OBSERVATIONS ON BICAMERALISM

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Most national assemblies are unicameral. According to the Interparliamentary Union, 114 (or almost 60 percent) of the 192 countries in which, according to the IPU, "a national legislature exists" each had only a single chamber.[1] The remaining number of bicameral national assemblies must be treated with caution because some of those 78 nations—Belarus, Congo, Kazakhstan, and Zimbabwe, for example—hardly are exemplars of democratic practice. Also, even among nations that can make some arguable claim to democratic standing, some have one chamber of their national assembly that is much more consequential than the other. Nonetheless, in constitutional theory at least, a noteworthy number of national assemblies are supposed somehow to divide their duties and responsibilities between two chambers.

We may conclude, therefore, that bicameralism is sufficiently common and widespread to merit our attention, but that it remains the exception and not the rule. So the burden of explanation and justification would seem to rest on the advocates and defenders of bicameralism. Why are two chambers thought to be better than one? How are the assembly's powers and authorities supposed to be divided? Are the two chambers to be roughly equal in power, or is one expected to dominate the other? How closely does actual practice conform to constitutional theory? How do the two chambers co-exist? To what degree and in what respects is their relationship cooperative or competitive? What characteristics of the two chambers seem to shape the nature of the relations between them? What effect, if any, does the existence of two chambers have on the relations between the assembly and the government or executive branch? What can be said about the compatibility of bicameralism with different electoral systems and with different constitutional forms of democratic regimes?

Such questions about bicameralism are inseparable from questions about the reasons for, and the consequences of, the existence of second chambers. Democratic theorists would agree, I hope, that a democratic (actually, a republican) form of government requires the direct election of most or all members of an assembly. This requirement having been met, a second chamber with a membership that also is elected in the same way and by much the same electorate can be dismissed as redundant and unnecessary. Recall the famous epigram of Abbe Sieyes: "If a Second Chamber dissents from the First, it is mischievious; if it agrees, it is superfluous."[2] If, on the other hand, the second chamber's members are not directly elected—as is the case, for example, in Thailand, Canada, and the UK, where many or all of them are appointed, and in India, Germany, and Russia, where the members are somehow selected by provincial assemblies or governments—it can be viewed as undermining the purely republican character of the regime.

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[1] www.ipu.org/parline-e/ParliamentsAtaGlance.asp; as of October 2010. The regional disparities are relatively minor. The only region with a majority of bicameral assemblies is the Americas, which presumably is a reflection of the powerful influence of the U.S. example on constitutional design.

[2] There are variations in the translation. This version is taken from George Galloway, *Congress and Parliament*. Washington: National Planning Association, 1955; p. 89).

So questions about bicameralism can be recast as questions about second chambers. Why do they exist? What value are they supposed to have; what purposes are they expected to fulfill? What duties and authorities are they given? Are they expected to be coordinate with or subordinate to the other house? Does their actual power accurately reflect their constitutional position? Is the relationship between the two chambers a competitive one, or does one house dominate the other? In the former case, do the benefits of this competition offset the costs it imposes on the political system? In the latter, what useful purpose does such a second chamber serve?

These questions merit more attention than they have received to date, and they constitute a research agenda that could consume the careers of a team of political scientists. I do not intend to offer fully-developed answers to any of them here. My purpose is to offer some observations that may help to shape the thinking and approaches of any who do take up the challenge of answering them.[3]

VARIETIES OF BICAMERALISM

As I already have suggested, not all bicameral systems share the same basic design, a design that is embedded at least in part in the national constitution. A familiar and useful basis for categorizing bicameral systems is Arend Lijphart's distinction between "strong" and "weak" bicameralism, a distinction that rests on his concepts of symmetry and congruence.

"The strength of bicameralism," according to Lijphart (1999: 315) depends on two criteria: the symmetry and incongruence of the two houses of the legislature. Two houses are symmetrical if they are equally powerful and if they are both directly elected by the voters and therefore both enjoy full democratic legitimacy. Two houses of a bicameral legislature are incongruent if they clearly differ in composition."

If the two houses of an assembly are more or less symmetrical in their powers, neither has the constitutional authority to dominate the other. If they also are incongruent in their mode of election, they are likely to differ in their partisan composition and, therefore, in their collective policy preferences. A bicameral system is "strong" if it reflects the combination of symmetry and incongruence because there is the prospect of policy disagreement between the two houses, both of which enjoy a measure of legitimacy, and neither of which easily can impose its will on the other. Otherwise, it is "weak", to a greater or lesser degree, because one of them may lack the stature that comes with popular election of its members, or because one house can dominate the other or has no need to do so because they are much less likely to disagree.

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[3] This essay draws upon, and incorporates excerpts from, my book, *Platypus and Parliament*. Canberra: Department of the Senate, 2003; and two other essays: (1) "Why a Senate? *The Federalist* Perspective, Then and Now," a paper presented at a conference on "Bicameralism: Australia in Comparative Perspective," sponsored by the Senate and House of Representatives of the Parliament of Australia and the Parliamentary Studies Centre of the Crawford School of Economics and Government, the Australian National University; Parliament House, Canberra, October 2008; and (2) "Reaching Bicameral Legislative Agreement in Canberra and Washington." In *Papers on Parliament* No. 53. Department of the Senate, Canberra, June 2010; pp. 97-142. Available online at www.aph.gov.au/Senate/pubs/pops/ index.htm.

How common is strong bicameralism? For a political system to qualify as strongly bicameral, it would seem necessary that both houses be directly elected. Lijphart's definition of incongruence assumes as much. Again resorting to information made available by the IPU, only 24, or less than one-third of the total number of bicameral national assemblies, have memberships that are entirely or primarily directly elected.[4] With respect to Lijphart's criterion of congruence, therefore, weak bicameralism evidently is the prevalent pattern, if not the international norm.

In addition, the two houses of a national assembly may be symmetrical in their constitutional authority over some matters, but not others.[5] While uncommon, such a situation is most likely to prevail in systems characterized by a vertical separation of powers—an awkward phrase that encompasses various forms of federalism, devolution, and decentralization.

Under the German basic law, for example, the Bundesrat—the second chamber comprising ministers of the various State governments or their designees—has an absolute veto with regard to some bills and a suspensive veto with regard to all others. According to Thomas Saalfeld (1998: 49):

> In the case of so-called 'consent laws' (…that is, laws requiring mandatory Bundesrat consent), the Bundesrat has an absolute veto, which cannot be overturned by the Bundestag. In addition, the representation of the states has a veto over all other laws ("simple laws"…). A suspensory [suspensive] Bundesrat veto against a 'simple' bill can be overturned only by an absolute majority of the Bundestag. If a 'simple' bill is rejected by the Bundesrat with a two-thirds majority, the veto can only be overturned if at least two-thirds of the Bundestag members present—and more than 50 per cent of the total number of the Bundestag deputies—vote to reject the veto.

Furthermore, 'consent laws' are not at all unusual. Saalfeld continues:

> The policy areas where the Bundesrat has an absolute veto are defined in the Basic Law. They include amendments to the Basic Law, all laws affecting the relationship between federation and federal states (including state finance), the relationship between the federation's administration and federal state administrations, declaration of the state of emergency and war as well as delegated legislation. In practice, more than one-half of all federal laws, and the vast majority of important domestic laws are 'consent laws'….

In a somewhat similar fashion, the new 2010 constitution of Kenya limits the legislative authority of the newly-created Senate to bills "concerning county government," including bills affecting the functions, powers, and finances of county governments. All other bills are considered only by the other house, the National Assembly. In the case of any bill concerning

[4] Among the 24 with relatively few members of the second house who are not directly elected are Bhutan (80.0% directly elected), Italy (97.8%), Spain (78.8%), and Uruguay (96.8%). Excluded from the 24 are Belgium (56.3% directly elected), Egypt (66.6%), Thailand (50.7%), and Zimbabwe (60.6%).

[5] "[T]hree countries used to have formally equal chambers–Belgium, Denmark, and Sweden–but the Belgian Senate's power was severely reduced when it was elected in its new federal form in 1995, and Denmark and Sweden abolished their second chambers in 1953 and 1970, respectively." (Lijphart 1999: 205-206) See also Longley and Olson (1991).

county government, however, its enactment requires the approval of both houses, and certain kinds of "special" bills concerning county government are sent on to the president for assent after approval by the Senate only, unless the National Assembly amends or vetoes such a bill by a two-thirds vote (Arts. 110-113).[6]

As these two examples illustrate, there can be different degrees of symmetry between the two houses of the same bicameral assembly. Moreover, the degree of symmetry and congruence may be governed by the national constitution or the constitution may allow them to be fixed and then changed by statute.

As an example of constitutional control, take the equal representation of the states in the Senate in both the United States and Australia. Under both charters, not only is equal state representation provided, it is almost entrenched—that is, beyond the reach of change through the normal constitutional amendment process. Article 5 of the U.S. Constitution provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." And to much the same effect, Article 128 of the Australian Constitution states that "[n]o alteration diminishing the proportionate representation of any State in either House of the Parliament…shall become law unless the majority of the electors voting in that State approved the proposed law."[7] Since no state is likely to assent to the diminution of its own constitutional powers vis-à-vis the other states, equal state representation is almost certain to continue unchanged in both nations, except perhaps in case of a wholesale revision of either charter.

As an example of statutory control over the symmetry or congruence of the two houses in a bicameral system, take the power of the Australian government to enact laws that fix the methods of electing its national Senators.[8] From 1901 through 1948, Senators were elected by plurality vote on a statewide basis, with the result that one party or the other often won most or all of the Senate seats being contested.

> The practical result of this system was the so-called 'windscreen-wiper effect', which delivered almost all contested Senate seats in each state to whatever political party achieved a majority....[O]nce the political parties became consolidated, the system began to deliver disproportionate victories to whichever party was riding high with the passing electoral majority: Labor won all of the 18 seats on offer at the 1910 election; non-Labor won all on offer at the 1918 and 1925 and 1934 elections; and Labor won all Senate seats at the 1943 election and 15 of the 18 on offer at the 1946 election. (Uhr 1999: 3-4)

Then, in 1948, Australia switched from this system to a system of electing Senators on a statewide basis by proportional representation. To simplify a more complicated story, the result has been that the 29 elections since then have produced government majorities in the Senate on

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[6] "Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary bill." (Art. 110(3)).

[7] Similarly, Article 79(3) of the German Basic Law states that "[a]mendments to this Basic Law affecting the division of the Federation into Lander [or] their participation on principle in the legislative process…shall be inadmissible."

[8] In the United States, by contrast, the switch from election of Senators by state legislatures to popular election required the adoption of a constitutional amendment.

only six occasions, and only once since 1981. What had been two congruent houses became incongruent, and contemporary Australian governments often have to struggle to assemble majorities to pass legislation in the Senate that they can pass without difficulty in the House of Representatives with its disciplined party majorities. The symmetrical powers of the two houses have remained unchanged, while the political dynamics of bicameralism in Australia have changed considerably.

FACTORS AFFECTING BICAMERAL RELATIONS

As Lijphart argues, the nature of bicameral relations and the pattern of bicameral interactions in a national assembly depends in part on whether the constitutional assignment of powers to each of them is largely symmetrical or assymetrical. Although there are other factors affecting bicameral relations, the respective constitutional powers of the two houses is the most durable in its consequences. Do the two houses enjoy roughly the same legislative powers? Are there constitutional arrangements governing the process for reaching bicameral legislative agreements that favor one house at the expense of the other? Typically, national constitutions assign considerably more legislative power, or give considerably more democratic legitimacy, to one house of a bicameral assembly.[9] And in such cases, one way in which constitutions can establish the dominance of one house over the other is by enabling it to impose its will in cases of legislative disagreements.

For example, a constitution may deny to one house the power to initiate or amend certain kinds of bills—most likely, essential financial legislation. It also may provide that, in cases of persistent bicameral legislative disagreement over the final terms of a bill, the preferences of one house are to prevail over the other.[10] Or it may achieve the same result somewhat more indirectly by submitting such legislative disagreements to majority votes of both houses sitting together, so that if each house is unified in defense of its position, the position of the larger house will prevail.

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[9] In post-Ceaucescu Romania, to cite an extreme counter-example, members of the two houses were elected in the same ways and for terms of the same length, and the two houses enjoyed the same powers. The original plan evidently called for a "differentiated bicameralism." "The final Constitution called for an undifferentiated bicameralism, however, conferring an identical democratic legitimacy upon both chambers. This unusual choice was partly motivated by the framers' fear that one institution's claim to ultimate legitimacy might permit an excessive concentration of power." Elana Stefoi-Sava. "Romania: Organizing Legislative Impotence," *East European Constitutional Review*, v. 4, n. 2, Spring 1995; pp. 78-83. Stefoi-Sava also describes the resulting arrangement as "carbon-copy bicameralism" and "monochrome bicameralism."

[10] In the French case, which has been well-analyzed in English by Tsebelis and Money, the process in broad brushstrokes is similar to that in the US Congress, in that a bill passed by one house then is sent to the other which in turn may propose amendments for the first house to consider. After both the National Assembly and the Senate have acted twice on a bill (or sooner if the bill is declared to be urgent)—the process of sending the bill back and forth is known in France as the *navette* or shuttle—the government may call for creation of a conference committee comprising equal numbers of members from the two houses. If the conference committee proposes a compromise that both houses accept, the legislative process is complete. However, if the conference committee fails to agree or if its report is rejected, the government can ask the National Assembly, to which it is responsible, to pass the bill in whatever final form the government proposes. In other words, the government and its parliamentary partner, the National Assembly, have the final word if they insist on having it. See George Tsebelis and Jeannette Money, "Bicameral Negotiations: The Navette System in France," *British Journal of Political Science*, v. 25, 1995, pp. 101-129; and Jeanette Money and George Tsebelis, "The Political Power of the French Senate: Micromechanisms of Bicameral Negotiations," *The Journal of Legislative Studies*, v. 1, 1995; pp. 192-217. .

In most democratic regimes with bicameral national assemblies, one house clearly dominates the other. Australia and the United States are unusual in having national assemblies in which (1) the two houses have relatively comparable powers, (2) both houses are directly elected so they enjoy the democratic legitimacy without which they might be reluctant to exercise their powers (compared to Canada's appointed Senate, for example), and (3) neither house has the constitutional means to impose its will on the other in the regular course of business.[11]

In addition, there are at least four other, non-constitutional, factors affecting the operations of bicameral national assemblies, factors that have their basis sometimes in law and sometimes in political practice. These other factors—partisan control, party cohesiveness, procedural comparability, and legislative autonomy—can be very powerful and persistent in their effects, even though they also are more subject to change over time and more subject to influence by national assemblies and their members.

First, with regard to partisan control, is the distribution of party strength largely the same in the two houses? If the same party or coalition of parties controls a majority of seats in both houses, then, everything else being equal (which, of course, it rarely is), it should be easier for the two houses to reach agreement than it would be if there are different and opposing partisan majorities in the two houses, or if at least one of them is not controlled by a single party or stable coalition.[12]

Second, to what degree is the majority party or coalition in each house unified or disciplined? If it consists of a collection of uncomfortable bedfellows who have policy disagreements among themselves and who do not feel obliged to vote with their fellow party members, much less with members of any coalition partners in the assembly, then the two halves of the assembly may prefer significantly different versions of the same bill, even if they have the same ostensible majorities. This difficulty can arise in assemblies controlled by multi-party coalitions, but it also can occur in what formally are two-party systems if one or both parties is, itself, a coalition of diverse factions (whether or not they are organized and recognized as such) and those factions are not represented in similar proportions in the two houses.

Third, do the rules (standing orders) or the procedural practices of each house enable the majority party or coalition to control its legislative outcomes?[13] Even if both houses have majorities of the same party or parties and even if the parties are unified or disciplined, it also matters if the legislative procedures of each house allow a simple majority of its members to

[11] In Australia, there is a constitutional option to resolve legislative disagreements in a joint sitting. However, this option arises only if the two houses fail to pass the same bill in the same form on three separate occasions, with a "double dissolution" election of all Representatives and all Senators occurring between the second and third occasions. Obviously, therefore, this process is too slow and cumbersome to be used regularly. And in fact, it has been used only once.

[12] This assumes the existence of a party system, which usually is a safe assumption to make, at least for national assemblies. In non-partisan assemblies, or in assemblies in which parties are inchoate or embryonic, the difficulties of reaching agreement may be greater because of the need for supporters of legislation in each house to assemble majorities one vote at a time. On the other hand, the absence of parties may facilitate agreement because there are less likely to be groups of assembly members whose first instinct is to oppose each other's positions.

[13] References throughout to "rules" encompass not only the codified and formally adopted rules of each house, but also the enforceable (and published) precedents and practices by which these rules have been interpreted and applied.

control its decisions without undue delay. If so, they are more likely to reach similar or identical decisions than if the procedures of one house give the minority (or opposition parties) more leverage that it (or they) can use to extract concessions and compel compromises.

And fourth, does the same sense of legislative autonomy prevail in each house? Again, even if the two houses are controlled by the same cohesive party or coalition, it also matters if the legislative agendas of the two houses and the specific legislative proposals they each consider are decided elsewhere—namely, by the executive government. If so, the differences in the versions of legislation that each passes are likely to be less significant than if each house exercises more control over its legislative agenda and if each acts more autonomously in drafting the legislation that it then passes and sends to the other house for its concurrence.

This combination of endogenous and exogenous conditions helps to shape the operation of bicameral assemblies, but they leave unanswered the underlying question: why is bicameralism desirable or necessary?

BICAMERALISM IN *THE FEDERALIST*

For a historic and principled argument in favor of bicameralism, Americans are most likely to turn to *The Federalist*, written in the 1780s in support of ratifying the recently-drafted constitution.[14]

The argument,[15] attributed primarily to James Madison, asserts that there is an inherent danger in any republican government, which elects its leaders and enacts its laws by majority vote, that a majority group (or a combination of minority groups)—"factions," in Madison's parlance—may gain control of the levers of governmental power and use them in ways that benefit its leaders in corrupt ways or that benefit certain group interests at the expense of the interests of other, minority groups or a more general public interest. Guarding against this danger is one of the great tasks of government, and constitutions should be constructed in ways that protect against it. One way to minimize the danger, without eliminating it entirely, was to enlarge the republic and thereby reduce the likelihood that any majority group would emerge or that any majority coalition of minority groups will coalesce. So an enlarged republic was the first line of defense against the potential for abuse of governmental power in republics.

A second line of defense was federalism: a constitutional relationship between the individual states and the national government that is much more than confederation but far less than consolidation. By the innovative device of empowering both the national government and each state government to act directly on the citizens of that state, but on different matters and for different purposes, a form of shared or divided sovereignty was created. This amounted to a vertical separation of powers in which the national government could be expected to resist encroachments by the states into its enumerated powers, and the state governments could be expected to resist encroachments by the national government into the states' residual powers. One result was to guard against a majority group controlling the powers of government because

[14] This part of the essay refers to "Congress" and "legislature" instead of "national assembly" because there is no need in this context for a phrase that encompasses both legislatures and parliaments.

[15] For a much more rigorous dissection and critical analysis of the logic of Madison's argument, see Dahl, pp. 4-33.

they were to be shared among the states and between the state governments and the national government.

The national constitution also created a third line of defense in the form of its system of separate institutions sharing the powers that the constitution assigns to the national government. Officials of that government were, for the most part, expected to be sincerely dedicated to the principles of the Constitution and the institutions of government it established. However, the Constitution also included a collection of "auxiliary precautions" to stimulate a competition for influence among the three branches of government. The senior officials of each branch were expected to understand that their reputations and ambitions were inseparable from the strength of the institution—whether legislative, executive, or judicial—of which they were a part. Furthermore, their ability to promote their preferred government policies (or those of their "factions") would depend on the relative power of their institution within the larger structure of government. They were expected to have powerful incentives, therefore, to protect the branch of government in which they served from encroachments by one or more of the others.

For any majority group to become able to abuse national governmental power, for personal or parochial interests, it would have to gain control of most if not all the levers of power, distributed as they are among the separated institutions. And the likelihood of this occurring was to be reduced by the different ways in which the members of each primary institution of the government were to be chosen: Representatives by direct popular election; Senators by indirect election by the state legislatures; the President by indirect election by an electoral college of notables who were themselves to be elected by the people; and federal judges, appointed by the President with the agreement of the Senate.

All this, however, is not enough. A fourth line of defense also was necessary because of a concern that seems implausible to us today: Madison's concern for a natural, perhaps inexorable, flow of power from the other branches to the legislature.

The natural inclination in colonial America had been to react against a concentration of power in the executive branch, in the person either of a hereditary monarch or his colonial governors. Indeed, that is a primary reason why the Articles of Confederation lacked a single executive and vested essentially all national power, such as it was, in the legislature. In turn, that was one of the inadequacies that led to the Constitutional Convention being convened and the convention to draft a new charter that provided for a president. The goal was to imbue the new national government with greater strength, energy, and efficiency, while also increasing its powers *vis-à-vis* the states. But, Madison contended, independence having been achieved, the greater danger now lay elsewhere: "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." (*Federalist,* No. 48)

> [I]n a representative republic, where the executive magistracy is carefully limited both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions. (*Federalist,* No. 48)

This fear of legislative power undoubtedly rings false to the contemporary ear, accustomed as we now are to the executive branch, whether presidential or parliamentary, that is "every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Yet understanding this context is essential to understanding Madison's argument, the design of the new constitutional order that he was advocating, and, ultimately, the value of a certain kind of bicameralism. The Articles of Confederation had protected all too well against a too-powerful national executive. Now the need was to establish effective counter-weights against "the encroaching spirit of power" developing within the legislative branch.

The Constitution's authors, according to Madison, were not prepared to assume that diligent efforts by members of each branch of government would suffice to maintain a requisite balance of power among them. To prevent that balance from tipping in favor of the legislature, the Constitution divided the Congress against itself. By creating a Senate that differed from the House of Representatives in how its members are elected, what qualifies them for election, and how long they serve, differences between the two houses were created that could be expected to emerge and affect their decisions as they exercised their shared and essentially equal legislative powers. Such a bicameral legislature was thought to be less likely than a unicameral alternative to have a unified interest in imposing its single will on the executive and the judiciary.

This is why a Senate was desirable if not essential, but only if the Constitution rendered the two houses of the legislature, "by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit." (*Federalist,* No. 51) Only strong bicameralism would suffice. If the Senate were to serve Madison's purpose, it had to be powerful and it also had to be sufficiently different from the House of Representatives for the two houses to have reason to compete with, and constrain, each other. In other words, both symmetry and incongruence were essential.

The Senate, then, lies at the end of a chain of argument about how a republican government can be made safe for the people it is supposed to serve. The starting point is that political power is "of an encroaching nature," so the question became whether the proposed new Constitution provided practical and effectual protections against such encroachment. Madison's answered that question affirmatively because he found in the Constitution four successive lines of defense: the very size of the republic; the sharing of power between the state and national governments; the sharing of power among the branches of the national government; and, finally, the establishment of a Senate to divide and thereby control the most dangerous of the branches, the legislature.

In the 1780s, then, Madison found in bicameralism a means to prevent a unified legislature from dominating the other branches of government and encroaching on their powers to the detriment of individual and collective liberties and interests. Now, after more than two hundred years have passed, a key component of Madison's argument has a quaint and almost amusingly anachronistic ring to it. Today it would be difficult indeed to sustain Madison's argument that "[i]n republican government the legislative authority, necessarily, predominates." Instead, the arguments of our era are far more likely to be over what to do about—or whether

anything can be done about—the imperial presidency, for example, or the decline of parliament. If there is one common or most prevalent theme in analyses during the past several decades of the condition of the legislative branch in the English-speaking world, it is the flow of power to the executive, with a consequent decline in the power and influence of legislatures and parliaments.

Our contemporary situation, then, would seem to undermine or even nullify Madison's core argument for the existence of a senate. If the legislative is no longer the potentially dominant branch of government, there is no need to constrain it by dividing it into two halves with incentives to compete as well as cooperate. Indeed, it might be a unicameral legislature that is better able to concentrate its remaining strength against encroachments by the executive branch without wasting any of that strength in intra-legislative competition. It is difficult enough for a collective legislative body to speak and act with unity when confronted by a single head of government. How much more fragmented and ineffectual should we expect it to be when it is divided into two halves that are "as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit"? (*Federalist,* No. 51)

But this line of argument makes sense only if the legislature recognizes a need to protect itself against encroachments by the executive branch. What if, instead, the legislative and executive branches regard each other as allies with a common interest in joining their respective powers in pursuit of shared goals? In *Federalist* No. 51, Madison argued that "the 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." What happens if a majority of legislators lack the personal motives to resist executive encroachments even though they retain the necessary constitutional means to do so? In that case, ambition no longer would counteract ambition, and "[t]he interest of the man" no longer would be "connected with the constitutional rights of the place." To continue paraphrasing this essay, the government surely would be able to "control the governed," but it would not have the necessary incentive "to control itself." The result would be greatly to increase the risk of majority self-interest or even oppression that Madison feared.

Modern political parties have created bridges to connect the separated institutions of Madison's system, and bring together members of the legislative and executive in common cause. Legislators may visualize their futures in places of executive power or in positions of greater power within the legislature. In either event, they understand that their ambitions for the future are most unlikely to materialize without the support and success of their party. With "the interest of the man" tied more and more closely to the preferment of his party, "the constitutional rights of the place," not surprisingly, tend to become a secondary concern. If the executive and legislative branches are in the hands of the same party, it matters less whether the power of government actually is exercised in one or the other. The mutual ambitions of their members already in office are, first, their collective ambition to remain in office and, then, their individual ambitions to advance in office. Their shared incentives, therefore, are for cooperation, not competition, between the branches and, in practice, a willingness for legislators to defer to the executive because there, after all, is where the leader of their party is almost always to be found.

The core of Madison's argument rests on two premises: first, that a government in the interests of even a majority faction is all too likely to be "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community" (*Federalis*t No. 10); and second, therefore, that the institutions of government can and should be designed to prevent any such faction from exerting a continuing dominance over government policy.

But is this not precisely the situation we are most likely to encounter in democratic governments today? In parliamentary systems, the legislature and the executive are in the hands of the same party; that is true virtually by definition (except in instances of minority government). And in presidential systems, we end up in much the same place if the president's party also wins a majority of the legislative seats. Unless, that is, the legislature is bicameral, and the members of the two houses are elected at different times and in different ways (as Madison urged), so that the two houses are less likely to share the same distribution of party memberships and policy preferences. And unless each house has sufficient constitutional powers, and sufficient will to exercise those powers, to prevent one from becoming dominant over the other.

So bicameralism remains critical even in an era of executive dominance, and perhaps even more than ever. In a republic, legitimacy demands that both houses represent the people as a whole, not a special segment of them, but there are advantages in providing for them to be elected in different ways to reduce the likelihood that they will endorse the same policies and even to create the possibility that the same political party will not unite the executive with both halves of the legislature. Even so, a difference in the political coloration of the two houses will matter little if one has the constitutional power to dominate the other (invariably, the senate), either acting alone or acting in alliance with the executive branch. The two houses need not have identical powers. However, each needs some essential powers that the other institutions of government cannot exercise without its concurrence, and each needs a sufficient sense of its own legitimacy and responsibility to prevent it from subordinating itself to the other house, or to a partisan alliance between the other house and the executive.

REASONS FOR BICAMERALISM

The Madisonian argument is essentially a negative one: the benefit of strong bicameralism lies in what it tends to prevent. The opposite—and positive—side of that argument is the tendency of strong bicameralism to promote compromise. Here is John Stuart Mill in his *Representative Government*:[16]

> The consideration which tells most, in my judgment, in favor of two Chambers (and this I do regard as of some moment) is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should, in great affairs, be able, even temporarily, to make their *sic volo* prevail without asking any one else for his consent. A majority in a single assembly, when it has assumed a permanent character–when composed of the same persons

[16] In Chapter 13, "Of a Second Chamber," and available at www.constitution.org/jsm/rep_gov.htm, in addition to many other sources and printed editions.

> habitually acting together, and always assured of victory in their own House–easily becomes despotic and overweening, if released form the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls makes it desirable there should be two Chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year. One of the most indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation: a readiness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views; and of this salutary habit, the mutual give and take (as it has been called) between two Houses is a perpetual school; useful as such even now, and its utility would probably be even more felt in a more democratic constitution of the Legislature.

Mills' argument for conciliation and compromise is consistent with the view that the legislative process is not so much a search for truth and the right public policy as it is an effort to construct the public policy that best takes account of the nation's usually diverse and sometimes conflicting interests and preferences within the broad context of shared social values. By creating such a process, even though one that is more complex and time-consuming than it otherwise might be, strong bicameralism tends to expand the range of interests and preferences that must be taken into account.

So one reason for strong bicameralism is to restrain majoritarianism (Madison) or its obverse, to promote legislative compromise and conciliation (Mills). In addition, there are at least five other reasons that can be adduced for bicameralism of some kind and that are too familiar to require much comment.

One is to reflect prior national experience. When nations are writing new constitutions, especially after a period of non-democratic rule, there is a natural tendency to look back on a previous "golden age" of democracy (whether mythical or actual), and to want to reconstruct modern versions of the institutions that then existed. If those institutions included a bicameral national assembly, that may well now be seen to be part of the national democratic tradition, so the burden of argument is likely to fall on those advocating unicameralism.

Another is to emulate other, apparently successful and prestigious, democratic regimes. The most obvious examples must be the appeal of U.S. presidentialism and bicameralism in South America, and the power of the British example, and not only in the U.S., Canada, India, Australia, and New Zealand. According to the IPU, bicameralism also reigns in Antigua and Barbuda, the Bahamas, Barbados, Belize, Grenada, Jamaica, Saint Lucia, and Trinidad and Tobago. And if foreign "experts" from the most visible and well-established democracies are imported to assist in drafting new constitutions, their own national experiences will accompany them and may include a preference for the kinds of bicameralism that operate at home.

A third is to capitalize on the available expertise and experience, and to bring into legislative decision-making those who are uninterested in or unsuitable for elective politics. U.S. Senators originally were expected to constitute a kind of council of elders or advisors to the president. It was thought that putting their selection in the hands of state legislatures would result in the choice of men of gravity, consequence, and wisdom, especially in comparison with the directly-elected Members of the House of Representatives. An argument for a largely or

entirely appointed House of Lords in the UK is that it would allow people of long experience and, often, specialized expertise, to have seats at the policy-making table. The English translation of the name of Afghanistan's upper house, the Meshrano Jirga, is the House of Elders. The members of Bahrain's Shura Council are appointed by the king to advise him. And in Belize, Barry (1995: 4) reports, where Senators are appointed–most by the Prime Minister, some by the leader of the Opposition—the "ruling parties have routinely named party members who were defeated in the general elections as senators, thereby making them eligible to serve in the cabinet." This is a useful opportunity for ensuring the availability of the best ministerial talent, especially in a small country with a restricted universe of prospective ministers.[17]

Finally, two other closely related reasons are the need to achieve a practical compromise on constitutional design that can attract the support required for ratification and the decision to incorporate representation of subnational units of government in the national structure of government. The 1787 "Grand Compromise" in the U.S. is well-known, and the bicameral design of Australia's national parliament reflects not only the U.S. example, but the fear of its smaller colonies (now to become states) of economic domination by the two most powerful and powerful states, New South Wales and Victoria (in other words, Sydney and Melbourne). If a new constitution has to be written during a time of external threat, there may be pressure toward centralizing power. But with so many examples today of bicameral constitutions in nations that either are federal or that recognize the existence and sometimes the differing characteristics of subnational divisions, bicameralism probably has become the option of choice, barring some exceptional circumstance or historical precedent.

Before turning to the compatibility of bicameralism and parliamentary government, the first and last of these reasons for bicameralism merit a bit more discussion.

First, as we have seen, one rationale for bicameralism rests on the purported weakness or danger of unicameralism–specifically, the risk of impetuous decisions made by transitory majorities of an assembly that is directly elected, usually for relatively short terms, and, therefore, may be unduly responsive to whims of public preferences.

Bicameralism can control this risk in two ways. First, it has the effect of requiring bills to go through an additional series of procedural stages, thereby slowing down the process and creating time for more mature reflection and reconsideration of what may have been impetuous decisions by the first chamber. And second, a recurring theme of this paper has been that differences between the two houses in the size of their memberships, in the length of those terms in office, in the methods by which their members are elected or otherwise selected, and even in the procedures by which they conduct their business, all can promote the likelihood that the two chambers may prefer different versions of new legislation, whether those differences are matters of detail or fundamental approach. In turn, these differences require some process of reconsideration and, more often than not, some compromise that tempers the ability of the first chamber's majority to work its will.

[17] On the other hand, Barry quotes a critic as describing the Senate as a "house of rejectees." Surely the legitimacy of the Senate must suffer if many of its members had been rejected by the electorate.

However, it needs to be acknowledged that there are ways in which much the same effects can be achieved within a unicameral assembly. The deliberative quality of the legislative process can be enhanced first by encouraging or mandating a preliminary stage of committee consideration, with opportunities for information gathering (possibly through public hearings) and for open debate and amendment, and by requiring the committee to justify its conclusions and recommendations in writing. Also, deliberation in the plenum can involve several distinct stages, often associated with sequential "readings" of a bill, perhaps with a requirement that some time interval intervene between stages. These sequential stages of consideration in committee and then on the floor, and on several distinct occasions in plenary session, can provide much the same benefit, in terms of the time allowed for reconsideration and public reaction, as the sequential consideration of legislation by two separate houses.

In such ways the risk of impetuous action in unicameral assemblies can be minimized. By the same token, the danger that majoritarian decision-making can fail to take adequate account of other intensely-advocated interests and intensely-held preferences can be minimized by imposing requirements for extraordinary majorities–two-thirds votes, for example–to take certain kinds of actions, whether the action is to end a debate or to approve certain proposals such as spending decisions, changes in tax laws, or legislation that would affect the rights and interests of protected minority groups. In short, we may conclude that there can be ways to achieve some of the benefits of bicameralism, especially in a relatively strong form, without confronting the risks that I will discuss in the closing section of this essay.

A second justification for bicameralism, as I have noted, is its frequent association with federalism. I would argue, however, that strong bicameralism is not an essential element of a federal system. Federalism is characterized by two (or more) levels of government and some division of powers among them. Federal systems differ, for instance, in how powers are distributed between or among levels of government, where the residual jurisdiction resides over undistributed powers, and how disagreements or incompatibilities between national and state (or provincial, etc.) policies or legislation are to be resolved. But it does not necessarily follow that the representation of the states within the legislative structure of the national government is an essential part of the federal arrangement. If a constitution assigns certain authority to the national government and other authority to subnational governments, perhaps with an independent court to adjudicate boundary disputes, there is no compelling reason why the subnational units have to be represented as such in the councils of the national government.

When states are given representation in the national parliament, they typically are given equal representation or at least representation that does not accurately reflect population disparities among the states. The essential reason for such representation is not theoretical, it is political: because the smaller states want disproportionate influence over how the national government exercises its powers and uses its resources, especially budgetary resources, within its constitutional jurisdiction. It is understandable why smaller states want such representation; it is in their interests to have it. But it is no more natural or necessary for the states to have a share of the powers of the federal government than for the federal government to have a constitutional share in the governance of each state–for example, by giving the U.S. President a veto power over legislation enacted by each of the 50 states. An 'upper' or 'second' house in which the states are represented equally may, as we know, be a price that smaller states demand for their agreement to federate, but it is not necessary to the design or operation of federal systems.

It also bears noting that once a decision is made to have an upper house with unequal representation of states (or provinces), that decision may be especially difficult to reverse. As I mentioned earlier, the constitutional provisions calling for unequal representation of states in the U.S. and Australian Senates are unlikely to be changed, not because they are constitutionally immune from amendment, but because any such amendments would require the concurrence of the affected states. More generally, if amending the constitution requires super-majority votes (such as two-thirds votes) in both houses, the disproportionate representation of smaller states or provinces in the upper house can well doom to defeat any amendments that would reduce their share of seats. For this reason, decisions to give states the constitutional claim to equal (or at least non-proportional) representation in a second chamber should be made with particular care. If those decisions later prove to be unwise or out-dated, even more than a century later in Australia and more than two centuries later in the U.S., it may be politically impossible to change them, short of a major constitutional upheaval or revolution.

BICAMERALISM AND RESPONSIBLE GOVERNMENT

There is an apparent incompatibility between bicameralism and political systems characterized by responsible government (used here to refer to parliamentary regimes as opposed to presidential and some mixed regimes). The essential, defining characteristic of a parliamentary system is the responsibility of the government (cabinet) to the parliament. The government takes office only if it enjoys majority support in parliament (whether that support is tacit or manifested in a vote of investiture), and the government remains in office only so long as it continues to enjoy the support (confidence) of a majority in parliament.

In such a constitutional order, therefore, the single most important governmental and political relationship is between government and parliament. The logic underlying parliamentary regimes is clear and simple: the people elect their representatives (the members of parliament) who, in turn, elect or approve a government that is more or less assured of majority support in parliament until the next election. There cannot be divided government–and, therefore, there should not be legislative gridlock or stalemate–because the same party or coalition holds all ministerial posts as well as a majority of seats in parliament. So long as this situation prevails, parliament usually can be expected to enact the government's legislation, and to do so without undue delay.

In bicameral regimes, however, this characterization is not quite accurate because the government typically is accountable not to parliament *per* se, but to only one house of parliament, the lower house which is always largely or entirely chosen by direct election. But then what is the rationale for having a second chamber? If parliament should, and can be expected to, approve the government's legislative program, and if both houses are equally likely to do so, what useful purpose does the second chamber serve? On the other hand, if there is reason to think that the second chamber might balk at approving elements of the government's program, is that not incompatible with the underlying logic of parliamentary government?

The linkage between the government and the lower house (and the problematic status of an upper house, especially in a system of strong bicameralism) becomes even tighter when the

discipline of parliamentary parties transforms responsible government into responsible party government. Now the political logic of parliamentarism becomes almost irresistible. The people elect the representatives of a party to implement that party's program. (There are good reasons to doubt this, but they are beyond the scope of this essay.) For this purpose, the representatives then select a prime minister from among their members as well as other ministers who may or may not also be MPs. This government converts the party's electoral program into legislation that its parliamentary majority enacts. That same majority holds the government to account for producing and then implementing that legislation as the party program envisioned, and, in turn, the voters hold that majority to account at the next election.

So there are clear lines of authority—from the people to parliament to the government—and then there are equally clear lines of responsibility—from the government to parliament to the people. This logic of parliamentary government—responsible party government—strongly suggests that, if a second chamber exists, it should be quite weak. This tight system of linkages leaves little or no room for meaningful bicameralism. A system of strong bicameralism would seem to undermine the very principles of parliamentarism.

The IPU data mentioned at the outset are consistent with this conclusion. If we look more closely at the 24 national assemblies with elected memberships in both houses, few are parts of parliamentary systems of government. Thirteen of the 24 are primarily presidential-congressional systems,[18] and four of the remaining ten can be eliminated for other satisfactory reasons.[19] That leaves us with seven national assemblies—those of Australia, the Czech Republic, Italy, Japan, Poland, Romania, and Spain—with second houses that have elected memberships and that are embedded in what are essentially parliamentary systems in that (1) if there is a president, his or her powers are limited, (2) the prime minister is the effective head of government, and (3) the prime minister and cabinet are effectively responsible to the national assembly.

In fact, in two of these bicameral political systems, government has been formally responsible to *both* houses of parliament. Article 94 of the Italian constitution, for instance, has provided in part that:

> (1) The Government must enjoy the confidence of both chambers.
> (2) Each chamber shall grant or withdraw its confidence by a motion for which reasons must be stated and which is voted on by roll-call.
> (3) Within ten days of its appointment, the Government shall appear before each Chamber in order to obtain its vote of confidence.

The government also has been responsible to both houses of the Romanian Parliament. In the 1991 Constitution, Article 85 stated in part that '[T]he President of Romania shall designate a candidate to the office of Prime Minister and appoint the Government on the vote of confidence

[18] Argentina, Bolivia, Brazil, Chile, Colombia, the Dominican Republic, Mexico, Nigeria, Palau, Paraguay, the Philippines, the USA, and Uruguay.

[19] Bhutan, as being too new to the ranks of representative democracies; Haiti, as having little experience as a functioning democracy; Liberia, as just emerging from a prolonged civil war; and Switzerland, as having a political system that is so unique as not to be very useful for comparisons.

of Parliament," and Article 58 explained that "Parliament consists of the Chamber of Deputies and the Senate."

There also are regimes in which the government is responsible to only one house, but the other house has a significant part to play in enacting the government's program. Druckman and Thies (2001: 1-2) illustrated how, in this situation, the second chamber can affect the size and durability of the government coalition, even though that coalition is not responsible to it:

> From 1955 through 1989, Japan's Liberal Democratic Party (LDP) controlled a majority of seats in both houses of the National Diet (parliament). A series of scandals and unpopular policy choices, however, caused the LDP to lose its upper house majority in July 1989, and policy making immediately became more difficult. Several bills were stopped by the now-opposition-controlled Upper House, and the LDP was forced to either retreat or compromise. In October 1999, after falling into opposition, participating in several coalition and minority governments, and then finally regaining its lower house majority, the LDP decided to invite the Clean Government Party (*Komeito*) into a coalition government. With no need for any more lower house votes, the LDP's action was intended explicitly to piece together a majority in the upper house, which it had never managed to regain on its own. The Japanese upper house is formally powerless in the government formation process, but its legislative powers were sufficient to cause the LDP to forge a coalition anyway.

In this case, in order to assure itself majority support in both houses for its legislative program, the governing coalition was expanded beyond what was necessary to secure majority support in the house to which the government was responsible.

The same authors cited Irish experience to illustrate the difficulties a governing coalition can face if it fails to take such action. They point to the installation in 1994 of a new government that did not enjoy majority support in the Senate (Seanad Éireann), and turned to Coakley and Manning (1999: 200) to summarize the consequences:[20]

> The result was a major change in the manner in which Senate business was conducted. The government was no longer able to take a Senate majority for granted, and the independent senators who held the balance of power were able to win significant concessions….The government suffered two defeats on legislation and avoided defeats on other occasions either by conceding on issues or by postponing them altogether.

Regarding Germany, Suzanne Schuttemeyer (1994-29-58) has pointed to the often cooperative relationship between government and opposition in the Bundestag, and the high percentage of bills that the Bundestag passes without strong opposition. This practice may be a reflection of modern political culture. It may reflect the bridgeable differences in policy preferences between the parties. And it may be a product of the relatively closed (non-transparent) character of Bundestag decision-making that makes it possible for the opposition to cooperate without appearing publicly to have done so.

[20] Forty-nine of the 60 members of the Irish Senate are elected indirectly; the prime minister appoints the others. By contrast, all 242 members of Japan's House of Councillors are directly elected.

However, this tendency toward cross-partisan agreement also may reflect bicameralism—especially the fact that so much legislation requires the concurrence of the Bundesrat, and the possibility (which has been realized) that the opposition in the Bundestag may enjoy a majority in the Bundesrat. If so, the government and its majority party or coalition in the Bundestag understands that it must accommodate opposition viewpoints enough to ensure majority support for its legislation in the Bundesrat. In other words, the existence of a directly-elected second chamber, with some veto power over legislation and with the prospect of being controlled by the party in opposition in the primary chamber, can push the primary chamber in what is otherwise a parliamentary system from what Lijphart (1999) calls a majoritarian model of decision-making (in which the government majority, no matter how minimal, can expect to prevail on all important matters) toward a more consensual model (in which the opposition party in the primary chamber is invited into participation and offered accommodative compromises).

And in Australia, where the rhetoric of partisanship knows few restraints and where there is almost absolute party unity on all except a handful of so-called "conscience" votes, the politics of bicameralism still requires governments to compromise on policy or risk seeing their legislation stalled or defeated.[21] Take, for example, David Solomon's characterization (1978: 9) of the situation confronting the Labor Government of Prime Minister Gough Whitlam during 1972-1975, which hardly reads like a description of "Westminster Down Under":

> At no stage did the Labor government have control of the Senate, so its legislative program was constantly under threat. In those three years the senate rejected more legislation than it had in its previous 71-year history. The government could never be certain that any particular bill would be passed, or even when it would be considered, by the upper house. This led to political as well as legislative problems for the government whose term could be threatened (and was eventually ended) by actions of the Senate

For more than a half-century, one of the two main parties called for abolishing the Senate, and governments have called repeatedly for diminishing the Senate's powers since the advent, mentioned above, of proportional representation for Senate elections made government majorities in the Senate rare indeed. There has been, and continues to be, a running debate among both politicians and scholars as to whether or not the Australian Senate is, at best, an appendix grafted on to what always was understood to be a Westminster-style parliamentary system, or whether it is every bit as much an integral part of a hybrid system as the House of Representatives itself.

Perhaps the most widely-read writer on Australian government concluded that "[i]t is impossible to reconcile sound democratic principles with the power of a Second Chamber constituted as is the Australian Senate to hold to ransom a Government with a clear House of Representatives majority and mandate to govern from the latest House general election." (Crisp 1983: 349) And the authoritative manual of the House of Representatives opines that:

> One of the features of the Westminster system of government is the existence of a clear line of representation from the people through the Parliament to the Executive Government. This in turn

[21] For an extended treatment of the subject, see my *Platypus and Parliament.* Canberra: Department of the Senate, 2003.

> results in a clear line of responsibility in reverse order from the Executive to the Parliament to the people. Once this clear line of responsibility is interfered with (as with the intervention of the Senate which is not an equitably representative body in the sense that the House is) the powerful concept of representative and responsible government is weakened. (*House Practice* 2001: 58-59)

Surely the Australian experience has not gone unnoticed by British and Canadian scholars and politicians who have grappled with whether or how to reform their non-elected chambers. A basic question which apparently has not yet been fully resolved in the UK is whether a partly or wholly elected upper house (whether the House of Lords or something else) would threaten responsible government. If both houses were to be elected and, therefore, could claim their own democratic legitimacy, could not the upper house also claim the right to play a more influential part in the legislative process, and even to have some say in the formation and fate of governments? Most of those who question the wisdom of an elected second chamber in the UK do not thereby demonstrate a lack of commitment to democratic principles. In fact, they can argue that they are the true defenders of the principles of responsible government that are at the very heart of their unwritten constitution.

Yet even so, and perhaps ironically, there is a powerful argument to be made that strong bicameralism can be even more valuable in parliamentary systems than in presidential-congressional systems.

In presidential-congressional systems, there can be no "responsibility" in the parliamentary sense because congress does not choose the president and because the president and his or her government cannot be dismissed if and when they lose majority support in one or both houses of congress. However, because of the system of separated institutions sharing powers (a more accurate characterization than "separation of powers"), a certain competition for power is built into the constitutional framework. And the fact that members of congress are elected independently of the president creates the possibility that he or she will not have a majority in one or both houses of congress. Thus, there always are institutional reasons for the congress to hold the president to account, and there may well be political ones as well.

Within days of the 2010 US congressional elections, in which President Obama's Democratic party lost its majority in the House of Representatives, members of the incoming Republican majority in that body already were announcing their intent to issue more committee subpoenas to investigate executive branch activities. Yet this was in part a reaction to the relative lack of such scrutiny during the two preceding years, when Representatives and Senators of the President's party had little incentive to investigate and criticize his government, and thereby put the reputation of their party and their own re-election prospects at risk. In the US presidential-congressional system at least, the increased homogeneity and unity within the two parties has reduced the likelihood that Representatives and Senators will strain to hold a president of their own party to account, except when pushed to do so by media revelations that they cannot ignore. Today, it probably is the real possibility that the president's party will not

control both houses of Congress that provides the best assurance that the executive branch will be held to account by the legislative branch.[22]

In a parliamentary system, on the other hand, and especially if it resembles a two-party system, there is neither the same constitutional, institutional, or political incentives for parliament to hold the government accountable. It remains true, of course, that government remains formally responsible to parliament in that the government can be dismissed from office on a parliamentary vote of no confidence. But at least in parliaments deriving from the UK model, such votes have become exceedingly rare; if prime ministers are dismissed between elections, it will almost certainly be the result of votes taken within a parliamentary party, not formal (and public) votes of parliament itself.

Accountability is a different matter. With the political prospects of a government and those of its parliamentary majority tied so closely to each other, the incentives for the latter holding the former to account for its decisions and actions are limited at best. Instead, the natural political reaction should be for the parliamentary majority to protect the reputation of its government to the extent that it can in the face of the pressure of events and public revelations. In other words, the strength of parliamentary parties and the ties that are thereby created between a government and its parliamentary majority can create a gulf between formal responsibility and actual accountability.[23]

Under these circumstances, it can be said that although strong bicameralism may threaten to interfere with responsible government, it can make an essential contribution to accountable government. To the extent that upper houses are elected in different ways and at different times than lower houses and the governments they support, they can have different balances of political forces and, therefore, different and stronger incentives to scrutinize government policies, decisions, and activities. Instead of bicameralism being incompatible with parliamentarism, it can be strong bicameralism that prevents parliamentary responsibility from decaying increasingly into a constitutional formality that fails to protect against what Lord Hailsham in a different conext famously described as an "elective dictatorship." (Hailsham 1976: 8).

DANGERS OF DELAYS AND DEADLOCKS

A bicameral national assembly is a characteristic of quite a few recently-drafted constitutions. According to the IPU, these include the national charters of Afghanistan, Bahrain, Bhutan, Bosnia and Hercegovina, Cambodia, Romania, Slovenia, and both Congos. To the extent that foreign models and "experts" have influenced the design of these constitutions, this

[22] But there also is the real possibility of scrutiny deteriorating into politically-motivated investigations of baseless allegations.

[23] The strength and applicability of this argument to coalition systems is complex, and depends in part on the durability and basis of the coalition. Some pre-election coalitions are so long-standing and predictable that it makes sense for many practical purposes to think of them as a single party. Otherwise, coalition agreements that are negotiated after elections can be so detailed (such as the Conservative-Liberal Democrat agreement after the 2010 UK election covering 31 policy arenas, available at www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf) as to give the parties involved little choice but to stand or fall together, which is not conducive to strenuous parliamentary efforts at holding the coalition government to account.

should not be surprising because so many of the most visible, well-established, and influential national assemblies—including the UK, the US, Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, and Spain—are themselves bicameral. Bicameralism, presumably, has served these nations well, or at least well enough, and perhaps it has contributed to democratic stability and durability. So it may be an important element of constitutional design that deserves to be emulated.

However, bicameralism can carry with it the dual dangers of delays and deadlocks that can put new or emerging democracies at risk.

Whatever the virtues of bicameralism may be, there is no doubt that it can complicate the legislative process in any assembly, and especially in national assemblies that represent the diverse interests and preferences of complex societies. Under some democratic constitutions, a proposed new law cannot take effect with binding legal force until both halves of a bicameral parliament or legislature have approved it in precisely the same terms. This requirement for bicameral legislative agreement can cause delays, require difficult and sometimes acrimonious negotiations, and even prevent enactment of a bill that each house already has passed, albeit with somewhat different provisions.

So the potential dangers of bicameralism have to be assessed in the context of the statutory and policy status quo. In strong bicameral systems, as I discussed above, it is constitutionally difficult or impossible for one house to impose its will on the other. If the national constitution requires that the two houses pass any bill in the same form before it can become law, they must reach this agreement more or less voluntarily. But if the two houses are both symmetrical and incongruent, in Lijphart's terms, majorities in the two houses may have significantly different policy preferences, and so may reach legislative agreement with difficulty, if at all. And if there is no bicameral agreement on how to change existing law, the statutory status quo remains in place.

Supporters of bicameralism in established democracies can afford to take a sanguine view of such a development. If the two houses, with their different policy majorities and perhaps partisan majorities as well, cannot reach agreement, at least in the near term, on how to change national policy affecting air pollution, or labor-management relations, or the tax system, or something equally important, that is evidence, isn't it, that the subject is not yet ripe for resolution—that there is nothing approaching a national consensus on the subject. Rational choice theorists may find in this situation evidence that no prospective law enjoys more support than the existing law, so the status quo remains preferable, at least for the time being, to any of the available alternatives.

But what if the statutory status quo is not a satisfactory option? The costs of bicameral deadlock generally are greater in new democracies or re-democratizing polities compared with more established democracies because, in the former, the status quo is less acceptable or may not be acceptable at all. In established democracies, the failure to enact new law usually leaves in place a body of existing law that may be defective but that usually remains at least marginally functional. The law-making process in such politics usually is incremental, a process of modifying existing law to adapt to changing circumstances and to respond to evident weaknesses

or failures in the statutory status quo. So a legislative deadlock that leaves existing law unchanged is a bearable, if undesirable, outcome.

By contrast, consider the situations that the national assemblies in central and eastern Europe faced during the 1990s. New laws had to be enacted on such subjects as the operations of labor unions and political parties because, even though there may well have been existing laws addressing both subjects, those laws were entirely unsuitable for competitive economic and political systems. Even if there were serious and principled disagreements about what the new laws should provide, the costs of inaction—of leaving the status quo in place for a while longer in the hope that those disagreements would fade—could be unacceptably high. And on other subjects, there was essentially no status quo at all. Laws to regulate such matters as stock markets, corporate governance, and bankruptcies needed to be enacted not because the existing laws on such subjects were objectionable, but because there were no such existing laws. There was no statutory status quo on which those nations could fall back if bicameral disagreements created legislative deadlocks.

If the constitution (or, possibly, the assembly's joint rules) permit one house ultimately to prevail—for example, by rejecting the second house's amendments or by outvoting the smaller second house in a joint meeting—there is no need for deadlocks to arise if the majority in the primary house is large, unified, and determined. But if each house enjoys an effective veto over legislation, an inability to achieve agreement can have one of two results.

First, anticipating the possibility of deadlock, one house or the other may have an incentive to reject compromise if it prefers the status quo to a compromise that moves substantially toward the other house's proposed changes in the status quo—if, in other words, the position of one house lies noticeably closer to the status quo than the position of the other house. Such strategic calculations can lead to short-term legislative victories at the cost of longer-term damage to the political system and public support for it.

This potential consequence of strong bicameralism is particularly dangerous when public expectations are particularly high. When the public in new democracies believes (or simply assumes) that the advent of democracy will bring with it rapid and dramatic changes in the society and improvements in the economy, the sight of the members of the two houses of their new national assembly being unable (or seemingly unwilling) to agree with each other can be disillusioning indeed. It is easy to envision demands arising to break the logjam, even if it could mean reverting to a less democratic constitutional system that seemingly is more efficient and decisive.

The second possible result, therefore, is for the law-making power to gravitate away from the national assembly and toward the executive government and especially to the head of government. This can occur through deliberate decisions of the national assembly to delegate certain legislative decision-making authority to the executive government. Indeed, there has been a widespread tendency in this direction, even in the nations such as the U.S. that take the greatest pride in their democratic credentials. The question then becomes how to monitor and

control such delegated "legislation" to ensure that it conforms with constitutional norms as well as with the laws authorizing it.[24]

Alternately, the head of government (most likely, a president) may intervene to legislate by decree, either exercising an explicit constitutional authority or finding such authority to be implicit in the constitution. In that case, there also is an incentive for one house or the other to reject legislative compromise in favor of deadlock if its position is much closer to that of the president than to that of the other house, and so if it can anticipate that it will prefer the president's decree to any agreement that it could hope to reach with the other house.

If the effect of a decree terminates automatically unless approved by an affirmative act of the national assembly within a reasonably short period of time, then resorting to the decree may create an extended window of opportunity for resolving the bicameral stalemate. But if the decree remains in effect indefinitely unless approved or disapproved by the assembly, the president's position continues to prevail if it enjoys majority support in either house, giving his supporters in that house an incentive to create or perpetuate a stalemate in order to provoke or trigger a decree that it then will allow to remain in force. And if the decree remains in effect unless it is disapproved or superseded by a law, then even if there is a majority that supports an alternative to the decree, the decree still may continue in force if the president can veto the disapproval or the superseding act and he has enough support to avoid being overridden (frequently by a two-thirds vote) in either house.

In Russia, at least as of a decade ago, "the president wields decree-making power that allows him to govern as he sees fit as long as decrees are consistent with the constitution and existing law."[25] Even if presidential decrees require subsequent approval by the national assembly, the practical difficulties of undoing what already has been done, when combined with a president's political power, give a national assembly what can be potent reasons for letting stand decisions that the assembly had not been anxious to make for itself in the first place.[26] In that case, not only does the assembly relinquish its ability to make the specific policy choices at

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[24] For years, for example, the U.S. Congress would, by law, delegate certain policy decisions to executive departments and agencies, but subject to an opportunity for one or both houses to disallow their decisions through what became known as legislative vetoes. Regrettably, the Supreme Court subsequently decided that practice was unconstitutional. In Australia, the Senate has a highly-regarded committee on regulations and ordinances that reviews all such directives before they take effect to ensure their compatibility with constitutional principles as well as with existing laws.

[25] Steven Smith and Thomas Remington, *The Politics of Institutional Choice*. Princeton: Princeton University Press, 2001; p. 121. See also Remington and Smith, "Theories of Legislative Institutions and the Organization of the Russian Duma," *American Journal of Political Science*, v. 42, 1998, pp. 545-572.

[26] For example, Magar (2001, 21-23) presented data on how the Argentine Congress responded to decrees issued by President Carlos Menem throughout most of his first term in 1989-1994. During that time, Magar reported, the Congress acquiesced in or ratified 94% of the 336 decrees that Menem issued. When Congress approved bills to modify or rescind, in whole or in part, 18 (slightly more than 5%) of those decrees, Menem vetoed 15 of the 18 bills and all but three of his vetoes prevailed, a two-thirds vote in each house being necessary to override a veto. In other words, on the relatively few occasions on which the Congress and the President clashed over his decrees, the President prevailed 80% of the time. The veto was a powerful weapon in Argentina, just as it has been historically in the United States. Magar (2001¨8-11) observed, by the way, that the constitutional basis for the presidential decrees issued during this period was at best tacit or, as he characterizes it, "meta-constitutional."

issue; it acquiesces in a longer-term diminution of its legislative authority vis-a-vis the president (or the executive more generally).

These prospects can heighten the value of including in the constitutions or joint parliamentary rules of new democracies some procedure for resolving bicameral deadlocks, such as through a vote in a joint meeting of the two houses, with members voting per capita, that gives assurance that a final legislative decision can be reached, even if it is unpalatable in some respects to both houses. They also suggest the wisdom of weighing the prospective advantages of bicameralism against its potential risks and dangers when devising a new constitution for a nation without strong democratic experiences and traditions.

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