existed a year ago"); see also RICHARD SAKWA, PUTIN: RUSSIA'S CHOICE 116 (2008) (listing the candidates in the 2004 Russian presidential election in which, out of the three parties mentioned above, only the CPRF was represented).

71. See Ariel Cohen, *Putin's Legacy and United Russia's New Ideology*, BACKGROUNDERS, June 1, 2006, at 3, [http://www.heritage.org/Research/RussiaandEurasia/upload/98056\\_1.pdf](http://www.heritage.org/Research/RussiaandEurasia/upload/98056_1.pdf) (stating that the United Russia party was formed in December 2001 by merging the Otchestvo and Edinstvo parties).

maintain control after Medvedev assumed the presidency.<sup>72</sup> The history of Otchestvo, in particular, illustrates the interplay of constitutional provisions. Initially formed by several regional bosses who aligned themselves with those they thought would succeed Yeltsin, the party's weak showing relative to the Kremlin-backed list (Edinstvo) signaled that Putin—an otherwise obscure, ex-KGB bureaucrat who initially seemed to be but the latest in a series of appointees as Prime Minister by a President whose approval rating hovered in the teens—would prevail as Russia's next President.<sup>73</sup> With the national aspirations of Luzhkov and Primakov quashed and the Kremlin having demonstrated its power to dictate presidential succession, Otchestvo's sponsors acceded to Putin's "request" that they coalesce with Edinstvo to establish United Russia as the new "party of power."<sup>74</sup> In fact, Otchestvo's leaders gave up little because they had no reason to sustain an independent political party at even the regional or local level.<sup>75</sup> In their most recent reelection victories, Moscow Mayor Yuri Luzhkov,<sup>76</sup> Bashkortostan President Murtaza Rakhimov,<sup>77</sup> and Tatarstan President Mintimer Shaymiyev<sup>78</sup> all won election and reelection with minimal opposition while garnering more than 70% of the vote; Ingushetia President Ruslan Aushev

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72. See LILIA SHEVTSOVA, *PUTIN'S RUSSIA* 181, 181–82 (2d ed. 2005) (commenting that the merger of Otchestvo and Edinstvo "meant that the last opponents of the federal center had realized that it was pointless to fight Putin"); Peter Finn, *Russian Voters Turn Out for Putin and United Russia*, WASH. POST, Dec. 3, 2007, at A12 (reporting on the 2007 majority victory by United Russia in parliamentary elections and interpreting them as confirmation of Putin's "desire to wield influence over not just the next parliament but the next president"); Susan B. Glasser & Peter Baker, *Putin Allies Gain Control in Election*, WASH. POST, Dec. 8, 2003, at A1 (reporting on the 2003 plurality victory by Putin's United Russia party in parliamentary elections and apparent bias shown by state-controlled media for United Russia).

73. See Danielle N. Lussier, *The Role of Russia's Governors in the 1999–2000 Federal Elections*, in *REGIONAL POLITICS IN RUSSIA* 54, 59 (Cameron Ross ed., 2002) (recording that Luzhkov's Otchestvo party "had developed strong bilateral ties with several regional executives . . . [who] bet that Luzhkov would be elected Yeltsin's successor and jumped on his bandwagon early"); *id.* at 71 tbl.4.3 (showing that by May 2000 the Otechestvo alliance held only 47 seats in the Duma while Edinstvo held 83).

74. See SHEVTSOVA, *supra* note 72, at 181 (noting that the Kremlin-orchestrated merger was successful since "[n]either Luzhkov nor Primakov nor their followers wanted to be perceived as the opposition").

75. See Lussier, *supra* note 73, at 72–73 (stating that from the start of Putin's tenure in 2000, regional leaders began to shift their support toward the federal center and away from Luzhkov's Otechestvo party; even Luzhkov eventually threw his party's support behind Putin's presidential candidacy).

76. See Clem Cecil, *Mayor Rides High Again*, TIMES (London), Dec. 9, 2003, at 15 (reporting that Luzhkov was reelected in 2003 with about 75% of the popular vote).

77. See Alex Fak, *Rakhimov Wins 78% in Runoff*, MOSCOW TIMES, Dec. 23, 2003, LEXIS, News Library, Mostms File (noting the president's reelection in 2003 with more than 78% in a runoff vote).

78. See *Tatarstan President Re-elected*, UNITED PRESS INT'L, Mar. 26, 2001, LEXIS, News Library, UPI File (reporting President Shaimiyev's 2001 reelection with approximately 80% of the vote).

won unopposed in 1993 with 99.99% of the vote.<sup>79</sup> These are not “candidates” with a need to cultivate partisan labels or with much of an incentive to share their political capital with anyone else.

The coming and going of Russian parties and party labels is illustrated in Table 1, which, when compared to Table 2, portrays the difference between Russia and Ukraine. Specifically, as Table 2 shows, essentially the same six parties have competed across the three most recent Ukrainian parliamentary elections, whereas in Table 1 we see that, with the exception of the CPRF, Liberal Democratic Party of Russia (LDPR), and a now-irrelevant Yabloko, parties or party labels seem to come and go in Russia with the seasons. Notice, moreover, the steep decline in the fortunes of the Communists in both countries as the issue of reform versus a Soviet status quo fades from view. But unlike in Russia, not one party but several benefit from this decline in Ukraine. Thus, while in Russia the difference between the first- and second-ranked parties since 1995 shows the increasing noncompetitiveness of parliamentary elections (changing from 11.1% to 1.0% to 25.0% to 52.7%),<sup>80</sup> in Ukraine those elections since 1998 have maintained their competitiveness (changing from 15.3% to 3.6% to 9.8% to 3.7%).<sup>81</sup> As another indicator of declining competitiveness in Russia as compared to Ukraine, the last lines of Tables 1 and 2 also calculate the “effective number of parties” for each country’s last four parliamentary elections.<sup>82</sup> This data reveals that while that number has been relatively constant in Ukraine and never less than 3.0, it exhibits a precipitous decline to 1.9 in Russia. Finally, it is important to note that with parliament holding

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79. THE REPUBLICS AND REGIONS OF THE RUSSIAN FEDERATION 131 (Robert W. Orttung et al. eds., 2000). Although regional governors during these years were directly elected, it was also obvious that the Kremlin had near-dictatorial control over their political survival, via its ability to control the national budget, interpret and apply federal law, and indict governors for real or invented corruption. See Robert W. Orttung, *Introduction to THE REPUBLICS AND REGIONS OF THE RUSSIAN FEDERATION*, *supra*, at xii, xix–xx (detailing tools that the Kremlin exploits to maintain control over the governors, including fostering regional disunity, offering or denying support in reelection campaigns, the distribution of federal funds, and federal–regional treaties).

80. See *infra* Table 1.

81. See *infra* Table 2. Ukraine’s presidential elections are no less competitive. In 1994 President Kravchuk and Leonid Kuchma split the first-round vote 38.4% versus 31.2% and the second-round 45.1% and 52.2% respectively. Marina Popescu, *Ukraine: Presidential Election Results* (Dec. 8, 2000), [http://www2.essex.ac.uk/elect/electer/ukr\\_prelr.htm](http://www2.essex.ac.uk/elect/electer/ukr_prelr.htm). In 1999 Kuchma outpolled the CPU candidate Symonenko 36.5% to 22.2% in the first round and then 56.3% to 37.8% in the runoff. International Foundation for Electoral Systems, *IFES Election Guide: Election Profile for Ukraine*, <http://www.electionguide.org/results.php?ID=796>. And in 2004, Yushchenko outpolled Yanukovich 39.9% to 39.3% in the first round and 52.0% to 44.2% in the December runoff. MYAGKOV, ORDESHOOK & SHAKIN, *supra* note 41 (manuscript at 152). This competitiveness, as reflected by the fact that no Ukrainian president has been elected without a runoff vote, adds to the incentives to maintain party organizations of some form at the local and regional levels.

82. “Effective number of parties” is calculated using the formula  $\sum(1/p_i)^2$ , where  $p_i$  is the proportion of the vote won by a party qualifying for seats in parliament, normalized by the share of the vote won by all such parties.

real constitutional authority, Ukraine's parties, while dominated by key personalities,<sup>83</sup> offer well-articulated platforms on the most salient issues, such as economic reform, social welfare, relations with Russia, joining NATO, joining the European Union, and so on. Those same parties, moreover, maintain strong regional and local organizations in part to maintain control of regional and local offices and to provide a base for the competition for seats in the national parliament.<sup>84</sup>

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83. Some of these key personalities include President Viktor Yushchenko with Our Ukraine, Petro Symonenko with the CPU, Viktor Yanukovich with United Ukraine-Party of Regions, Oskar Moroz with the SPU, and Yulia Timoshenko with BYuT. MYAGKOV, ORDESHOOK & SHAKIN, *supra* note 41 (manuscript at 196–97).

84. *See id.* (manuscript at 166–67) (describing a party with an “administrative advantage” in a particular region as essentially guaranteed to win in that region, through either fraudulent or legitimate means).

Table 1: Trends in Russian Parliamentary Elections<sup>85</sup>  
 (Showing the percentage of popular votes won by each party)

	1993	1995	1999	2003	2007
CPRF	12.4	22.3	24.3	12.6	11.6
LDPR	22.9	11.2	6.0	11.5	8.1
Yabloko	7.9	6.9	5.9	4.3	1.6
Agrarians	8.0	3.8	-	3.6	2.3
United Russia	-	-	-	37.6	64.3
Fair Russia	-	-	-	-	7.7
Unity (Edinstvo)	-	-	23.3	-	-
Fatherland (Otchestvo)	-	-	13.3	-	-
Regions	-	-	-	9.0	-
Our Home Is Russia	-	10.1	-	-	-
Russia's Choice	15.5	-	-	-	-
Women of Russia	8.1	4.6	-	-	-
Effective # of Parties	-	4.3	3.8	2.8	1.9

85. The data for this table is gathered from Russia's Central Election Commission (CEC). Central Election Commission of the Russian Federation, <http://www.cikrf.ru/eng>. Data for 2003 and forward was available on the Russian CEC's Web site but for only a short period of time. *Id.* Comprehensive data and data from earlier elections was obtained through leaks from the CEC; where appropriate, the author checked for consistency with aggregated official reports. The compilation of this data is on file with the author.

Table 2: Trends in Ukrainian Parliamentary Elections<sup>86</sup>  
 (Showing the percentage of popular votes won by each party)

	1994	1998	2002	2006	2007
Our Ukraine (Rukh)	8.1	9.4	23.6	14.0	14.2
CPU	24.8	24.7	20.0	3.7	5.4
United Ukraine (Regions, PDPU)	-	5.0	11.8	32.1	34.4
Vitrenko Bloc/Prog. Socialists	-	4.0	3.2	2.9	1.3
SPU	6.0	8.6	6.9	5.7	2.9
BYuT	-	-	7.2	22.3	30.7
Litvyn bloc	-	-	-	2.4	4.0
SDPU	-	4.0	6.3	-	-
Effective # of Parties	-	3.7	5.0	3.4	3.3

86. The data for this table was gathered by Ukraine's CEC, the core source being the CEC's official Web site. Central Election Commission of Ukraine, <http://www.cvk.gov.ua/>. The compilation of this data is on file with the author.

One would be hard pressed to attribute the patterns in Tables 1 and 2 exclusively to constitutional provisions. But, in addition to the autonomy enjoyed or not enjoyed by regional and local officials, we should not discount the differential impact of each country's electoral calendar. If Russia's 1999 parliamentary contest had been held a year earlier or its presidential vote a year later—or, better still, if they had been held simultaneously—we could readily envision a party system that would have survived to institute a more meaningful balance between president and parliament. Surely Edinstvo and Otchestvo would have taken different forms—most likely as parties designed to compete for control of parliamentary coalitions. In Ukraine, on the other hand, if a presidential vote had taken place early in 2003, then Petro Symonenko, as head of the Communist Party of Ukraine (CPU), would have been President Yushchenko's primary competitor, as opposed to the inconsequential role he played in 2004.<sup>87</sup> In 2002, moreover, Viktor Yanukovich's Party of Regions was but one of several components of United Ukraine,<sup>88</sup> and since he had not yet been elevated to the post of Prime Minister by Kuchma,<sup>89</sup> we might also conjecture that his subsequent role as Putin's stand-in for the Kremlin's attempt to dominate Ukrainian politics would not have materialized. Of course, the differential timing of elections in Ukraine has had the effect of making both its 2006 and 2007 parliamentary votes a part of the jockeying for position in the forthcoming 2009 presidential balloting, but not to the same extent as in Russia. In any event, we can imagine an even more coherent party system emerging if Ukraine's presidential and parliamentary elections were held simultaneously, with the incentives for coherence becoming greater still if presidential candidates were precluded from heading parliamentary lists and if regional and local elections were held alongside national ones.

We also should not underestimate the role played by Ukraine's election calendar, alongside any other constitutional encouragement given to the establishment of a competitive party system, insofar as the pervasiveness of electoral fraud is concerned. It is true, as we noted earlier, that the level of electoral malfeasance exhibited in Ukraine's first 2004 (November) runoff round approximates the relative magnitude of fraud committed on Putin's

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87. See Ukraine Ctr. Electoral Comm'n, *Latest CEC Result Puts Yanukovich a Point Ahead of Yushchenko*, UKRAINE NEWS, Nov. 4, 2004, available at 2004 WLNR 13822155 (reporting Symonenko's roughly 5% of the popular vote in 2004, a figure that put him in fourth place behind Yanukovich, Yushchenko, and Moroz).

88. MYAGKOV, ORDESHOOK & SHAKIN, *supra* note 41 (manuscript at 304 n.40); Galina Ivanova, *The Ukrainian Party of Regions*, RUSSIA ELECTION 2008, Nov. 8, 2007, <http://russian-election2008.blogspot.com/2007/11/ukrainian-party-of-regions.html>.

89. See Sabrina Tavernise, *Embattled Ukraine Chief Names New Premier*, N.Y. TIMES, Nov. 17, 2002, at A11 (reporting that President Kuchma had that day appointed Yanukovich as Prime Minister).

behalf earlier that year.<sup>90</sup> However, its second (December) runoff was, at least by post-Soviet standards, virtually fraud-free, as were its 2006 and 2007 parliamentary votes.<sup>91</sup> It is easy to understand how fraud was allowed to permeate the November balloting, only to virtually disappear in December 2004. The presidential contest was competitive nationally but not regionally—any number of election districts in the East saw Yanukovich garner second-round pluralities of 90% or more (with turnout in excess of 100%) while Yushchenko won with similar margins in the West.<sup>92</sup> However, with international observers and journalists flooding the country for the December round<sup>93</sup> and with President Kuchma (along with a greatly embarrassed Putin) leaving Yanukovich to twist in the wind,<sup>94</sup> regional political bosses had far fewer opportunities and incentives to commit fraud. But with far less international scrutiny, why was the balloting in 2006 and 2007 also relatively fraud-free? Surely the stakes were no less great than in 2004, since Ukraine's Prime Minister and the parties that control the parliament possessed even greater authority relative to the President than they did previously.<sup>95</sup> Again, we can only speculate, but the competitive character of elections across Ukraine is a critical component of any explanation. With three to four well-organized parties seeking to become part of a majority-governing parliamentary coalition, no region of Ukraine failed to provide fertile ground for competition between at least two of them.<sup>96</sup> Yanukovich's Party of Regions may have dominated in eastern Ukraine, but the CPU campaigned effectively there, while the Bloc of Yulia Tymoshenko (BYuT) ran perhaps the first true national campaign and cut into the support of both the Party of Regions in central Ukraine and

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90. See *supra* note 45 and accompanying text.

91. See *supra* note 46 and accompanying text.

92. MYAGKOV, ORDESHOOK & SHAKIN, *supra* note 41 (manuscript at 162–63).

93. See GlobalSecurity.org, Ukraine 2004 Presidential Election, <http://www.globalsecurity.org/military/world/ukraine/election-2004.htm> (“The repeat second round of the presidential election in Ukraine on December 26 brought Ukraine substantially closer to meeting international standards, according to the International Election Observation Mission that deployed 1,370 observers from 44 countries for the election.”).

94. See GlobalSecurity.org, Ukraine Election Crisis Week 3, <http://www.globalsecurity.org/military/world/ukraine/election-2004-3.htm> (chronicling Kuchma's support just before the runoff of constitutional changes that weakened the Ukrainian President's power, despite opposition to the changes by Yanukovich); *id.* (noting that Kuchma initially “strongly backed” Yanukovich prior to the 2004 election).

95. For a detailed account of events between the November and December rounds, see Ukraine 2004 Presidential Election, *supra* note 93. What is significant here is that as a consequence of the negotiations leading to a rerun of the November runoff, the President's powers were significantly reduced, leaving him able to appoint (with the concurrence of parliament) only the Prime Minister, Defense Minister, and Foreign Minister. Ukraine Election Crisis Week 3, *supra* note 94. Thus, the powers of parliament, along with incentives to compete for seats within it, were greatly enhanced.

96. See MYAGKOV, ORDESHOOK & SHAKIN, *supra* note 41 (manuscript at 196–98) (describing the regional competition among parties in the 2006 and 2007 parliamentary elections).

Yushchenko's Our Ukraine in the West.<sup>97</sup> Thus, if it is competition that drives out corruption, we can infer that whatever institutional factors encourage a regionally competitive party system—including the electoral calendar—contribute also to a reduction in electoral fraud.

### III. Constitutional Provisions

The timing of elections is no less important in the United States. Of course, it was not until the Twentieth Amendment that an electoral calendar was formally incorporated into the U.S. Constitution and then only implicitly via the requirement that the new President assume office on January 20th and the new legislature on January 3rd.<sup>98</sup> The previous calendar was more a consequence of convention, since the original document, aside from choosing the House of Representatives, imposed no requirement for direct elections at all.<sup>99</sup> Nevertheless, that is precisely what, for the most part, evolved. In explaining the eventual emergence of simultaneous elections, we can point to various practical issues such as minimizing the cost of administering a multitude of federal, state, and local elections, as well as aligning the start and stop dates of the two-year terms of Representatives, the four-year terms of Presidents, and the six-year terms of Senators to closely if not identically correspond. Indeed, because some flexibility in start and stop dates was essential under the initial assumption that more often than not the House of Representatives would be required ultimately to choose presidents<sup>100</sup> and since, presumably, newly elected as opposed to lame-duck state legislatures or governors would most likely choose Senators, no specific unified date could be established.<sup>101</sup> Details were left to statute as prescribed by Article I,

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97. *Id.* (manuscript at 213). Of the ten oblasts carried by Yanukovich's Party of Regions in 2006 and 2007, Tymoshenko's BYuT, Yushchenko's partner in the Orange Revolution, outpolled even the Communists in six of them to come in second in those regions. *Id.* (manuscript at 196, 209–10). Perhaps more indicative of BYuT's national campaign is the fact that of those election districts in the West in which Yushchenko's Our Ukraine polled over 40%, BYuT increased its share from 32.4% to 51.8%. *Id.* (manuscript at 212). While in the East, though still reflective of Ukraine's geographic divide, Tymoshenko's BYuT increased its share from 8.3% to 11.4% in those districts in which Yanukovich's Party of Regions polled over 40% in 2006. *See id.* (manuscript at 209, 305 n.45).

98. U.S. CONST. amend. XX, § 1. The Twelfth Amendment's provision that the Vice President serve as President in the event that the House fails to elect a President prior to the fourth day of March presupposes that electors have been chosen by the individual states prior to that date, which sets a calendar of sorts for those states allowing for the direct election of electors. *Id.* amend. XII.

99. *See id.* art. I, § 3, cl. 1 (providing that Senators shall be chosen by their states' legislatures); *id.* art. II, § 1, cl. 3 (providing that the President shall be chosen by state electors).

100. *See id.* art. II, § 1, cl. 3 (making the House of Representatives responsible for choosing the President in various situations).

101. *See id.* art. I, § 4, cl. 1 (failing to establish a unified date for House and Senate elections, delegating to each state the authority to establish dates, but also reserving to Congress the right to legislate on the issue at any future time); *id.* art. II, § 1, cl. 4 (granting Congress the authority to establish a date for presidential elections but not expressly establishing any such date).

Section Four and Article II, Section One,<sup>102</sup> but it is reasonable to infer that the framers presumed that each branch of the federal government would assume its position at approximately the same time. The framers, unable to foresee the evolution of institutions and conventions that, while not mandated by the Constitution, did not contravene it either, were understandably unable to foresee fully the advantage of having elections occur simultaneously. Thus, their silence on this subject should not be taken as a template for contemporary constitutional design.

Here we see the conjunction of several constitutional and quasi-constitutional provisions aligning to establish the character of America's party system and the roles of Congress versus the President. We noted earlier how constitutions (and quasi-constitutional legislation such as the Northwest Ordinance) can encourage if not dictate the proliferation of offices to be filled by direct election at the national, state, and local levels that, in turn, encourages the development of political parties.<sup>103</sup> Next, establishing an electoral calendar—or at least not mandating otherwise—in which presidential candidates must compete alongside candidates for other offices encourages presidential aspirants to become an integral part of the party system. Indeed, although Madison and Jefferson's visit to upstate New York in 1791 may have been to study the flora and fauna of the region, it was clearly the fauna of state and local political bosses that most interested them and that set Madison in motion in organizing nationally to win Jefferson the presidency.<sup>104</sup> Despite his earlier warnings about the evils of faction,<sup>105</sup> what Madison understood is that no candidate for the presidency can be successful and no president can be effective without the support of a national organization of some sort that exists both within and without the national Legislature.<sup>106</sup> And as Madison also understood, the logical place to begin the construction of such an organization was local, county, and state “parties,”<sup>107</sup> thereby inaugurating what has emerged as a symbiotic relationship between presidents and those who hold other offices and share their partisan affiliation.

We appreciate that the “party” Madison organized bore little resemblance to what we label a political party today. It was not until the

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102. See *id.* art. I, § 4 (establishing that the “times, places and manner of holding elections” would be decisions for state legislatures); *id.* art. II, § 1 (allowing each state to appoint electors to the Electoral College).

103. See *supra* notes 26–33 and accompanying text.

104. See NORMAN K. RISJORD, THOMAS JEFFERSON 88, 87–88 (1994) (describing the political relationships made on that tour as “la[ying] the foundation for a ‘New York–Virginia axis’ that would be the centerpiece of the Jeffersonian Republican Party”).

105. See *supra* note 12 and accompanying text.

106. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 30 (2d ed. 2003).

107. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 274 (2000) (stating that Hamilton and Jefferson needed to “appeal[] to state and local political leaders to build a stable following” for a national party).

1830s and the competition between Whigs and Jacksonian Democrats that we would see national organizations imitating contemporary parties and providing for the full integration of local, state, and national organizations.<sup>108</sup> But if, in addition to the constitutional provisions considered thus far, we turn our attention to those powers granted to the President, we find another critical influence on the evolution of electoral arrangements that are not to be found in a constitution under the explicit or implicit heading of “elections.” Briefly, it may have been true in 1787 that the American President was afforded powers and protections that far outstripped those given to state governors—the unrestricted legislative veto,<sup>109</sup> a four-year term<sup>110</sup> (as opposed to the general norm of one year),<sup>111</sup> cabinets of the President’s choosing as opposed to legislatively selected executive councils,<sup>112</sup> and selection via a mechanism wholly independent of the national Legislature.<sup>113</sup> Nevertheless, the document the framers wrote was clearly Legislature-centric. The veto can be overridden,<sup>114</sup> the four-year term can be shortened via impeachment and conviction,<sup>115</sup> and cabinet members are appointed only with the advice and consent of the Senate,<sup>116</sup> and then only to entities authorized and funded by Congress.<sup>117</sup> The President has no role in amending the Constitution,<sup>118</sup> no direct authority over state governments,<sup>119</sup> and no constitutionally mandated authority to set the legislative agenda.<sup>120</sup> Compared to any number of presidential systems today, it is a constitutionally weak office, at least as defined by its formal powers relative to the Legislature.<sup>121</sup> Yet, if one were to list those countries with “strong

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108. See Richard P. McCormick, *Political Development and the Second Party System*, in *THE AMERICAN PARTY SYSTEMS* 102, 99–102 (William Nisbet Chambers & Walter Dean Burnham eds., 2d ed. 1975) (discussing the development during the 1830s of the two-party system from a nominal system to one where voters “respond[ed] to candidates and issues as Whigs or Democrats”).

109. U.S. CONST. art. I, § 7, cl. 2.

110. *Id.* art. II, § 1, cl. 1.

111. See MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY* 51 (1999) (noting that the first state constitutions of the original thirteen states, except South Carolina, ordered annual elections for governors).

112. U.S. CONST. art. II, § 2, cl. 2.

113. *Id.* § 1, cls. 2–3.

114. *Id.* art. I, § 7, cl. 2.

115. *Id.* art. II, § 4.

116. *Id.* § 2, cl. 2.

117. *Id.* art. I, § 8, cl. 18; *id.* § 9, cl. 7.

118. See *id.* art. V (setting forth the amendment process without mentioning the President).

119. See *id.* art. II, § 2 (granting to the President various powers and authorities but not providing direct authority over any state entities except for state militias).

120. See *id.* (granting to the President various powers and authorities but not providing any mandated authority to set the legislative agenda). *But see id.* § 3 (requiring that the President recommend “necessary and expedient” measures to Congress for consideration).

121. See, for example, MATTHEW S. SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES* 155 tbl.8.2 (1992) for an assessment of the legislative powers of presidents in the forty-four systems with popularly elected presidents: twenty-three systems offer their president greater powers than the American President, while only ten offer fewer.

presidencies,” surely the United States would make the grade. The explanation for this lies in part in the fact that the American presidency has two other political resources at its disposal. The first is that the President is the uniquely nationally elected official and thus, in Teddy Roosevelt’s words, is in control of the “bully pulpit.”<sup>122</sup> The second source is the President’s standing as head of a national political party. Indeed, if anyone has an incentive to cultivate a party (as Madison foresaw almost immediately)<sup>123</sup> it is candidates for that office, since without the subnational organizations that lie beneath it, election and effective administration are impossibilities.<sup>124</sup> If presidents seek to implement an agenda, they must secure the support of the Legislature; to influence that branch they must, of necessity, involve themselves in state and local politics to the extent that they can best influence legislators through their constituents.<sup>125</sup> It is here that we find one source of the political power of an otherwise constitutionally weak office: namely, the incentives of presidents to lead via an appeal to the electorate and the cultivation of the nebulous notion of leadership, as opposed to the direct and often clumsy application of the formal levers of constitutional authority.

It is here, moreover, that we find the other source of that power—the symbiotic relationship that exists among presidents, national legislators, and state and local politicians. With parties and party labels playing the informational role that they do,<sup>126</sup> it is not merely presidents who have an incentive to cultivate their party labels and relations with subnational political elites. All politicians competing in partisan elections have a similar incentive. This, in turn, effectively joins “at the hip” all politicians sharing the same label. A president must cooperate with and cultivate politicians and political elites from his party, while those same politicians and elites must do what they can to ensure that whoever heads their party—a president or perhaps even a failed candidate for that office—does not tarnish the label with unwise or ineffective policies. Indeed, should such a party leader commit some moral misdeed (adulterous sex in the White House comes to mind), then far be it for members of a president’s party to do much in the

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122. See Christopher Honeyman, *The Physics of Power*, 87 MARQ. L. REV. 872, 872 (2004) (repeating Teddy Roosevelt’s description of the presidency as a “bully pulpit”); see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 67 (1991) (“The Presidency has become a plebiscitarian office, the platform from which the victor seeks to persuade Congress to support his ‘mandate’ from the voters.”).

123. See *supra* notes 104–08 and accompanying text.

124. See Walter Dean Burnham, *Party Systems and the Political Process*, in *THE AMERICAN PARTY SYSTEMS*, *supra* note 108, at 277, 278 (asserting that one broad function performed by fully developed political parties is the “office-filling function; orderly and democratic processes are prescribed for elite recruitment to a limited number of elective and appointive positions”).

125. For elaboration of this argument, see generally ACKERMAN, *supra* note 122, at 106, which notes the rise of the “plebiscitarian Presidency” and the increased importance of dams, roads, hospitals, and military bases in presidential negotiations with representatives over legislation.

126. See *supra* notes 32–38 and accompanying text.

way of publicly criticizing such behavior (Roosevelt, Eisenhower, Kennedy, and Clinton all come to mind now).

Thus, the absence of explicit constitutional authority on the part of the President along with other constitutional and quasi-constitutional provisions referred to earlier<sup>127</sup> combine to yield the American party system as we know it today. It is fair to say, then, that the functioning of our electoral institutions owes as much to the formal powers not given to the presidency as anything else. We cannot argue, of course, that alternative arrangements might not have encouraged an equivalent evolution. However, once it was agreed that the term of House members should be set at two years<sup>128</sup> (and here we note that if a number other than “two” had been chosen, it would have been “one”)<sup>129</sup> and the President at four,<sup>130</sup> then in the context of an otherwise weak presidency and the encouragement given to the proliferation of elections throughout the polity, it becomes difficult to imagine the emergence of “the Russian problem” wherein legislative elections substitute for presidential primaries, parties are ephemeral entities, and the Legislature (and perforce, the Judiciary) become wholly subservient to the Executive.<sup>131</sup> Surely the framers could hardly have foreseen the full interplay of the institutions they established or encouraged, or imagined the proliferation of elective offices and its impact on the invention, evolution, and ultimate importance of parties. On the other hand, perhaps, with the examples in the colonies and states of offices already filled via direct election, such as sheriffs, city council members, militia officers, and so on,<sup>132</sup> they did so. As Madison also argued,

Many considerations . . . seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow.<sup>133</sup>

Nevertheless, the constitutional principles the framers illuminated were hardly sufficient to map out the full implications of their design, and we are in some sense the beneficiaries of fortuitous circumstances and the evolutionary flexibility they gave to their document. However, this Article would be incomplete if we failed to consider the one part of the U.S. Constitution that specifically addresses elections—the Electoral College.<sup>134</sup>

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127. *See supra* notes 98–104 and accompanying text.

128. U.S. CONST. art. I, § 2, cl. 1.

129. *See supra* note 111 and accompanying text.

130. U.S. CONST. art. II, § 1, cl. 1.

131. *See supra* Part II.

132. *See, e.g.,* CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760–1860, at 82 (1960) (describing colonial problems regarding election of militia officers).

133. THE FEDERALIST NO. 46 (James Madison), *supra* note 12, at 233.

134. U.S. CONST. art. II, § 1, cls. 2–3.

And interestingly, this is the one provision that was almost immediately understood as being in need of repair following the deadlock between Jefferson and Burr and the evident inadvisability of having a political adversary serving as vice president in a president's administration.<sup>135</sup>

The changes in the Electoral College mandated by the Twelfth Amendment<sup>136</sup> are in a sense unremarkable. After all, the period following the ratification of the Constitution was one of considerable experimentation and change in election laws, suffrage, and the manner in which public officials—from governors, to representatives, to senators, to presidential electors—were chosen.<sup>137</sup> Massachusetts is a case in point. In 1792 it employed a multimember, direct-vote district system to choose presidential electors.<sup>138</sup> It switched in 1796 to a mixture between legislative selection and a direct vote, switched in 1800 to pure legislative selection, and then oscillated between a direct vote and legislative selection in 1804, 1808, 1812, and 1816.<sup>139</sup> It switched again and settled finally on a direct vote in 1820.<sup>140</sup> Even today, as other countries experiment with all manner of electoral schemes, combining single-mandate districts with plurality or majority rule with various forms of proportional representation,<sup>141</sup> the “peculiar” mechanism whereby we transform the popular vote into a president-elect remains the subject of considerable controversy, with the vote reversal of 2000, the fourth such in history,<sup>142</sup> resurrecting interest in change.<sup>143</sup> Of

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135. See RICHARD B. BERNSTEIN, *AMENDING AMERICA* 65 (1993) (“The 1801 nightmare convinced the Republicans and some Federalists to begin an overhaul of the Electoral College machinery.”). It was apparent that the Twelfth Amendment would encourage party formation, a fact that was the source of the Federalist opposition to the amendment and was subsequently a factor in the party's reduction to a regional entity with little chance of dictating national elections. *Id.* at 63.

136. See U.S. CONST. amend. XII (altering the rules of the original Constitution dictating how the electors vote for President and Vice President, the process through which the House selects a President when no candidate receives a majority of electoral votes, and the process through which the Senate selects a Vice President when no candidate receives a majority of electoral votes).

137. See BERNSTEIN, *supra* note 135, at 59 (describing multiple proposals during the post-ratification period for changes to the presidential election process).

138. *McPherson v. Blacker*, 146 U.S. 1, 30 (1892).

139. *Id.* at 31–32.

140. *Id.* at 32.

141. See Matthew S. Shugart & Martin P. Wattenberg, *Mixed-Member Electoral Systems: A Definition and Typology*, in *MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS?* 9, 9–11 (Matthew S. Shugart & Martin P. Wattenberg eds., 2001) (providing examples and variations of the basic characteristics of mixed majoritarian and proportional systems).

142. The commonly cited reversals are the presidential elections of 1824 and 1876. See, e.g., Roberta A. Yard, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure “One Person, One Vote,”* 42 *SANTA CLARA L. REV.* 185, 193–97 (2001) (describing the 1824 election of Andrew Jackson and the 1876 election of Rutherford B. Hayes). Arguably, though, the 1960 election is a reversal as well, though rarely reported as such in the media. In Alabama, Democrats elected eleven electors pledged as “independent,” six of whom eventually supported Harry Byrd's States Rights Party. Charles D. Kelso & R. Randall Kelso, *Of Cabbages and Kings: A Review of Our Undemocratic Constitution by Sanford Levinson*, 86 *TEXAS L. REV.* 1263, 1266 (2008). If we subtract a proportionate share of Democratic votes normally attributed to Kennedy in summary accounts of the election, then arguably Nixon won the popular

course, the Twelfth Amendment did not halt the evolutionary development of the college, with states, for the most part, adopting a winner-take-all format<sup>144</sup> (the current exceptions being Maine and Nebraska)<sup>145</sup> and parties taking control of the electors themselves.<sup>146</sup> However, that more radical change has not occurred can be attributed to two facts. The first is that the stability of the Republic seems impervious to the peculiarities of the college. And second, no one is certain of the consequences of the alternatives and their impact on our two-party system. The original provision pertaining to the college, though, doubtlessly had its own independent impact on the development of parties in the way in which electors were to be chosen—to wit, by state legislators or in a manner set by those legislators. Quite directly, then, the U.S. Constitution linked not only the selection of one chamber of the Congress, the Senate, to state legislative elections, but it did so as well for the presidency and made competition for that office a decentralized affair. Thus, while the imperative for amendment might seem to make this first experiment in incorporating electoral law into a constitutional document a failure, Article II, Section One, both before and after amendment, doubtlessly had its own impact on encouraging the development of parties and the requisite symbiotic relationship among politicians. We might judge it, then, to have been a failure in details but not in the incentives it established for the political integration of the polity.

#### IV. Parliamentary Government and Conclusions

Much of what we have said here applies uniquely to presidential systems where a balance is sought among three branches of government. In parliamentary systems, in contrast, the chief executive officer is selected by the legislature and is usually beholden to a majority coalition within it.<sup>147</sup> Nevertheless, it would seem that principles similar to the ones enunciated by the framers should apply here, although now the problem of balancing the

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vote. Walter A. McDougall, *The Slippery Statistics of the Popular Vote*, N.Y. TIMES, Nov. 16, 2000, at A35.

143. See McDougall, *supra* note 142 (“[V]arious Democrats, led by Senator-elect Hillary Rodham Clinton, are now denouncing the Electoral College as undemocratic and anachronistic, and calling for its demise.”).

144. Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation’s Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 206–07 (1994).

145. Richard L. Hasen, *When “Legislature” May Mean More Than “Legislature”*: Initiated Electoral College Reform and the Ghost of Bush v. Gore, 35 HASTINGS CONST. L.Q. 599, 602 (2008).

146. See Williams & Macdonald, *supra* note 144, at 207 n.34 (noting that while state law can limit the voting power of electors, they are generally permitted to vote for whatever candidate they please and can constitutionally enter into elector voting pledges, which presents an opportunity for parties to control electors).

147. See, e.g., Geoffrey Palmer, *The Cabinet, the Prime Minister and the Constitution*, 4 N.Z. J. PUB. & INT’L L. 1, 22, 24–25 (2006) (explaining that New Zealand’s Parliament elects the Prime Minister, whose authority relied on the confidence of Parliament).

powers of the legislature and head of state fades as a salient concern. There remains, nevertheless, the issue of encouraging a viable party system that integrates the interests of political elites throughout the polity. Here we can take a lesson from Germany: it is not simply the mixture of single-mandate districts with PR that gives local interests direct representation in the Bundestag<sup>148</sup> but also the requirement that party lists be decentralized to the level of individual states within the federation and the formula for allocating seats wherein parties have an incentive to develop competitive state organizations.<sup>149</sup> We note, however, that this system is not constitutionally prescribed. Insofar as the Bundestag is concerned, aside from establishing a four-year term, Germany's Basic Law requires only that "Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. . . . Details shall be regulated by a federal law."<sup>150</sup> As critical as the German national electoral system is to the functioning of the state, one can of course wonder why details are left to statute. After all, we should take cognizance of the fact that experimentation continues in any number of democratic or pseudo-democratic states. Both Russia and Ukraine, for instance, began with what can generously be called bastardized versions of the German system whereby parliamentary seats are filled by a mixture of party-list PR and single-mandate elections,<sup>151</sup> along with the requirement (based on the silly presumption that unless a "large enough" share of the electorate voted, it is impossible to determine the will of the people) that turnout exceed fifty percent before an outcome could be deemed valid.<sup>152</sup>

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148. Sanford Levinson, "Democracy in a New America": *Some Reflections on a Title*, 79 N.C. L. REV. 1559, 1561 (2001).

149. See, e.g., Charlotte Streck, *Ecopolitics in Modern Germany: The Rebirth of the Green Party*, 8 DICK. J. ENVTL. L. & POL'Y 33, 35–36 (1999) (noting that the use of party lists in state elections gives parties with small, local voting blocs a chance at electoral success).

150. GG art. 38.

151. Under the 1993 decree for Russian elections, half of the representatives to the Duma were elected based on PR from federal party lists and the other half from single-mandate districts. Anatoly Kulik, *Political Parties in Post-Soviet Russia: An Agent of Democratic Transition?*, in POLITICAL PARTIES IN POST-SOVIET SPACE 13, 18–19 (Anatoly Kulik & Susanna Pshizova eds., 2005). In Ukraine, the national parliament reformed the electoral system in 1997 to mandate a half-and-half electoral system roughly identical to Russia's. Volodymyr Fresenko, *Influence of the Electoral System on the Role of Political Parties in the Development of Democracy in Ukraine*, in POLITICAL PARTIES IN POST-SOVIET SPACE, *supra*, at 95, 96.

152. Note, however, that the aforementioned 1997 election reforms in Ukraine lowered to twenty-five percent the Soviet-inspired requirement for a fifty-percent turnout. Ustina Markus, *Ukraine Plods On*, in ANNUAL SURVEY OF EASTERN EUROPE AND THE FORMER SOVIET UNION: 1997, at 161, 164 (Peter Rutland ed., 1998). Similarly, for the 1993 Russian elections, Yeltsin's decree lowered the Soviet-era fifty-percent requirement to twenty-five percent. RICHARD SAKWA, RUSSIAN POLITICS AND SOCIETY 106 (2d ed. 1996). A year later, in a bid to hold onto power in the 1995 Duma elections, Yeltsin attempted—unsuccessfully—to restore the minimum threshold to fifty percent. LAURA BELIN & ROBERT W. ORTTUNG, THE RUSSIAN PARLIAMENTARY ELECTIONS OF 1995: THE BATTLE FOR THE DUMA 26–29 (1997). In 2007, Russian authorities abolished the minimum turnout requirements for both presidential and parliamentary elections. Robert W. Orttung, *Russia*, in NATIONS IN TRANSIT 2007: DEMOCRATIZATION FROM CENTRAL EUROPE TO EURASIA 577, 583–84 (Jeannette Goehring ed., 2007).

However, neither system survived a decade, and today both countries employ only party-list proportional schemes.<sup>153</sup> Such experimentation is allowed by the silence of constitutions as to the precise methods for the conduct of elections, and if Germany, with its parliamentary system, were to follow the examples set by Russia and Ukraine, its party system would almost certainly be jeopardized.

So the question remains as to whether experimentation should be allowed, or even encouraged, by leaving the details of election law to statute. The answer, it would seem, is both yes and no. We know that if the formal character of an election system is altered, it is done to serve the interests of those who hold the power to change things—incumbents.<sup>154</sup> And change often occurs because, in setting forth initial rules, it is unclear how alternatives serve specific interests. For example, a number of countries today in addition to Germany employ some mixture of PR and single-mandate forms since, even with decades of experience and study, it is unclear how to best achieve a balance between regional representation and encouraging a coherent party system.<sup>155</sup> However, if the arguments offered in this Article are correct—if the critical determinants of a polity's electoral system are things other than the precise formulas whereby votes are translated into winners and losers—then allowing incumbents to experiment, fine-tune, and change those formulas may be, at worst, a harmless game among elites and, at best, a way of bringing electoral institutions into harmony with existing structures.

Returning, then, to our earlier questions: Which bums? Under what rules? Where should those rules be specified?<sup>156</sup> We can imprecisely answer the first part with: As many bums as is practical. The second and third parts are more difficult to answer since there are a great many rules—constitutional and statutory—that interact to dictate the form and function of elections. And definitive answers to such questions are especially elusive when we accept the proposition that not all relevant rules apply directly to elections and the manner in which public offices are filled. Minimally, then, we would answer: Constitutional provisions that do not discourage the proliferation of elective offices across all levels of government or that

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153. See FREEDOM HOUSE, FREEDOM IN THE WORLD 2008: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 741 (Arch Puddington ed., 2008) (reporting that Ukraine's parliamentary elections in 2006 were the first to be conducted exclusively according to party-list PR); Steven Lee Myers, *Russia: Lawmakers Back Putin Bill, on Second Try*, N.Y. TIMES, May 12, 2005, at A10 (reporting on the Russian Duma's approval of PR elections according to party lists).

154. See Walter M. Frank, *Help Wanted: The Constitutional Case Against Gerrymandering to Protect Congressional Incumbents*, 32 OHIO N.U. L. REV. 227, 228 (2006) (arguing that redistricting is done to protect incumbents); Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 847–48 (noting the potential for self-interest of incumbents in creating election law).

155. For a survey and country-by-country analysis of mixed electoral systems, see generally MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS?, *supra* note 141.

156. See *supra* text accompanying notes 21–23.

encourage statutory legislation that undermines symbiotic relationships among political elites should be the rules. To this answer we should once again add the qualification that it is unlikely that any single provision will account for the character of electoral competition in a society. In Russia, for example, the timing of elections reduces the role of the parliamentary contest to a primary for the presidential vote because of the influence of other constitutional factors, such as the authority of the President relative to parliament and regional governors and the absence of meaningful electoral competition at the regional level.<sup>157</sup> In Ukraine, in contrast, although its 2004 parliamentary and presidential elections occurred within months of each other, a similar pattern did not arise largely because of the importance of parliament in the governing of the state and the relative independence of regional political bosses.<sup>158</sup>

Finally, with a nod to Franklin and our question: Wherein are the opportunities and incentives to keep good rules and to change bad ones?<sup>159</sup> We can only say that they lie everywhere and nowhere in particular but are contained in the character not only of national constitutions but in regional constitutions and charters as well. Indeed, if our arguments and inferences are correct, then in asking what ought to be in a constitution, we need to ensure that our focus is not exclusively national constitutions but also those things that dictate the form and function of elections at all levels of government and that perhaps even encourage experimentation in domains less critical than national politics.

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157. *See supra* text accompanying notes 39, 44, 63–69.

158. *See supra* text accompanying notes 74–78. Although Ukraine held a parliamentary election in 1998 and a presidential vote in 1999, these two elections were separated by nineteen months—March in 1998 and October in 1999. INT’L REPUBLICAN INST., 1999 UKRAINE PRESIDENTIAL ELECTION OBSERVATION MISSION REPORT 5 (2000), available at <http://www.iri.org/eurasia/ukraine/pdfs/Ukraine's%201999%20Presidential%20Elections.pdf>.

159. *See supra* text accompanying note 23.