

ANALYSEN UND BERICHTE

Constitutional Design and Democratic Performance in Latin America

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Introduction

What are the principles of constitutional design in Latin America? Do the presidential systems of this region mimic the structure and dynamics of the US political system? What impact do these factors have on regime survivability and policy performance? While we know a great deal about the constitutional basis and political operation of the US separation of powers system, we know a lot less about the institutional dynamics of 17 Central and South American presidential systems (as well as those of Cuba and the Dominican Republic). Political scientists, for example, have analyzed the nature of executive-legislative relations and explored the distributional implications of electoral laws, but we know a lot less about, for example, the relations between the elected branches of government and the judiciary or the bureaucracy.¹ And, constitutional lawyers have spent a lot less time examining cases and rulings to uncover the design principles of political systems, ones crucial for making sense of the architectural properties of the state.

Answering these questions is important because separation of powers systems in the region have not performed very well. Dictatorship was the norm during approximately one-half of

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¹ *Gerald L. Munck*, “Democratic Politics in Latin America: New Debates and Research Frontiers”, *Annual Review of Political Science*, 7 (2004), pp. 437-462.

the country years during the twentieth century.² Even now, when virtually all Latin Americans live in formally democratic systems, most have good reasons to complain about the quality of their political systems. During the 1990s, Latinobarometer surveys indicate that less than 40 percent of those surveyed are very or partly satisfied with democracy in their countries; only in Costa Rica and Uruguay do these percentages exceed 60 percent. In contrast, an average of 50 percent of the citizens of the fifteen countries of the European Union responds that they are very or partly satisfied with democracy.³ These systems also have not, again with a few exceptions, protected individual rights, perhaps the central objective of any constitutional order. As the data on regime types show, authoritarian regimes of one type or another have ruled the countries for half of the twentieth century. In the process, they have violated the civil rights of their citizens and occasionally killed large numbers of them. In Guatemala, by the far country with the worst human rights record, the armed forces and paramilitary groups killed the vast majority of an estimated 200,000, mostly indigenous, citizens between 1960 and 1996.

In this essay, I show that the short answer to the first two questions is that the constitutional design of Latin American countries is a mix of the old and new separation of powers. If the hallmark of James Madison's theory of government is entrusting each function of government to two or more parts of government, then some Latin American constitutions do follow in the footsteps of perhaps the most influential of the American Federalists.⁴ Some, like the Argentine constitution of 1853, are replicas of the Philadelphia constitution. Yet, most presidential constitutions do not have more than a limited resemblance to the US charter. By the early twentieth century, constitutional engineers in Bolivia, Ecuador, and Honduras borrowed practices like ministerial interpellation and the congressional designation of cabinet ministers from parliamentary systems to prevent the arbitrary use of executive power.⁵ During the twentieth century, quite a few political systems also developed constitutional designs similar to what Bruce Ackerman calls the new separation of powers.⁶ Instead of making two or more parts of government responsible for each function of government, they reformed their constitutions to minimize institutional overlap of governmental functions. Indeed, the most successful cases of presidential government in Latin

² Peter H. Smith, "Los ciclos de la democracia en América Latina", *Política y Gobierno*, 11 (2004), p. 200.

³ *Programa de las Naciones Unidas Para el Desarrollo*, *La Democracia en América Latina*, New York, 2004, p. 164.

⁴ Alexander Hamilton / James Madison / John Jay in: Benjamin F. Wright (ed.) *The Federalist*, New York, 2002, pp. 336-58 (essay numbers 47-50, especially no. 51 ["Checks and Balances"]).

⁵ William S. Stokes, "Parliamentary Government in Latin America", *American Political Science Review* 39 (1945) pp. 522-36.

⁶ Bruce Ackerman, "The New Separation of Powers", *Harvard Law Review*, 113 (2000), pp. 634-727.

America – Chile, Costa Rica, and Uruguay – are the systems that depart most from the Madisonian version of the separation of powers.

This short paper consists of three sections. The first presents a balance sheet of research on the merits and demerits of presidential and parliamentary systems. I begin here because any effort to assess the performance of separations of powers systems must incorporate the findings of perhaps the most intellectually productive vein of research on these political systems, that of why presidential systems appear to be less supportive of democratic stability than parliamentary systems. Yet, I argue that the focus on executive-legislative relations neglects to analyze issues of institutional design vital for not only understanding why parliamentary systems last longer than presidential ones, but also to understand why some political systems perform better than others. The second section, as a result, examines alternative models of constitutional design to broaden the debate about the goals and aims of constitutional systems. The third looks at the development of different combinations of the old and new separation of powers in Latin America. Here, I present some evidence about my underlying hypothesis that the new separation of powers is more conducive to democratic stability and policy effectiveness. The final section of the paper summarizes the main findings and discusses their implications.

Presidential and Parliamentary Government: A Balance Sheet

Comparisons between presidential and parliamentary systems are one of the big topics of comparative politics and of constitutional law. Yet, it is not something we began to study systematically until the last several decades of the twentieth century. Sure, before World War II, some scholars wrote case studies that we still read today. Walter Bagehot published *The English Constitution* (1867), in which he analyzed how the locus of power had shifted from the monarchy to the Houses of Parliament in nineteenth century England.⁷ Inspired by Bagehot, Woodrow Wilson wrote *Congressional Government*, a study critical of the operation of the US system of the separation of powers.⁸ For Wilson, dispersing responsibility over government between the two elected branches of government only undermined accountability and policy effectiveness. In the 1920s, Carl Schmitt published *The Crisis of Parliamentary Democracy*, a still widely read indictment of making executive authority dependent upon placating fickle parliamentary majorities.⁹

⁷ Paul Smith (ed.), Bagehot, *The English Constitution*, Cambridge, 2001, 291pp.

⁸ Woodrow H. Wilson, *Congressional Government*. 2d ed, Boston, 1885, 333pp.

⁹ Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, München, 1926, 90pp.

This, of course, is only a selective list of relevant books and studies. It does, however, make the point that the classics of constitutional design were more implicitly than explicitly comparative. As a result, the study of constitutional design did not compare presidential and parliamentary governments. Students of the US political system focused on the operation of its components. They never examined the operation of other presidential systems to understand, for example, how differences in presidential powers shaped the performance of political systems. Outside of a limited number of comparisons with the English political system, there also were no efforts to compare presidential and parliamentary forms of government. Analysts of European parliamentary systems made a number of notable contributions about the way different types of parliamentary systems worked, but they too eschewed comparison with separation of powers systems.¹⁰

In the 1980s, Juan Linz put the debate on constitutional forms back on the discussion table.¹¹ He argues that presidential systems are inherently less stable than parliamentary ones. Linz makes a number of provocative arguments, two of which I highlight here. First, he suggests that divided government often leads to inter-branch conflict, an outcome that does not occur in parliamentary systems. Elected independently of the legislature, the president can end up with very little legislative support, either because his party obtains only a minority of seats in congressional elections or because his co-partisans stop supporting his bills. So-called “irresponsible” legislative majorities can emerge, ones that appear to obstruct the president while offering little leadership on pressing national problems. In the best of outcomes, both branches compromise over policy and thus reduce the basis for discord. In the worst case, both branches can play confront each other and law-making can bog down. The inability to produce laws – what Linz calls paralysis – can then be the backdrop to regime breakdown.

Second, the problem of “dual legitimacies” can foment or even create conflict between the two elected branches of government. Each can claim to represent the popular will. Independently of whether paralysis exists, competition between the branches of government can escalate into a confrontation over which part of government best represents the popular will. Paralysis or executive-legislative rivalry can be the backdrop to one branch of

¹⁰ There are a large number of important contributions here. See *Arend Lijphart*, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven, 1984 as well as his: *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven, 1999. Finally, see *George Tsebelis*, *Veto Players: How Political Institutions Work*, Princeton, 2002.

¹¹ *Juan J. Linz*, “Presidential or Parliamentary Democracy: Does It Make a Difference”, in *Juan J. Linz / Arturo Valenzuela* (ed.), *The Failure of Presidential Democracy: Comparative Perspectives*, Baltimore 1994, pp. 3-90. This circulated in unpublished form for almost 10 years prior the publication in 1994. A shorter version appeared as *Juan J. Linz*, “The Perils of Presidentialism”, *Journal of Democracy* 1 (1990), pp. 51-69.

government's assault on the other branches of government. Though legislatures occasionally win these struggles, it is much more common for presidents to defy legislative constraints on their authority. The history of democratic breakdown is littered with defeated legislatures and the concomitant rise of arbitrary executives. Contrary to Madison's fears about the legislature's abuse of authority, the breakdown of democracy is about the executive's abuse of his authority.

These two problems are unique to presidential systems. Minority governments – the functional equivalent of divided government in presidential government – are quite common in parliamentary systems. Kaare Strøm estimates that 36.4 percent of all parliamentary governments were minority governments between 1945 and 1982.¹² Unlike divided governments, minority governments are rarely associated with regime breakdowns. They are the products of strategic compromises, ones where certain parties prefer not to join the cabinet, but nevertheless offer the executive support of some or many of his proposals. Minority governments are thus different from divided governments in presidential systems because they command a more predictable amount of legislative support than a president during divided government. Moreover, as soon as parliamentary support evaporates, the cabinet falls and either a new coalition forms or new elections are called.

The dual legitimacies problem is much less severe in parliamentary systems. In a parliamentary system, the executive is the agent of a legislative majority, which in turn is the people's representative(s). Sure, the Prime Minister can claim to be the people's representative, even if he had lost the confidence of his parliamentary majority. But, unlike in presidential systems, the executive in a parliamentary system would be forced to demonstrate the accuracy of this claim in a general election. Simply put, there is no government unless the executive commands the support of a parliamentary majority.

What does the evidence say? One group of studies casts doubt on whether presidential systems are any more brittle than parliamentary ones. Matthew Shugart and John Carey show that the number of parliamentary breakdowns is larger than the number of presidential failures during the twentieth century.¹³ Yet, a simple listing of cases is unconvincing because it does not control for the number of countries and years that countries had each type of political system. Among Third World cases, Shugart and Carey find that differences in breakdown rates between regime types are minimal: 52.2 percent of presidential systems vs. 59.1 percent of parliamentary regimes broke down during the twentieth century (and that have remained democratic for two or more elections). Timothy J. Power and Mark Gasiorowski echo these findings; they examine the duration of 56 transitions to democratic

¹² Kaare Strøm, *Minority Government and Majority Rule*, Cambridge, 1990, p. 61.

¹³ Matthew S. Shugart / John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, Cambridge, 1992, pp. 40-1.

rule in the Third World between 1930 and 1995.¹⁴ They find that 75 percent of transitions to parliamentary systems do not collapse, a figure that is not statistically different from the 69 percent of presidential systems that survive. Both sets of calculations of political system failure in the Third World do not include developed countries, a fact that allows them to disregard more than a dozen successful cases of democratic consolidation.

A second group of studies upholds Linz's arguments. Alfred Stepan and Cindy Skach show that only 18 percent of parliamentary systems among 53 non-OECD countries that were democratic for at least one year between 1973 and 1989 experienced a coup.¹⁵ In contrast, 40 percent of presidential systems during this period witnessed a coup. Josep Colomer's *Political Institutions* is particularly noteworthy because it looks at all democratic regimes since the late nineteenth century.¹⁶ Colomer also draws a useful distinction between Westminster parliamentary systems that use first-past-the-post electoral systems and parliamentary systems that use proportional representation. Since the first wave of democracy (1874-1943), the success rate of majoritarian parliamentary systems is 42 percent. The success of presidential and semi-presidential ones is 56 percent. The success rate of proportional parliamentary systems is 69 percent.

Colomer's observations are particularly welcome because they address Donald Horowitz's potentially devastating criticism of Linz's arguments. Drawing upon the troubled history of Westminster systems in Africa and Asia, Horowitz argues that parliamentary majorities can rule at the expense of opposition parties and turn themselves into dictatorships.¹⁷ As Colomer's simple percentages show, majoritarian parliamentary systems are the least stable because of their winner takes all political dynamic. In the absence of power-sharing arrangements, opposition forces can have few incentives to respect democratic arrangements.

Adam Przeworski, José Antonio Cheibub, and Sebastian Saiegh use a dataset of all democracies between 1946 and 1999 in the most systematic of all studies comparing the stability

¹⁴ Timothy J. Power / Mark Gasirowksi, "Institutional Design and Democratic Consolidation in the Third World", *Comparative Political Studies* 30 (1997), pp. 123-55.

¹⁵ Alfred Stepan / Cindy Skach, "Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism," *World Politics* 46 (1993), pp. 1-22.

¹⁶ Josep Colomer, *Political Institutions: Democracy and Social Choice*, Oxford, 2001.

¹⁷ Donald L. Horowitz, "Comparing Democratic Systems", *Journal of Democracy* 1 (1990), pp. 73-9. For Linz's reply, see his "The Virtues of Parliamentarism", *Journal of Democracy* 1: 4 (1990), pp. 84-91.

of presidential and parliamentary systems.¹⁸ They show that the probability that a parliamentary democracy will breakdown in a given year is slightly more than 1 percent. In contrast, the probability that a presidential democracy will breakdown is approximately 20 times greater. In earlier work, Przeworski and his colleagues demonstrate that presidential systems are more brittle than parliamentary systems, even after controlling for levels of economic development.¹⁹

Critics of presidentialism therefore appear to be more right than wrong. Separations of powers systems are less stable. Nevertheless, the jury is still out on some key issues. Even after a decade and a half of cross-national research (and valuable case-study research, little of which I discuss in this essay), we still do not know what causes presidential regimes to collapse. Let me quickly review some of the potential causal mechanisms before suggesting that the focus on executive-legislative relations may not be the only way to think about why separation of powers systems do not seem to work very well.

Scott Mainwaring is the first attempt to test Linz's argument about divided government leading to paralysis.²⁰ He uses the standard measure of the effective number of parties as a rough proxy for divided government among countries that have been continuously democratic for at least 25 years between 1945 and 1992. Only one of these countries was a multi-party presidential system (Chile between 1933 and 1973); the other 3 have been two-party systems (Colombia, Costa Rica, and Venezuela). In contrast, José Antonio Cheibub (2004) examines 727 country years in 23 presidential democracies between 1945 and 1999 to show that the relationship between the number of parties and breakdown is not linear. Breakdown is more likely in presidential systems with 2 or fewer parties or with 3 to 5 parties. Similarly, Scott Morgenstern and Pilar Domingo show that coups are just as frequent in presidential systems where the executive does and does not have a legislative majority.²¹ In a sample of 9 (or half) of Latin American countries during different periods of the twentieth century, 17 and 21 percent of majority and minority governments fell to coups, respectively.

¹⁸ Adam Przeworski / José Antonio Cheibub, / Sebastian Saiegh, "Government Coalitions and Legislative Success Under Presidentialism and Parliamentarism", *British Journal of Political Science* 34 (2004), pp. 578.

¹⁹ Adam Przeworski / Michael E. Alvarez / José Antonio Cheibub / Fernando Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990*, Cambridge, 2000, pp. 128-35.

²⁰ Scott Mainwaring, "Presidentialism, Multipartism, and Democracy: The Difficult Combination", *Comparative Political Studies*, 26: 2 (1993), pp. 198-228.

²¹ Scott Morgenstern / Pilar Domingo, "The Success of Presidentialism? Breaking Gridlock in Presidential Regimes", in: *Diego Valadés / José María Serna* (coordinadores), *El Gobierno en América Latina: ¿Presidencialismo o Parlamentarismo?* México City, 2000, pp. 95-132.

The number of parties and background conditions like electoral formulae turn out not to be very good proxies for divided government. Two-party systems are just as likely to breakdown as certain types of multiparty presidential systems. Multipartism has not proven to be an obstacle in parliamentary systems; many of the most stable and best performing political systems have been multiparty parliamentary systems. Indeed, Josep Colomer and Gabriel Negretto argue that institutional engineers should make presidents more responsive to the median legislator to emulate the success of multiparty presidential systems.²² Ideological distance – and, in the worst cases, polarization – probably is the cause of gridlock and breakdown. Competition between two highly disciplined and ideologically divergent parties can be just as destructive as the rivalry between several such parties.

Research does and does not raise doubts about whether divided government leads to policy paralysis and then to breakdown. While not directly concerned with regime breakdown, Mark P. Jones shows that executive-legislative conflict increases as the size of the pro-government's legislative contingent declines in a sample of 14 Latin American countries between 1984 and the mid-1990s.²³ Przeworski, Cheibub, and Saiegh's study argues that divided government does not lead to breakdown. This study is noteworthy not only because it uses the most comprehensive database of regime breakdowns available, but also because it tries to measure the legislative success of presidents, something that no previous group of researchers had tried to measure cross-nationally. It is true, they find, that parliamentary executives get more of their legislative program passed than presidents do. Based on a sample of 335 years in 20 parliamentary democracies between 1945 and 1999, Przeworski, Cheibub, and Saiegh estimate that prime ministers got 80.15 percent of their bills enacted in parliament. For a smaller sample, for one containing 175 country years in 9 Latin American countries, they find that presidents got 62.63 percent of their bills approved in the legislature. On the basis of these findings, they argue that presidential systems are surprisingly successful. Even single minority (61.34 percent) or coalition minority presidents (53.03 percent) get most of their legislation passed. So, they conclude, paralysis is unlikely be the cause of breakdown.

There are good reasons, nevertheless, to doubt the validity of these findings. First, the sample size is restricted. They have information about the legislative success of executives for 36 percent (or 175 out of 485 country years) of democratic country years in presidential systems. Second, the sample is biased in favour of longstanding presidential systems. More than half of these country years – 56 percent to be exact – occur in 3 presidential success stories: Costa Rica (26 years), the US (43 years), and Venezuela (29 years). If the average

²² Josep Colomer / Gabriel Negretto, "Can Presidentialism Work like Parlamentarism?", *Government and Opposition* (2005), pp. 60-89.

²³ Mark P. Jones, *Electoral Laws and the Survival of Presidential Democracies*, Notre Dame, 1995, pp. 39-52.

executive in these systems gets most of his bills passed and that total is lower than in parliamentary systems, it is important to ask whether the legislative success rate of presidents is even lower for a more representative sample of presidential governments and lower still for the cases that undergo regime collapse. Third, the sample of cases ignores an important transformation in the way presidential systems resolve political stalemates. Before 1978, a military coup was the way to overcome gridlock. Between 1978 and 2003, a combination of street protests and executive-legislative conflict has prompted 19 percent (or 14 out of 74) of all presidents to tender their resignations before Congress before their terms expire.²⁴ Interestingly, separation of powers systems have found a way of settling conflicts, one that echoes the way prime ministers leave government when they lose a parliamentary vote of confidence.

Several things are clear from this brief review of studies of executive-legislative conflict. First, presidential systems are more likely to collapse than parliamentary systems. Second, levels of economic development and inequality are more important conditioners of regime success.²⁵ This is an important point: while constitutional forms count, they are one of several factors that shape political stability. Third, the ideological distance between parties seems to be both an intuitively and empirically plausible cause of breakdown, and one meriting a systematic test. The divided government leads to paralysis thesis and then to a military coup explanation is also plausible, but thus far remains unsubstantiated. Even if Przeworski, Cheibub, and Saiegh turn out to be wrong, their study suggests that the critics of presidential government have to assemble databases of legislative productivity to show that policy paralysis precedes regime collapse. Most importantly, we still need to know why presidential systems breakdown more often than parliamentary systems. And, conversely, we need to understand why some presidential systems like the Costa Rican perform better than most of their regional counterparts.

Models of Constitutional Design

A limitation of the very productive line of research on executive-legislative relations is that that explanandum is narrow. Regime continuity is unquestionably a key criterion for assessing the performance of constitutional forms. Indeed, focusing on whether executives have or do not have stable legislative support can sideline other aims of constitutional government, including the protection of individual liberty. The unification of executive and legislative power is, after all, an example of the concentration of power. James Madison was not

²⁴ Gabriel L. Negretto, "Minority Governments and Types of Presidential Systems in Latin America," *Latin American Politics and Society*, forthcoming, Fall 2006.

²⁵ In addition to the book by Przeworski / Alvarez / Cheibub / Limongi cited above, see Carles Boix, *Democracy and Redistribution*, Cambridge, 2003.

the first to warn that the concentration of power can lead to tyranny. The focus on executive-legislative relations can therefore overemphasize the importance of decisiveness – just one of the properties of good government.

Constitutional design should focus on several goals. Responsiveness to public opinion is an important criterion, one about which I will not say very much at all at the present. So is the promotion of individual liberty, to which I alluded in my reference to James Madison. Maintaining democratic stability is obviously another goal. Indeed, a regime breakdown can lead to the violation of liberty. Finally, the effectiveness and efficacy of public policy is another.

Decisiveness, liberty, responsiveness, and policy effectiveness can be thought of as the central goals of constitutional design. And constitutional design is more than just an issue of institutional operation. Institutional analysis – a big issue in comparative political science – tends to focus on the impact of rules on political areas in carefully delimited arenas. The debate on presidential vs. parliamentary government, for example, only focuses on how electoral laws and the powers of the presidency make it easier or harder to enact laws. To date, this debate has not been part of a broader discussion of how best to integrate the branches and institutions of the state to maximize not one, but several aims, of government.

Constitutional design is therefore about a broader set of topics. It is about assigning the functions of government among the parts of government. It invokes meta-theoretical conceptions of public power. These principles emerge as properties that constitutional systems display in the way they weave the functions of government together. It is the courts that typically articulate these principles when they arbitrate disputes between the branches and organs of the state. Jurisprudence then unifies rulings, precedents, and interpretations into a body of meta-theoretical design principles that provide theoretical coherence to the structure of government.

There are several models of how to integrate the parts of government. Parliamentary sovereignty is one. This is a design that evolved in the Old World. As monarchs gradually lost power to popularly elected assemblies in the nineteenth century, parliaments became the principle lawmaking branch of government. Though parliamentary sovereignty is a legacy that Britain left in its colonies, it is not one that structures the relations between the organs of the state in Latin American countries. As a result, I will not have much to say about parliamentary sovereignty in this essay other than this principle of constitutional design has

been, until recently, the dominant feature of the English political system and that of Scandinavia.²⁶

A second and much more common meta-theory of power in the Americas is the checks and balances version of the separation of powers. To prevent tyranny, each function of government is divided among two or more parts of government. If a unified state, one where the powers of government are concentrated in one part of government, possesses the unity to oppress the body politic, then fragmenting the state is the way to protect individual liberty. According to Madison, responsibility for the multiple functions of government must be shared among officeholders, each of whom will check the power of the other.

The US political system, the embodiment of Madison's theory of government, fragments political power. Its executive is weak. He has no special powers to set the legislative agenda. He cannot declare states of siege. He basically has, to quote Robert Neustadt, "the power to persuade."²⁷ The US president also faces a Congress that is solely responsible for setting its agenda. Congressional committees oversee the executive and often contest the president, especially on domestic issues. Congressmen often serve in the House or the Senate for long periods of time and acquire the policy expertise to challenge the executive. An independent court exists to arbitrate relations between the branches of government, one that constantly reaffirms the theory of checks and balances and thus reproduces the constitutional basis of the struggle between the parts of government.

A third model of constitutional design is what Ackerman calls the new separation of powers. In his path-breaking study (see footnote 5), Ackerman suggests that political systems adopt functional specialization as their core principle of constitutional design. Instead of splitting each function of government between two or more parts of government, he recommends assigning each function of government to a single part of government. This principle of constitutional design emphasizes the careful delimitation of the authority among the organs of the state. Like in the old separation of powers, the multiplicity of state agencies prevents the concentration of power that can lead to tyranny. Unlike the theory of checks and balances, functional specialization reduces conflict and allegedly leads to a more efficient running of the state. By empowering each part of government to pursue a specific function of government, the new separation of powers enables the state as a whole

²⁶ *Vernon Bogdanor*, "Constitutional Reform in Britain: The Quiet Revolution", *Annual Review of Political Science*, 8 (2005), pp. 73-98 analyzes the development of parliamentary sovereignty in England and how institutional reforms over the past decade have changed the English constitutional tradition. For a recent assessment of parliamentary government, see *Kaare Strøm / Wolfgang C. Müller / Torbjörn Bergman* (eds.) *Delegation and Accountability in Parliamentary Democracies*, Oxford, 2003, 764pp.

²⁷ *Robert E. Neustadt*, *Presidential Power: The Politics of Leadership*, New York, 1960.

to remain democratic, to protect individual liberty, and to have a unity of purpose often lost with the old separation of powers.

The political system of Germany is a good example of functional specialization. A popularly elected Bundestag (lower house of parliament) selects the Chancellor (prime minister) and his cabinet. It, however, is not sovereign in all affairs. The Bundestag cannot enact laws affecting the internal administration of the Länder (federal states) without the consent of the Bundesrat (upper house of parliament), which is an agent of the states. Prior to circulation of the Euro in 2002, the Bundesbank was solely responsible for monetary policy. A host of other public or quasi-public institutions were responsible for policy in specific domains. A Constitutional Court interprets the Basic Law; among other functions, it polices the boundaries between the branches and organs of the state.²⁸ So, like in the US, state power is fragmented in Germany. Unlike the US, however, the parts of government do not share responsibility for every function of government. Instead, the German political system assigns a function of government to each part of government.

The Old and New Separation of Powers in Latin America

A hasty examination of the constitutional history of Latin America suggests that constitutional engineers copied the US constitution. All countries do have separation of powers systems where the president is independently elected of the legislature. As a result, it could be argued that they accepted the validity of the checks and balances theory of public power.

There is some evidence for this claim. The 1853 Argentine constitution and the 1857 (and even the 1917) Mexican constitution do look remarkably like the US constitution. Juan Bautista Alberdi, the great Argentine constitutional thinker, modelled the Argentine constitution of 1853 on the US federal charter.²⁹ The quasi-socialist reputation of the 1917 Mexican constitution is deceiving. It preserves the 1857 constitution's call for a weak executive, though the 1917 charter did strengthen the presidency by empowering the chief executive to veto legislative acts (while also allowing each house of Congress to override the president's veto if two-thirds of all legislators agreed to do so). Seventy years of one-party dictatorship by the Institutional Revolutionary Party (PRI) concealed this. Democratization

²⁸ Peter J. Katzenstein, *Policy and Politics in West Germany: the Growth of a Semisovereign State*, Philadelphia, 1987, is the English language source that most forcefully makes this point without, however, mentioning the new separation of powers. For a recent assessment of Katzenstein's argument, see Simon Green / William E. Paterson (eds.), *Governance in Contemporary Germany: the Semisovereign State Revisited*, Cambridge, 2005.

²⁹ Juan Bautista Alberdi, *Bases*, Buenos Aires, 1852.

since the 1990s, however, has swiftly led to the reactivation of the checks and balances in the 1917 constitution.³⁰

Even the 1853 Argentine constitution, however, departs from the checks and balances version of the separation of powers. It simultaneously empowers a more powerful executive, and one more dependent upon provincial governments. On the one hand, it endows the national executive with the power of federal intervention in the provinces. When public order is threatened, the president can dissolve a provincial government. This was a power that, for partisan reasons, presidents greatly abused.³¹ The overthrow of Argentine democracy in 1930 and the subsequent rise of populism also led to the subordination of Congress and the judiciary for much of the twentieth century. An irresponsible system of revenue sharing also has made the federal government responsible for financing provincial spending over which they have little control, a situation that national governments find impossible to change because constitutional reform requires approval by a majority of provinces.³²

Most other Latin American constitutions are different combinations of presidential and parliamentary government, ones that upset the careful balance of checks and balances of the US constitution. Virtually all Latin American constitutions empower chief executives to suspend the constitutional order, a power notably absent in the US constitution.³³ Especially in the twentieth century, constitutional engineers have given chief executives special legislative powers, ones borrowed from European parliamentary systems. Examples include allowing the chief executive to convene extraordinary sessions of the legislature in which he sets its agenda. Other powers include special decree powers, including the right to issue laws, subject only to legislative rejection within a certain time frame.³⁴ Starting at the end of the nineteenth century, institutional engineers also gave legislatures the power to interpellate and to dismiss cabinet ministers. This "parliamentarization" of presidential government, to quote the term William Stokes coined 60 years ago (and cited in the introduction),

³⁰ Jeffrey Weldon, "Political Sources of Presidencialismo in Mexico", in: Scott Mainwaring / Matthew Soberg Shugart (eds) *Presidencialism and Democracy in Latin America*, Cambridge, 1997, pp. 225-58 was perhaps to see that it was unified government that made the Mexican president so apparently strong. Also, see Fabrice Lehoucq, et al., "Political Institutions, Policymaking Processes, and Policy Outcomes in Mexico," Working Paper, Latin American Research Network Paper No. 512, Inter-American Development Bank, Washington, D.C., 2005.

³¹ Anne Louise Potter, "The Failure of Democracy in Argentina, 1916-1930: An Institutional Perspective," *Journal of Latin American Studies* 13 (1981), pp. 81-109.

³² Pablo Spiller / Mariano Tommasi, *The Institutional Foundations of Public Policy: A Transaction Theory and an Application to Argentina*, Cambridge, forthcoming.

³³ See Brian Loveman, *The Constitution of Tyranny: Regimes of Exception in Spanish America*, Pittsburgh, 1993 as well as Diego Valadés, *La Dictadura Constitucional en América Latina*, México, 1974.

³⁴ John M. Carey / Matthew Soberg Shugart (eds.), *Executive Decree Authority*, Cambridge, 1998.

seems to have led to the development of bizarre combinations of the executive rigidity that Linz decries in presidential systems and the legislative irresponsibility that both Schmitt and Giovanni Sartori criticize in parliamentary systems.³⁵

In contrast to the US, executives in most presidential systems mimic the behaviour of their counterparts in multiparty parliamentary systems. Though systematic data is lacking for most of the twentieth century, available information suggests that coalition government is very much the norm in the region. If half of all governments in 1984 were single party majority ones, they have become a distinct minority by the end of the 1990s. More than 70 percent of all governments relied upon legislative coalitions by 2000, ones where the executive was head of a coalition drawn from parties with legislative representation.³⁶ If an alleged virtue of presidentialism is that it promotes executive stability, then it is worth noting that cabinets do not appear to be any less stable in presidential than in parliamentary systems.³⁷ Related research shows that presidents, like prime ministers, consciously make cabinet appointments to build support for bills in Congress.³⁸

Political instability also seems to have encouraged constitutional reformers to make perhaps the single most important departure from the old separation of powers. If the checks and balances theory of political power turns every administrative agency into peculiar combinations of executive and legislative delegation of authority,³⁹ a number of separation of power systems in the Americas have established autonomous institutes to circumvent the incessant conflict among the elected branches of government. Also known as decentralized agencies, these institutes are typically long-term grants of public authority that isolate specific functions of the state from the partisan politics endemic in the central state apparatus. These agencies often have constitutional status or special organic laws. They include state corporations, public banks, regulatory commissions, and social policy institutes to administer pensions, health care, and related programs.

³⁵ Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes*, New York, 1994, pp. 110-1.

³⁶ J. Mark Payne / Daniel Zovatto / Fernando Carrillo Flórez / Andrés Allamand Zavalla, *Democracies in Development: Politics and Reform in Latin America*, Washington, D.C., 2002, p. 215.

³⁷ See, Cecilia Martínez Gallardo, "Designing Cabinets: Presidents, Politics, and Policymaking in Latin America," unpubl. Ph.D. Dissertation, Columbia University, 2005. For a case study of Uruguay, see David Altman, "The Politics of Coalition Formation and Survival in Multi-Party Presidential Democracies: The Case of Uruguay, 1989-99," *Party Politics*, 6 (2000), pp. 259-83.

³⁸ Octavio Amorim Neto, "The Presidential Calculus: Executive Policy-Making and Cabinet Formation in the Americas," *Comparative Political Studies*, 39 (2006), forthcoming.

³⁹ David Epstein / Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*, Cambridge, 1999.

The establishment of autonomous electoral court systems throughout the twentieth century is one of the best examples of this type of statecraft. Though classical constitutional theory made the executive responsible for organizing elections and empowered the legislature to certify their results, incessant political conflict led parties to entrust “the electoral function” to a set of independent agencies and courts – thus establishing institutions based upon a new set of constitutional design principles. Though framers first gave these bodies constitutional status with the Austrian (1920), Czechoslovakian (1920), and Greek (1927) constitutions, politicians and parties have most fully developed electoral commissions in Latin American countries. Starting in Uruguay (1924), Chile (1925), and Costa Rica (1925-46), politicians in the region have removed the electoral function from the executive and legislative branches of government. Electoral courts and other autonomous agencies therefore strike at the heart of the checks and balances version of the separation of powers.⁴⁰

Decentralization and Democratic Performance

Debates about the merits of the old and new separation of powers only matter if alternative design principles have consequences. If the new separation of powers is a superior principle of constitutional design, then it should empower governments that are more decisive, effective, and responsive to public opinion than political systems based upon checks and balances. Though systematically assessing the merits of the old versus the new separation of powers is beyond the scope of this essay, I present some evidence in this section to suggest that the new separation of powers may have something to do with why Chile, Costa Rica, and Uruguay have the best political systems in the region. Here I focus on the decentralized state sector, perhaps the single most significant way that separation of powers systems can overcome the conflict and partisanship at the core of the Madisonian vision of political power.

Autonomous institutes proliferated in the twentieth century in Latin America, especially after the 1929 Great Depression. Though their legal standing differs between and within countries, institutional engineers granted them legal independence so that they could pursue their mandates free of partisan interference. Their budgets often are exempted from the normal lawmaking process and have earmarked sources of funding. With varying degrees of institutional independence, state corporations, for example, organized oil and gas production, telephones, electricity, water, and other public services. Other such institutions run pensions and health care. Yet others run regulatory services. Constitutional reform and administrative reform often endowed Comptroller Generals with wide sweeping authority not only to review how agencies spent their monies, but also the power to interpret admin-

⁴⁰ *Fabrice Lehoucq*, “Can Parties Police Themselves? Electoral Governance and Democratization,” *International Political Science Review*, 23 (2002), pp. 29-46.

istrative laws and decrees. Despite the restructuring of the state in the 1980s, the decentralized state sector remains an important part of the Latin American institutional landscape.

Table 1 contains data on the relative size of the centralized and decentralized state sectors for selected years in 6 Latin American countries and in the United States.

Table 1: Size of the Central and Decentralized State in Selected Latin American Countries					
		As a Share of Public Sector		Expenditures/GDP	
Country	Year	Centralized	Decentralized	Centralized	Decentralized
Argentina	1962	87%	13%		
Bolivia*	1970	27.8%	72.2%	10%	20%
Brazil	1965	24.7%	75.3%		
Costa Rica	1968	51.2%	48.9%	15.8%	15.1%
México	1967	51.4%	48.6%	13.3%	12.6%
Venezuela	1967	67.8%	32.2%		
US**	1967	86.9%	13.1%	30%	5%

Source: *James W. Wilkie*, "Recentralization: The Budgetary Dilemma in the Economic Development of Mexico, Bolivia, and Costa Rica," in: *James W. Wilkie* (ed.) *Statistics and National Policy*, Los Angeles, 1974. Columns 3 and 4 are from p. 103 and columns 5 and 6 from p. 126.

*Last two columns are estimates for 1968.

**Last two columns are an estimate based upon the public sector shares of the central and decentralized sectors and assuming that central state revenues = 35% of GDP.

In Bolivia, Brazil, Costa Rica, and Mexico, autonomous institutes accounted for more than one-half of the public sector budget. By 1970, there were 108 such agencies in Bolivia.⁴¹ By the 1990s, there were more than 119 autonomous institutions in Costa Rica.⁴² In Venezuela, there were more than 300. Private law governs 294 of these decentralized bodies in Venezuela while public law governs 68 of them. In 1982, government-owned enterprises were responsible for almost 30 percent of GDP in Venezuela.⁴³

In contrast, decentralized agencies spent approximately 13 percent of the public sector budget in the US. This is a figure comparable to that for Argentina, one of the several Latin American cases with a constitutional design most like that of the United States. While the share of the decentralized sector is high in Mexico, it is the case that public law granted

⁴¹ *James W. Wilkie*, "Recentralization: The Budgetary Dilemma in the Economic Development of Mexico, Bolivia, and Costa Rica," in: *James W. Wilkie* (ed.), *Statistics and National Policy*, Los Angeles, 1974.

⁴² *Fabrice Lehoucq*, *Lucha electoral y sistema político en Costa Rica, 1948-1998*, San José, 1997, pp. 36-9.

⁴³ *Brian F. Crisp*, *Democratic Institutional Design: The Powers and Incentives of Venezuelan Politicians and Interest Groups*, Stanford, 2000, p. 128.

much less independence to decentralized agencies in this country than in political systems like Costa Rica based much more on the theory of functional specialization. Moreover, informal relations between members of the hegemonic PRI kept all state agencies on a tight leash for most of the twentieth century.⁴⁴ The Mexican case also helps to make the point that the centralization of political power can undermine the independence of formally decentralized agencies.

There is evidence that functional specialization is related to superior democratic performance. Figure 1 is a scatter plot of the number of years a country has been democratic and its international rank on the 2003 Bertelsmann Management Index (BMI).⁴⁵ The BMI ranks a political system's ability to pursue goals "strategically and consistently," to use resources effectively, to build consensus around these goals, and to cooperate with international donors to promote market-compatible reforms and to fight for social justice. With a correlation coefficient of -0.448, the scatter plot shows that experience with democratic government and political management are related. More specifically, it reveals that the best states in Latin America – Chile, Costa Rica, and Uruguay – are also those that have relied upon creating bureaucratic agencies and of horizontal accountability largely outside of the central state to isolate them from the partisan bickering of the elected branches of government.

Uruguay seems to have been the first country where central state politicians began creating what they called Autonomous Entities. In 1918, voters approved a constitution that gave the Autonomous Entities a place in the Uruguayan constitutional order. The 1934 constitution established different types of autonomous agencies, some of whose budgets did not require legislative approval. The president named the Directors of the Autonomous Entities, subject to approval by the Senate, and involving candidates from government and opposition parties.⁴⁶ Chile followed suite in the wake of the 1925 constitution, which called for the decentralization of public administration. By mid-century, the Chilean public sector boasted a panoply of decentralized agencies that included the Corporation for the Promotion of Production (CORFO) and a powerful Comptroller General. The Comptroller General was a widely respected and independent agency that not only audited public accounts, but could also declare executive decrees unconstitutional.⁴⁷

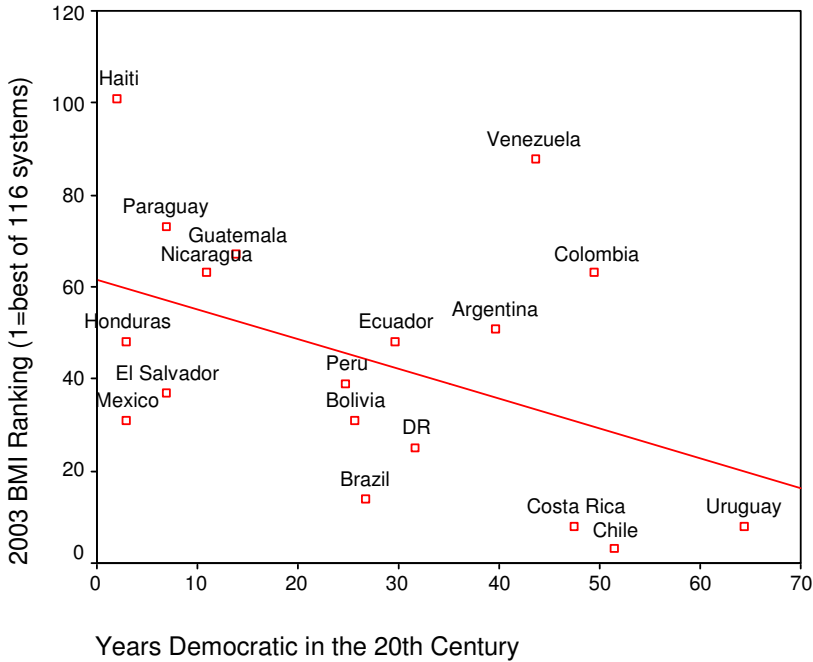
⁴⁴ *Roderic Ai Camp*, *Mexico's Mandarins: Crafting a Power Elite for the Twenty-First Century*, Berkeley, 2002, 308pp.

⁴⁵ *Bertelsmann Stiftung*, *Bertelsmann Transformation Index 2003: Politische Gestaltung im Internationalen Vergleich*, Gütersloh, 2004. The estimate of years a country has been democratic is from Smith cited in footnote 1.

⁴⁶ *Héctor Gros Espiell*, *Evolución constitucional del Uruguay*, Montevideo, 2003, pp. 89-90.

⁴⁷ *Arturo Valenzuela*, *The Breakdown of Democratic Regimes: Chile*, Baltimore, 1978, pp. 13-6. Also, see *Frederico Gil*, *The Political System of Chile*, Boston, 1966, pp. 97-99.

Figure 1: Political Management and Democratic Experience in Latin America



Sources: Bertelsmann Stiftung, Bertelsmann Transformation Index 2003: Politische Gestaltung im Internationalen Vergleich, Gütersloh, 2004 and Peter H. Smith, "Los ciclos de la democracia en América Latina", *Política y Gobierno*, 11 (2004), p. 200.

Politicians started creating autonomous institutes in Costa Rica in 1915, when the central state created a central bank to deal with the cut off of exports to Germany during World War I. Granting them formal autonomy was part of the 1949 Constituent Assembly's broader effort to depoliticize many of the functions of government. Perhaps the most prominent of these is the Board of National Social Security, founded in 1943. By the 1990s, this institution provided medical care for nearly 68 percent of the salaried and unsalaried EAP and their families.⁴⁸ Other social welfare institutions include the Children's Hospital (1964), the Mixed Institute of Social Assistance (1971), the National Institute of Housing and Urban Issues (1954) and the National Ward for the Blind (1957).

⁴⁸ *Proyecto del Estado de la Nación*, Estado de la Nación, 2004, San José, p. 403.

A more disaggregated look at decentralized agencies suggests that some have performed better than others. In general, state corporations have not performed very well in Latin America.⁴⁹ Part of the problem was a shortage of funds, in part because their rates were politically determined. State corporations often behaved like predictable monopolists and, as a result, extracted rents that were shared between private suppliers, union officials (and members), and central government officials. Not infrequently, interest groups, typically in association with state officials (policy triangles), captured these bodies along with those of regulatory agencies.

Electoral tribunals have performed much better. Electoral tribunals helped to consolidate democracy in Chile, Costa Rica, and Uruguay by preventing the partisan manipulation of election administration and vote tallies.⁵⁰ Concentrating the electoral function in an electoral court system also helped to depoliticize electoral governance in other countries of the region, even though military coups often made their work irrelevant. Only when an electoral management body and a set of courts took over responsibility for elections in Mexico did government and opposition parties agree to accept the results of increasingly competitive elections in the 1990s.⁵¹ A statistical analysis of Latin American elections between 1980 and 2000 shows that electoral tribunals did lead to fairer elections, as judged by international observers, and more compliance with election outcomes.⁵² To the extent that electoral tribunals had the independence and resources to organize elections and to count the ballots, elections were fairer and less likely to provoke post-election conflicts.

Conclusions and Implications

This essay began by noting that the political systems of Latin America have not always maximized individual liberty nor been very effective. For half of the twentieth century, Latin Americans, on average, have lived in dictatorships of one type or another. Though there are some exemplary cases of democratic governance in Latin America, all too many citizens of the region have been stuck with authoritarian, unstable and/or bad government.

⁴⁹ *Alberto Chong / Florencio López-de-Silanes* (eds.) *Privatization in Latin America: Myths and Reality*, Stanford, 2005.

⁵⁰ *Fabrice Lehoucq / Iván Molina*, *Stuffing the Ballot Box: Fraud, Electoral Reform, and Democratization in Costa Rica*, Cambridge, 2002, 294pp.

⁵¹ *Todd A. Eisenstadt*, *Courting Democracy in Mexico: Party Strategies and Electoral Institutions*, Cambridge, 2004, 354pp.

⁵² *Jonathan Hartlyn / Jennifer McCoy / Thomas J. Mustillo*, "The 'Quality of Elections' in Contemporary Latin America: Issues in Measurement and Explanation", Paper prepared for delivery at the XXIV International Congress of the Latin American Studies Association, Dallas, Texas, March 27-29, 2003

In this essay, I have explored the impact of institutional factors on the political development of the region. I argue that constitutional design may very well be an important source of political instability, poorly implemented policies, and the collapse of democratic government. By constitutional design, I mean the principles that political systems use to assign the functions of government to the different parts of government. So, my argument in this essay does not simply refer to the longstanding debate about the advantages of presidential and parliamentary forms of government, which concludes that presidential systems are more unstable than parliamentary ones, though the causal mechanisms for the instability of presidential systems are not entirely clear. Policy paralysis and ideological polarization between the branches of government are plausible causes of regime breakdown, but the limited empirical tests to date do not permit concluding that either is the cause for the brittleness of presidential systems. I hypothesize that a broader conception of institutional arrangements, one that focuses on design principles helps us to understand why so many separation of powers systems have performed less than admirably.

One conclusion of this paper is that the political systems of Latin America are alternative combinations of two of the three dominant models of constitutional design. With a few minor traces, parliamentary sovereignty has not structured the relations among the parts of government in the Spanish and Portuguese speaking countries of the region. State structures are neither delegates of a popularly elected assembly, nor have legislatures been the dominant branch of government in Latin America. Instead, states are different combinations of the old and new separation of powers. The existence of executives and legislatures elected independently of each other is a vestige of checks and balances theory of statecraft. That both share responsibility over the production of laws is the most concrete manifestation that the old separation of powers is alive in Latin America. Yet, many separation of powers systems have created institutions based upon the theory of functional specialization, which is at the core of the new separation of powers. Instead of making 2 or more parts of government responsible for important functions of government, institutional engineers have created autonomous agencies to isolate key policymaking responsibilities from the incessant conflict of the two elected branches of government. Since the 1930s, most political systems of the region have, in fact, created a large number of independent and/or quasi-independent agencies to run auditing agencies, administer pensions and health care programs, and to organize and to hold elections.

The second conclusion of this paper is that successful governance in the region stems from converting, as much as possible, of the old into the new separation of powers. The 3 most successful cases of democratic governance in the region are Chile, Costa Rica, and Uruguay, 3 countries in which presidents and legislatures devolved important policymaking functions to agencies of the decentralized state sector. In this essay, I suggest that isolating government functions from the elected branches of government helped both the stability and quality of democracy. By depriving the central state of important responsibilities, the

establishment of autonomous agencies reduced the scope of conflict among the elected branches of government. Administrative decentralization also contributed to political system effectiveness by detaching policymaking from the electoral calendar that drives so much of central state behaviour. As a result, the new separation of powers may very well help to explain the uncommon success of several presidential systems in Latin America.