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### **SYMPOSIUM: PUBLIC LAW AND THE NEW POPULISM**

Stephen Gardbaum and Richard H. Pildes

### **Populism and Democratic Institutional design: Methods of Selecting Candidates for Chief Executive in the United States and Other Democracies**

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POPULISM AND DEMOCRATIC INSTITUTIONAL DESIGN: METHODS OF  
SELECTING CANDIDATES FOR CHIEF EXECUTIVE IN THE UNITED STATES AND  
OTHER DEMOCRACIES

Stephen Gardbaum\* and Richard H. Pildes\*\*

ABSTRACT

Donald Trump would most likely not be President but for the institutional change made in the 1970s, and analyzed here, in the nature of the presidential nomination process.

In the 1970s, the United States shifted almost overnight from the methods that had been used for nearly 200 years to select party nominees, in which official representatives of the political parties played the major role in deciding the parties' candidates for President, to a purely populist mode (primaries and caucuses) for selecting presidential nominees. This article explores the contrast between nomination processes that entail a central role for "peer review" – in which party leaders have a central voice in the selection of their parties' nominees – and purely populist selection methods, such as currently used in the United States, in which ordinary voters completely control the selection of nominees and party figures have no special role.

The first half of the article is historical and focuses on the United States. The second half is comparative and explores how other major democracies structure the process of choosing party leaders and candidates for chief executive. In the historical sections, we seek to show both how radical the change was that was made in the 1970s and yet how accidental, contingent, and inadvertent this transformation was. The "framers" of these changes did not actually intend to create the system with which we ended up, in which the primaries and caucuses completely determine the parties' nominees. The comparative sections show that the U.S. system is an extreme outlier among major democracies: in no other democracy is the selection completely

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controlled by the mass of ordinary voters. Most other democracies use systems of pure peer review to select candidates for chief executive; or use systems that mix elements of peer review with popular participation; and in other ways continue to give official representatives of the parties much greater say than in the United States over the selection of the parties' nominees for Chief Executive.

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The institutional design through which democracies choose nominees who compete to become a nation's Chief Executive is among the most consequential features in the design of democratic elections. Yet there is surprisingly little scholarship that explores this issue in detail. This article also contributes to the general analysis of the rise of populist politics in many democracies today by showing how the institutional design for how party nominees are chosen can enable or constrain how easily and quickly populist political forces are able to capture control of government.

The institutional framework and legal rules through which democracies choose the nominees who compete to become a nation's Chief Executive (the President or Prime Minister) are among the most important features in the institutional design of any democracy. Yet despite the considerable academic attention "the law of democracy" has received in the United States over the last 20 years, surprisingly little scholarly focus has thus far been devoted to this fundamental attribute in the institutional design of American democracy. This lacuna is particularly striking because one of the most consequential and radical changes in the last 50 years to the way American democracy is structured is the fundamental change we made to the way the major party nominees for President are selected: the shift to a purely populist method in which primary elections (and a small dose of caucuses) completely determine the party's nominees. Similarly, there is little comparative analysis and assessment of the different methods various established democracies use to structure the process of choosing the principal candidates for Chief Executive. Yet different selection methods inevitably can have profound selection effects on the kind of people who choose to run; on which kind of political figures are most likely to succeed in capturing nominations and office; and,

most importantly, on how the resulting government functions and the interests and political forces to which it is most likely to respond.

The primary aim of this article is to provoke more widespread reflection about how best to design this crucial feature in the institutional framework of democracy. Precisely because the dramatic new system put in place in the United States nearly 50 years ago has since then remained largely unchallenged and unchanged, most Americans undoubtedly have come to take for granted that our current system of presidential primaries and caucuses is the “natural” or the only “democratic” way to select nominees for President. We seek to unsettle that notion by providing both historical and comparative perspective on this issue.

A secondary aim is to contribute to the more general debate over the rise of populist forms of politics in many parts of the world, including the United States and Europe, in the last several years.<sup>1</sup> We seek to explore how different selection methods for party nominees might be relevant to the likelihood that populists will gain office as a country's chief executive.

Part I briefly chronicles the historical development within the United States of the different methods and institutional frameworks that have been used over time for selecting presidential nominees. Part I demonstrates that for most of American history until the 1970s, the selection system included a significant role for what is called “peer review,” in which those who were existing officeholders and party officials had significant weight in deciding who ought to represent the party as candidate for President. As Part I shows, the change in the 1970s can be characterized as the replacement of this “peer review” system to a purely populist system in which voters, through primaries and caucuses, completely determine the presidential nominees.<sup>2</sup>

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<sup>1</sup> There is a good deal of debate currently taking place over how precisely “populist politics” ought to be conceptualized or defined. For the work which has received the most attention and inherently links populism to a rejection of political pluralism, see JAN-WERNER MÜLLER, *WHAT IS POPULISM* (2016). For a critique of Müller and a defense of a more expansive conception of populism, see Robert Howse, *Populism—A Defense: Reflections on the History of Democratic Thought and Practice* (unpublished manuscript) (on file with authors).

<sup>2</sup> For clarification, by “populist” (versus “peer review”) system, we are using the term in a procedural sense, where the mass of voters select a party's candidate, and not in the more general or substantive

After describing that shift, Part I also suggests that we did not so much intentionally choose this new “modern” populist system as much as stumble inadvertently into it.

Part II then turns to comparative perspectives on how other major democracies structure the process of choosing party leaders or candidates for Chief Executive. In line with the framework just described, as a first cut the central divide is between more “populist” systems for making this choice versus ones in which “peer review” (the views of elected officials or party figures) plays a significant role. Comparative perspective can help further destabilize the idea that our current populist system is the “natural” or uniquely “democratic” way of choosing nominees for the highest office. Part II therefore explores how party leaders and/or nominees for chief executive are chosen in many other established democracies, including the major democracies of Western Europe—the UK, Germany, France, Italy—as well as a diverse range of other large or important countries, such as Canada, Japan, Israel, South Korea, Argentina.

The comparative analysis in Part II is driven by, and organized around, three major aims: (1) to identify the greater role that “peer review” plays in many democracies than in the United States in the selection of party leaders and candidates for chief executive; (2) to explore whether significant changes have taken place in the methods of making this choice over recent decades among major democracies, and whether those changes, where they exist, have tended to move as far in the direction of greater popular control as they have in the United States; (3) to show the diversity of forms peer review has taken in other democracies, in recognition that different ways exist for building in a role for peer review in systems that are not purely populist ones.

Although this article is on the surface primarily historical and comparative, we do not want to hide the normative concerns that animate it. We write to challenge the unexamined notion that our current populist system of candidate selection is the best way to choose the nominees who then compete in the general election for President. As

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sense referenced in describing the “secondary aim” of this article in the previous paragraph. However, procedure and substance are far from unrelated, as it is a major point of this article that populist selection methods are far more likely to result in populist candidates for chief executive than where some form of peer review is employed.

some political scientists predicted when we changed to this system in the 1970s, this populist selection method makes it more likely than in a “peer review” system that candidates who lack the relevant experience and competence will emerge, as well as candidates who are more politically extreme. To the extent there remain small vestiges of peer review in our current system (superdelegates in the Democratic Party), we want to bolster the case for retaining that role. To the extent other democracies are contemplating moving further in the direction of more populist selection methods, perhaps in imitation of the United States or in response to the growing disillusionment with the mainstream political parties in Europe and elsewhere,<sup>3</sup> we want to sound a cautionary note. For one pragmatic benefit of peer review is that it can help to prevent populist leaders from capturing these parties and thereby putting themselves in a stronger position to win highest political office. And to the extent it is possible to catalyze a conversation about whether the United States should consider building back into our nomination processes a greater role for peer review, we hope to do so.

### **I. THE MOST POPULIST SELECTION METHOD IN THE WORLD: THE UNITED STATES SINCE THE 1970S**

To put the current American presidential-nomination process in historical perspective, we used a dramatically different system for all of American history until the 1970s. The change that took place in the 1970s was both radical, against this historical backdrop, and in many ways unintended, as described below.

The Framers of the Constitution devoted substantial attention to the final stage of how the President ought to be chosen, settling ultimately on the Electoral College, with the hope that the structure of the Electoral College would have significant selection effects on the kinds of figures who would become President. They expected the Electoral College to produce a non-partisan system of presidential election in which pre-existing national reputations of the candidates would play the decisive role.<sup>4</sup> But the Framers appear to have assumed that these potential credible candidates would emerge more or

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<sup>3</sup> See, e.g., PETER MAIR, *RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY* (2013); Cas Mudde, *Europe's Populist Surge*, FOREIGN AFF., Nov./Dec. 2016, at 25.x

<sup>4</sup> JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 41 (1979).

less spontaneously; they gave little thought to whether there was any need for a prior stage of filtering, in which potential candidates were somehow distilled down to a group amongst which voters (voting for the electors) would then choose.<sup>5</sup>

Yet starting in the early 19th century, the first form of peer review and two-stage selection process emerged.<sup>6</sup> This was the congressional caucus, which arose as the de facto means of pre-selecting the most credible candidates for President in a world in which factional or partisan divisions had begun to emerge. In the caucus system, which lasted until 1824, members in Congress from a self-identified coalition—namely, the Republicans—would privately come to agreement on the candidate they would endorse to the public as the representative of their views. The birth of the caucus system reflected, in part, the fear that without such a filtering device, too many candidates would run, the Electoral College would not be able to select a clear winner, and that the selection of the President thus end up being decided in the House of Representatives (where each state delegation had one vote).

The emergence of the caucus was ironic, for two reasons. First, it reflected the blossoming of the kind of partisan divisions that the Framers most feared and that the Constitution had been designed to preclude.<sup>7</sup> Second, the Framers had specifically rejected having the President chosen by Congress, out of fear that the President would then be too dependent upon Congress.<sup>8</sup> But the entry of the caucus system at the “nomination” stage generated precisely that kind of dependency. To be sure, defenders of the caucus system argued that members of Congress were merely making recommendations to the public, with the choice still in the hands of the voters. And while scholars have debated how decisive the choice of the congressional caucus actually

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<sup>5</sup> CEASER, *supra* note 4, at 86 (“[T]he Founders’ thought remains vague on just how individuals would earn the ‘continental reputations’ of which they spoke. Their view was that such reputations would naturally emerge in a regime in which national politics played a large, if not the dominant, role.”).

<sup>6</sup> The first caucus was in 1800, when Republicans were united behind Jefferson as their presidential candidate, but were uncertain about their vice-presidential candidate, and so gathered in private to forge agreement on Aaron Burr. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 843 (Liberty Fund 1995) (1888).

<sup>7</sup> See *e.g.*, CEASER, *supra* note 4, at 77 (“Virtually all the Founders associated parties with seditious bodies.”).

<sup>8</sup> See *e.g.*, *id.* at 65, 82.



was, that choice became the President in every general election from 1800–1816.<sup>9</sup> For much of the first forty years, the role of the congressional caucus in the selection process meant that American government operated less as the system of separated powers originally envisioned and more as one involving a congressionally-dominated fusion of legislative and executive powers.<sup>10</sup>

But critics derided the system as “King Caucus”—an elite capture of the presidential process—and the system began to lose its legitimacy. Within a couple decades, it was replaced by the national, political-party nomination conventions that (in vestigial form) remain with us today. Though the party convention was not invented by Martin Van Buren, he quickly turned into an enduring feature of American democracy, along with his brilliant creation and legitimation of the mass, national political party.<sup>11</sup> Of particular relevance here, Van Buren had concluded that, in the vacuum created by the demise of the congressional caucus as a way of filtering presidential nominees, competition for the presidency had devolved into a system of highly personalized and factional politics which generated too many candidates and more extreme, demagogic campaign appeals, as individual candidates fought to find ways to distinguish their personal brands.<sup>12</sup> Unified, national political parties and party nominating conventions were thought to be vehicles for fostering broad consensus by forcing compromise among cross-cutting cleavages and reining in the role of personalized, hence more demagogic, politics. By 1836, “the idea of partisan nominations was never again seriously challenged; it became part of the living constitution.”<sup>13</sup>

Though the conventions purportedly involved a larger and more representative group of selectors than the congressional caucus, the reality was that state and local party leaders effectively controlled the conventions and the nomination process. They

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<sup>9</sup> CEASER, *supra* note 4, at 117.

<sup>10</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2321 (2006).

<sup>11</sup> The first national conventions were held in 1831, by the Anti-Masons and the National Republicans (who soon became the Whigs). In 1832, another national convention adopted the Whig nominations. In 1836, the Jacksonian Democrats selected through a national convention, but their opponents did not. But by 1840, the national convention had become used by all significant parties. See, e.g., JAMES S. CHASE, *EMERGENCE OF THE PRESIDENTIAL NOMINATING CONVENTION, 1789–1832*, at 294–95 (1973).

<sup>12</sup> CEASER, *supra* note 4, at 132, 136.

<sup>13</sup> *Id.* at 127.

had considerable capacity to influence the choice of delegates (who were chosen by means like party caucus, district convention, state convention, executive committee, or some combination of these and similar methods). These party leaders also led their own state delegations and essentially controlled how their state's delegation voted.<sup>14</sup> Party leaders, who included state and national officeholders, had thick ties to their party and its commitments; they had ongoing and long-standing ties to their parties and were professional politicians.<sup>15</sup> Thus, despite opening up the selection process to greater participation through the nominating conventions, through the dominance of these state and local party leaders, the conventions continued to provide peer-review filtering of potential nominees, albeit in more attenuated form than the congressional caucus.

With certain incremental changes, these party conventions continued to provide this form of peer review and filtering all the way until 1972. The most significant adaption of this system came in 1912, with the advent of the Progressive Era's press for direct primaries as a general means of choosing party nominees for all levels of election. That movement introduced a limited role for a few direct presidential primaries to choose convention delegates. But in hindsight, what is most remarkable is how little affect the direct-primary movement had on the presidential nomination process, given how successful that movement turned out to be for elections at virtually every other level.

The direct primary was introduced as an element—but just an element—in the nomination system on behalf of former President Theodore Roosevelt's pursuit of the nomination in 1912. Disenchanted with his hand-picked successor, William Howard Taft, Roosevelt, who had been President from 1901-1909, decided to challenge Taft in 1912 but realized that by this time President Taft had control of the party apparatus. To circumvent the party establishment, Roosevelt and his allies pressed states to adopt the direct primary for choosing delegates to the Republican Party convention, at the same time as the movement for direct primaries for choosing nominees for other offices was gaining steam. This support for increasing the direct role of "We the People" was purely

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<sup>14</sup> For one description, see LEON EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 90 (1986).

<sup>15</sup> *Id.*

strategic; before being convinced this was his only path to the nomination, Roosevelt had opposed direct primaries and other forms of more popular democracy.<sup>16</sup> Nonetheless, it is no surprise that one of the architects of the Democratic Party's post-1968 move to the "modern" system in which presidential primaries completely determine the party's nominee, Geoffrey Cowan, has recently written a book celebrating Roosevelt's role in inaugurating the first presidential primaries.<sup>17</sup> As a result of the pressure of Roosevelt and his allies, 13 states ended up choosing their delegates through the direct primary for the 1912 Republican convention.<sup>18</sup>

From this point on, our presidential nomination process is best understood as what scholars have characterized as a "mixed system." Primary elections to choose delegates from some states became an element in the process, alongside the continuing role for local, state, and national party figures selected in the more traditional ways. Although winning a primary could influence the selection process, the dominant power to determine the nominees continued to rest with the traditional party figures.<sup>19</sup>

Indeed, one might expect that once primaries were introduced into the system for Roosevelt, the pressure for the direct primary would only gain more momentum, particularly in light of the soon-common use of the direct primary to choose nominees for other national and state offices. But the presidential nomination process continued to resist the forces of complete populist control. President Woodrow Wilson believed a

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<sup>16</sup> GEOFFREY COWAN, *LET THE PEOPLE RULE: THEODORE ROOSEVELT AND THE BIRTH OF THE PRESIDENTIAL PRIMARY* 42 (2016) (noting that Roosevelt "refused to embrace popular democracy as the cornerstone of the progressive agenda"); *id.* at 43 (quoting Roosevelt private letter remarking that every real supporter of democracy "acts and always must act on the perfectly sound (although unacknowledged, and often hotly contested) belief that only certain people are fit for democracy"). By the time he was running against Taft and pressing for primaries, he gave widely-noticed speeches, including one he called "The Right of The People to Rule," in which he asserted: "The great fundamental issue now before the Republican Party and before our people can be stated briefly... It is: Are the American people fit to govern themselves? I believe they are. My opponents do not." *Id.* at 99.

<sup>17</sup> COWAN, *supra* note 16.

<sup>18</sup> *Id.* At 1.

<sup>19</sup> In 1952, the American Political Science Association surveyed each state party organization in the country to find out how they selected delegates to the conventions and who effectively controlled that process. In carefully reviewing that survey data, the authors of *The Party Decides* concluded "that most party organizations were sufficiently insulated from popular pressures that the selection of delegates to the party conventions – and hence the choice of party nominee – was dominated by insiders." MARTY COHEN ET AL., *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* 118 (2008) [hereinafter *THE PARTY DECIDES*].

more empowered President was necessary, that direct primaries would be a means towards that end, and thus formally proposed in his first State of the Union speech in 1913 that Congress enact a national primary law.<sup>20</sup> But this proposal went nowhere. The high-water mark for primaries came in 1916: 20 States used one form or another of a presidential primary, and more than half the delegates for each party's convention were selected this way.<sup>21</sup> But even these primaries were not the primaries of today. Under many of these primary laws, state party leaders could still control their delegations by rules that permitted delegates to be elected as "unpledged" or to support "favorite son" candidates (the state's senator or governor, typically) who would be abandoned at the convention, as the party figures then bargained and negotiated over the serious nomination options.<sup>22</sup>

And by 1920, enthusiasm for the direct primary as part of the presidential-candidate selection process had dissipated. Primaries settled into a contained feature of the system, with the dominance of the party organization re-solidified.<sup>23</sup> After 1920, only 12–18 states in various years used some form of primary to select delegates.<sup>24</sup> Indeed, we suspect most readers will be surprised to learn that, as late as 1968, only 14 states used primaries; they selected 37–38% of the delegates, well less than majority needed to control the choice of nominee.<sup>25</sup>

The conventional negative story about this "old" system is that a cadre of party bosses got together in smoke-filled back rooms to choose the parties' nominees. But whether that characterization was accurate at one time, the "mixed system" for nominations in the 20th century functioned in considerably more complex and nuanced

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<sup>20</sup> CEASER, *supra* note 4, at 173.

<sup>21</sup> See HOWARD L. REITER, *SELECTING THE PRESIDENT: THE NOMINATING PROCESS IN TRANSITION 3* (1985) (Table 1.1). EPSTEIN, *supra* note 14, at 91, reports that 26 states, not 20, used some form of primary. The difference in these numbers probably reflects the range of structures that can arguably be considered some form of primary.

<sup>22</sup> EPSTEIN, *supra* note 14, at 91; THE PARTY DECIDES, *supra* note 19, at 113.

<sup>23</sup> EPSTEIN, *supra* note 14, at 91.

<sup>24</sup> REITER, *supra* note 21, at 3. The one exception is the Democratic Party convention of 1956, when 20 states used primaries of some form. *Id.*

<sup>25</sup> REITER, *supra* note 21, at 3 tbl.1.1. Again, there is also some discrepancy in number between the sources on exactly how many states used primaries. Some sources report 16–17 states as using primaries in 1968. See e.g., EPSTEIN, *supra* note 14, at 91.

ways. In this system, the role of the popular primaries and that of the party figures turned out to perform a kind of checking and balancing function on each other's influence. The institutional party figures continued to have incentives to put their weight behind candidates likely to hold the party's factions together, run a competitive election, govern effectively, and reflect the party's general ideology. But primaries also kept the system from being too closed; "outsiders" could challenge existing party hierarchy and orthodoxy and force the parties to remain responsive, at least up to a point. No single institutional designer sat down in a single moment of synoptic rationality to create the "perfect" mix of populist and peer-review sources of power; as often happens with democratic institutions, this system emerged from competing pressures over time. Yet we believe the mixed system functioned surprisingly well.

Primaries enabled less-tested candidates to show skeptical party leaders that they could win votes—as when John Kennedy won the West Virginia primary in May, 1960, and proved that a Catholic could win votes even in heavily Protestant areas.<sup>26</sup> Even an insurgent candidate, like Barry Goldwater in 1964, could successfully work the mixed system.<sup>27</sup> But no candidate could succeed without also convincing enough institutional party figures throughout the country that they would be credible figures the party could support. In 1960, for example, Kennedy won only 10 primaries. To win the nomination, he therefore had to persuade enough party regulars to back him. When candidates ran in the primaries they were thus always constrained to keep party regulars on board too. While personal appeal mattered, so did the ability to put together coalitions within the party. And party figures could bring to bear more personal knowledge than voters of how candidates actually functioned in government, which potentially could weed out nominees temperamentally unsuited to governing.

The selection effects of this mixed system were also balanced in a complex way. Under this system, some candidates chose to "run" on the inside track and make their appeal primarily or even exclusively to the party figures who controlled convention delegates; for instance, the Democrats nominated Adlai Stevenson in 1952, even though

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<sup>26</sup> THE PARTY DECIDES, *supra* note 19, at 125–26.

<sup>27</sup> *Id.* at 142.

he had not run in any primary. The Democrats did so even though Estes Kefauver had run in and won 11 of the 12 the Democratic primaries he entered.<sup>28</sup> Others, such as JFK, effectively took advantage of the outside track to demonstrate their popular appeal. Whichever path a candidate took, this system combined populist and party-centered features. But the net effect was to keep the political parties (meaning party leaders from the national, state, and local levels) in control. As the most thorough recent study concludes about the convention process in the decades before it collapsed, in no nomination contest “was a party forced by strong candidates with large popular followings to choose a nominee it didn’t want.”<sup>29</sup> And, “[w]ith the exception of the Republicans in 1964 and the Democrats in 1968, parties consistently attempted to find candidates who were broadly acceptable to party groups and able to compete well in the general election.”<sup>30</sup> In other words, while the mixed system titrated peer review with a degree of populism, the power of peer review remained dominant.<sup>31</sup>

Thus, for the course of American history until the 1970s, the selection of credible nominees for the presidency typically involved a high degree of control and “peer review” by national, state, and local party leaders from throughout the country. “[P]arty leaders retained most of their customary power over presidential nominations,”<sup>32</sup> even as the precise form of this peer review evolved, from selection by a small caucus in Congress to nominating conventions that eventually created a partial role for direct popular input. But in the mixed system that emerged in 1912 and endured until the 1970s, peer review always played a central role in determining the major party presidential nominees.

*Stumbling into the “modern” system.* This long-standing peer-review system was destroyed, almost overnight, in the aftermath of the 1968 Democratic convention in

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<sup>28</sup> COWAN *supra* note 16, at 293; THE PARTY DECIDES, *supra* note 19, at 123.

<sup>29</sup> THE PARTY DECIDES, *supra* note 19, 145.

<sup>30</sup> *Id.*

<sup>31</sup> Some scholars did argue in the 1950s that the parties’ role in the conventions had already been weakened and that more populist forces had already taken control of the process. See William Carleton, *The Revolution in the Presidential Nominating Convention*, 72 POL. SCI. Q. 224–40 (1957). For a later reflection of this view, see also REITER, *supra* note 21. The analysis in *The Party Decides* rejects this view and provides strong empirical analyses for the opposite conclusion.

<sup>32</sup> EPSTEIN, *supra* note 14, at 91.

Chicago. In its place was erected what has been called a pure “plebiscitary” system of selection. This change was radical. It took place almost overnight. And in many ways, it was unintended; indeed, it transpired despite the objective of its architects to forestall exactly the changes that their recommendations nonetheless brought about. Within a decade, the American system had abandoned nearly 200 years of a peer-review selection system and replaced it (somewhat inadvertently) with a populist one. It is that system that now makes possible the nomination by a major party of figures like Donald Trump.

The catalyst for re-examining the nomination process, of course, was the disastrous 1968 Democratic convention in Chicago, where the Democratic Party was torn asunder by political conflict, primarily over the Vietnam War.<sup>33</sup> Outside the Convention hall, national television showed violent confrontations between Mayor Daley’s police force and tens of thousands of anti-war demonstrators. Inside the Convention, some Democrats—particularly young, anti-war ones—were outraged that the Convention chose the establishment candidate, Vice President Hubert Humphrey, who supported the war—despite the fact that he had not won any primaries and that the party caucuses he did win instead were based on the complex selection structure of the traditional system (Theodore White famously described Humphrey as having been nominated “in a sea of blood”).<sup>34</sup>

To appease the critics of his nomination, Humphrey agreed to a reform commission, eventually known as the “McGovern-Fraser Commission” (which turned out to be dominated by anti-war party reformers) to make recommendations for reforming the nomination process for the 1972 convention. These recommendations, which the Democratic National Convention accepted, led to the most centralized imposition ever by the national party of rules on the state parties for how they could select delegates to the Convention (the Supreme Court then held that the Convention did indeed have the power to tell the state parties how they could select their

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<sup>33</sup> For a description of the overall context of the 1968 Democratic Party convention and the turmoil surrounding it, see NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 9–53 (1983).

<sup>34</sup> *Id.* at 33.

delegates).<sup>35</sup> These top-down rules, described in a bit more detail below, were designed to open up participation in the nomination process.

Overstating the immediacy and significance of the changes made in the aftermath of the Commission's recommendations would be tough to do. As the author of the most thorough study of this reform process, Bryan Shafer, puts it, these changes brought "the arrival of a revolutionary change in the mechanics of presidential selection, the greatest systematically planned and centrally imposed shift in the institutions of delegate selection in all of American history."<sup>36</sup> A mere four years later, by the time of the 1972 Democratic National Convention, "every state was forced to amend the rules governing its delegate selection, and most did so in fundamental ways, to the point where half abandoned the basic institutional device they had used only four years before. . . . Along the way, and perhaps most crucially, the official party has been erased from what was still nominally the party's nomination process."<sup>37</sup> Under the new rules, there was a dramatic decrease in the number of party leaders and elected officials who attended the convention.<sup>38</sup> As one commentator put it: "In less than four years, the Democratic Party discarded 130 years of political tradition."<sup>39</sup>

Almost overnight, the United States moved toward a purely populist-dominated selection. In 1968, the primaries had bound 36% of the delegates to each convention; just four years later, the primaries bound 58% of the Democratic delegates and 41% of the Republican ones, and by 1976, two-thirds of the Democrat delegates and more than half the Republican ones were bound.<sup>40</sup> By 1976, the system had changed completely: More than 30 states were using presidential primaries (today, more than 40 states use

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<sup>35</sup> See *Cousins v. Wigoda*, 419 U.S. 477 (1975), which upheld the power of the national credentials committee at the 1972 Democratic Convention to exclude delegates from Illinois that had been certified as the state's delegates but chosen under state rules that conflicted with the new rules the DNC had now established. In a later case analogous to a Supremacy Clause case for political parties, the Court upheld the power of the DNC to exclude delegates selected under state party rules that conflicted with the rules of the DNC. *Democratic Party of the U.S. v. LaFollette*, 450 U.S. 107 (1981).

<sup>36</sup> BYRON E. SHAFER, *QUIET REVOLUTION: STRUGGLE FOR THE DEMOCRATIC PARTY AND THE SHAPING OF POST- REFORM POLITICS* 4 (1983).

<sup>37</sup> SHAFER, *supra* note 36, at 6.

<sup>38</sup> James I. Lingle, *Democratic Party Reforms: The Past as Prologue to the 1988 Campaign*, 4 J.L. & POL. 233, 237–38 (1988).

<sup>39</sup> *Id.* at 236.

<sup>40</sup> POLSBY, *supra* note 33, at 64 tbl.2.3.



primaries). In the 1950s, primary elections changed from being ways of demonstrating electability to party leaders, while in the new system, primaries directly determined delegate votes. “In the old system, candidates worked through the party regulars who habitually attended a caucus; in the new system, candidates try to flood party caucuses with their own people.”<sup>41</sup> Among other effects, the greater number of candidates who ran signaled the loss of party control; “party statesmen and spokesmen [were] replaced by ‘cause candidates’ espousing ideology (McGovern), the views of a discrete group (Jackson), and by ‘anti-politics candidates’ trumpeting political independence (Carter) or offering technical solutions to political problems (Hart).”<sup>42</sup> Primary challenges to sitting Presidents became more common.<sup>43</sup>

But strikingly, this radical change to one of our most important democratic institutions was not the intended aim of many reformers, which is the conclusion of the major studies of the post-1968 “reforms.”<sup>44</sup> Indeed, these changes were, ironically, exactly the opposite of their intent. The Commission did not seek to create a primary-dominated selection system that essentially eliminated the voice of the institutional party figures altogether. In fact, the Commission wanted to save the party through reforms that would maintain a critical role for the party itself.

Thus, among the Commissioners was Austin Ranney, a prominent political scientist who throughout his career had aimed to strengthen the parties, not hollow them out. He described the mismatch between what the Commission had meant to do and what happened in fact when its recommendations were implemented:

I well remember that the first thing we members of the Democratic party’s McGovern-Fraser commission (1969-72) agreed on...was that we did not want a national presidential primary or any great increase in the number of state primaries. Indeed, we hoped to

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<sup>41</sup> THE PARTY DECIDES, *supra* note 19, at 160.

<sup>42</sup> Lengle, *supra* note 38, at 239.

<sup>43</sup> *Id.* at 239–40.

<sup>44</sup> THE PARTY DECIDES, *supra* note 19, at 161; ELAINE C. KAMARCK, PRIMARY POLITICS: HOW PRESIDENTIAL CANDIDATES HAVE SHAPED THE MODERN NOMINATING SYSTEM 15 (2009); SHAFER, *supra* note 36, at 387.

prevent any such development by reforming the delegate-selection rules so that the party's non-primary process would be open and fair, participation in them would greatly increase, and consequently the demand for more primaries would fade away...But we got a rude shock...We accomplished the opposite of what we intended.<sup>45</sup>

What had the Commission actually intended to do? And how did we end up instead with our current primary-dominated system?

The reforms largely sought to preserve the legitimacy of the party by making the caucus system more accessible, transparent, and open; until then, it had been governed by baroque rules designed to enable only party insiders to participate. Up till then, the caucuses were often open only to those who held party office. Some states chose delegates an entire year before the campaign began. Even when the caucuses were nominally open, anyone who wasn't a party official had a hard time finding out where and when they were; in some cases, different parts of the state might caucus on different days.<sup>46</sup>

Under the new rules, if states were going to use local caucuses or state conventions to select delegates, the process had to be open to all who claimed to be party members; the meeting times had to be widely publicized (a significant change) and they had to be held the same year as the presidential election (before, many states had held them a year or even two beforehand, which led only the most committed party members to participate). If states used primaries, they now had to be "candidate primaries"—meaning the name of the presidential candidate, rather than the potential delegate, would be listed.<sup>47</sup> But the McGovern-Fraser Commission was not seeking a greater role for primaries, nor for reducing the institutional party's role. The aspiration was that the recommended reforms would legitimate a continuing central role for the institutional party.

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<sup>45</sup> AUSTIN RANNEY, *CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA 203–09* (1975).

<sup>46</sup> EPSTEIN, *supra* note 14, at 90.

<sup>47</sup> THE PARTY DECIDES, *supra* note 19, at 159–60.

Yet as these new rules got implemented, they brought about the dramatic changes described above. Instead of opening up caucuses and conventions, the state parties—first on the Democratic side, then the Republican—responded by rapidly expanding the role of primaries, which had the effect of putting the nomination in the hands of primary voters once a majority of delegates were selected that way. Apparently, state parties were worried that if they failed to implement the new rules properly, their delegations would be subject to credentials challenges (of which there had been many at the 1972 Democratic convention). Party leaders in many states thought primaries would be simpler and safer. Of course, even the remaining caucuses were also no longer controlled by party insiders.

Republicans were pulled down the same path, partly because in many states in which Democrats controlled the legislature, they passed laws creating a primary for both parties. And as more open and participatory Democratic processes attracted greater media attention, Republicans also felt the need to move in the same direction.

To see how the Democratic Party stumbled into this profound change is dispiriting. As Shafer concluded, the committee members tended to overlook “practical effects in formally codified rules,” which contributed to “the rapid and quiet acquiescence of these members in reforms which purported to alter the entire structure of national party politics.”<sup>48</sup> Then, when the recommendations came to the DNC for approval, they also failed to receive careful scrutiny, because the spectre of the 1968 nightmare loomed large. As one participant said: “There was still a lot of concern for having a nice, orderly, unified National Convention. These rules would help do that, but if there was foot-dragging on party reform, there would be disaffection on the left, and that would bring 1968 back, only worse.”<sup>49</sup>

In describing how dramatic the post-1968 change was in presidential nominations, we must acknowledge the partially dissenting (but widely misunderstood) view expressed in a frequently cited book, *The Party Decides: Presidential Nominations*

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<sup>48</sup> SHAFER, *supra* note 36, at 385.

<sup>49</sup> *Id.* at 390.

*Before and After Reform.*<sup>50</sup> There, an influential quartet of political scientists argue that, after the initial shock of the 1970s reforms, the parties have figured out once again how to assert their control and control the outcome of the nomination process, notwithstanding the advent of the primary-dominated system.<sup>51</sup> In their view, an informal, “invisible primary” has emerged that re-creates the bargaining dynamics of the party conventions in the prior, mixed system.<sup>52</sup> In this “invisible primary,” before the first formal primary takes place, “party elites” and “party insiders” effectively select the person who will in fact become the party’s nominee. If this claim is right, it could be taken to mean that the 1970s changes made less practical difference than might be thought because “the party” still effectively determines its nominees.

But this interpretation is, first of all, a misunderstanding of *The Party Decides*. For one, “the party” that purportedly decides in the “invisible primary” is not the traditional party establishment from the days of meaningful “peer review.” The authors redefine “the party” to include not just elected officials and formal party organizations, but also “religious organizations, civil rights groups. . . organizers, fundraisers, pollsters, and media specialists” along with “citizen activists who join the political fray as weekend warriors.”<sup>53</sup> Influential bloggers, politically-activist talk radio and cable TV hosts, and other influential actors are all part of “the party” in this account. Once the party is redefined this expansively, it is clear that any “invisible primary” operates very differently from the “peer review” of elected party officials that dominated in the old, mixed system of nomination.

Even with this extremely loose conception of the party, it’s also unclear whether “the party decides” claim is accurate. The authors concede that the Democratic candidates of the 1970s, McGovern and Carter, were not the choice of the party establishment and would not have been chosen but for their figuring out how to work

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<sup>50</sup> THE PARTY DECIDES, *supra* note 19.

<sup>51</sup> *Id.* at 7 (“The reformers of the 1970s tried to wrest the presidential nomination away from party insiders and bestow it on rank-and-file partisans, but the people who are regularly active in party politics have regained much of the control that was lost.”).

<sup>52</sup> *Id.* at 187.

<sup>53</sup> *Id.* at 4.

the new, populist-controlled nomination system.<sup>54</sup> Dismissing the significance of these nominations as transitional ones, the authors then rested their case on only ten nomination contests, 1980-2004, when they wrote. In eight of these, they conclude “the party decided” the nominee, though they acknowledge two of those cases are questionable ones.<sup>55</sup> Nominations since then have been even less kind to their theory. They conceded at the time they wrote that, if McCain were nominated in 2008 (as he was) that would “rank as a clear breakdown of party control”<sup>56</sup> and be an “embarrassment” to their theory. And though they try to wriggle out a bit from the same conclusion concerning Obama’s nomination, they have to add an epicycle to pull that off: They call Obama’s nomination “unique” because “[t]he party changed its mind” *after* the voting had begun, with the Iowa caucus.<sup>57</sup> They candidly “confess that we did not anticipate this development” and call it “a problem” for “the party decides” claim.<sup>58</sup>

And now we have 2016. Begin with the Democrats. If ever a party had decided in the invisible primary that supposedly now substitutes for the party convention, it was the Democrats with their blessing of Hilary Clinton. Yet consider how close Bernie Sanders—a socialist and Independent, not even a member of the Democratic Party, widely disliked by the Democratic Party establishment when he ran, by members of Congress, the party organization—came to a coup against the party’s choice.<sup>59</sup> Had he won, it would be hard to imagine a more dramatic example of the populist-selection system completely displacing peer review. Hard, but not impossible: because, of course, there is President Trump. Trump obviously represents the ultimate triumph of the populist nomination process over any role for peer review or for the newly constituted “invisible primary” through which “the party” purportedly still decides on the nominee. As a reminder, Trump abandoned many of the party’s traditional policies; had no prior experience in government or the military; became a Republican only in recent years;

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<sup>54</sup> *Id.* at 161–69.

<sup>55</sup> *Id.* at 175.

<sup>56</sup> *Id.* at 348, 352.

<sup>57</sup> *Id.* at 346.

<sup>58</sup> *Id.* at 347.

<sup>59</sup> This was recognized back in January, 2016, in Daniel W. Drezner, *The Easy Test for 'The Party Decides' Suddenly Doesn't Look So Easy*, Wash Post, (Jan. 26, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/01/26/the-easy-test-for-the-party-decides-suddenly-doesnt-look-so-easy/?utm\\_term=.184de78c8a34](https://www.washingtonpost.com/posteverything/wp/2016/01/26/the-easy-test-for-the-party-decides-suddenly-doesnt-look-so-easy/?utm_term=.184de78c8a34).

and had virtually no support before the voting began from any traditional sources of authority and leadership in the party. He was essentially an independent free-agent who successfully hijacked the party label for his own candidacy, as Sanders nearly did as well. For the authors of *The Party Decides*, “a central claim” about why the (broadly conceived) party still controls nominations is that, even in the primary-controlled process, the parties are able to “resist candidates who are unacceptable to important members of the coalition, even when those candidates are popular with voters.”<sup>60</sup> For the Republicans in 2016 and 2008, that has hardly been the case.<sup>61</sup>

The way a primary-dominated selection system could change the kind of successful nominees was recognized by astute analysts of American politics. Even back in the 1880s, when the British Viscount, James Bryce, was studying the American system and the first primaries were introduced, Bryce speculated that if the primary system ever became national, it might “eliminate all aspirants except those who possess conspicuous popular gifts.”<sup>62</sup> In similar, if more pointed language, as this “modern” system was taking shape, leading political scientists worried that it “might lead to the appearance of extremist candidates and demagogues, who unrestrained by allegiance to any permanent party organization, would have little to lose by stirring up mass hatreds or making absurd promises.”<sup>63</sup>

When William Mayer surveyed the American literature and commentary in 2009 on “peer review” and its vestigial remnant in the Democratic Party of superdelegates, he concluded: “I cannot find a single, sustained attempt to defend the proposition that party leaders and elected officials deserve a larger role in what is clearly the most important decision the American parties make.”<sup>64</sup> But as this article and several of the

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<sup>60</sup> THE PARTY DECIDES, *supra* note 19, at 339.

<sup>61</sup> Using *The Party Decides*’ own accounting system and totaling up all the post-reform contested nominations, we can say that the (broadly conceived) party has succeeded in determining the nominee between 9–11 times in the “modern” era, while insurgents, or the non-party candidates, have prevailed between 7–9 times.

<sup>62</sup> BRYCE, *supra* note 6, at 850.

<sup>63</sup> NELSON W. POLSBY & AARON B. WILDAVSKY, PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS 230 (1964).

<sup>64</sup> William G. Mayer, *Superdelegates: Reforming the Reforms Revisited*, in REFORMING THE PRESIDENTIAL NOMINATION PROCESS 85, 104 (Steven S. Smith & Melanie J. Springer eds., 2009).

contributions to this Symposium attest, questions about recapturing a greater role for the political parties in the nomination process is now indeed receiving renewed attention.

## **II. HOW OTHER MAJOR DEMOCRACIES CHOOSE CANDIDATES FOR CHIEF EXECUTIVE**

Contrary to the abandonment in the United States of any formal role for peer review in selecting party nominees for President, several well-established democracies around the world continue to rely *exclusively* on peer review, while many others employ a mixed system in which elements of peer review continue to combine (often in fascinating ways) with a broader selectorate—that usually consists only of formal party members but not ordinary voters. Only a small minority of democracies has moved to mostly populist selection methods, but even here, the percentage of ordinary voters involved is far lower than in the United States. Moreover, as Part G demonstrates, important contextual differences between the United States and other democracies mean that, even in the few countries that have adopted populist selection methods, the party's influence or control over the process remains greater than in the United States. In addition to peer review, where it exists, this second source of greater party influence also helps to prevent populist leaders from capturing major parties—as happened in the United States in 2016—and thereby decreases the likelihood of such figures becoming chief executives.

As far as we are aware, the first purely populist, open-primary selection process in an established democracy outside the United States did not occur until 2005, in Italy.<sup>65</sup> While there has been movement in subsequent years to including a greater element of popular participation in a number of countries, much of that movement has entailed shifting from an exclusively peer review system to forms of mixed systems of peer review and voting by ordinary party members. A few democracies have dispensed with the peer review part of the mixed system in favor of selection by dues-paying party

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<sup>65</sup> In 1995, during the country's period of democratization, the Taiwanese Democratic Progressive Party held an open primary for its candidate in the first direct presidential election, although it reverted to closed primaries of party members for subsequent ones.

members. Only a small group of democracies have ridden this trend all the way to mostly populist selection processes, which means that such systems remain in the minority among democracies around the world.

In what follows, we first explain why in certain (i.e., mostly parliamentary) democracies, the nominees who compete to become the nation's chief executive are the major party leaders so that this becomes the important selection contest. The core of this Part then describes and provides examples of countries that have adopted and currently employ each of the three main selection methods in turn. It also explains the reasons for the (non-universal) trend towards greater inclusivity that has led some democracies towards mixed systems of peer review and populism and others towards exclusively populist methods. The Part concludes by suggesting how other, more general differences between the United States and many other countries in the law and practice of democracy tend to result in lesser selection effects in the latter, even where purely populist methods are adopted. Our analysis focuses on major parties both because this is normally where chief executives come from,<sup>66</sup> and they, rather than minor parties, have been the main drivers of the general trend.<sup>67</sup> Part I demonstrated that the purely populist selection process that currently prevails in the United States is a relatively recent, highly contingent development.

Part II further shows, based on comparative study, that there is nothing “natural” or “inherent” in the idea of democracy, as revealed by the practices of major democracies around the world, that requires purely populist selection methods for choosing major-party candidates for party leader or chief executive.

#### A. *Selecting Party Leaders versus Party Candidates for Chief Executive*

In most parliamentary systems, a party's candidate for chief executive (prime minister, chancellor) is *ex officio* the party leader. There are no separate party leadership and candidate selection processes, but only the leadership contest which

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<sup>66</sup> Emmanuel Macron, the new French president, is of course an exception.

<sup>67</sup> That is, even where minor parties have used more inclusive selection methods (because, for example, they have few elected officials), this has not generally had a “contagion effect” on the major parties in that country.



thereby doubles as the process for selecting its candidate for public office. In other words, party leaders are selected *as* candidates for chief executive. Indeed, quite frequently in parliamentary systems, a party leader becomes prime minister without a general election and so without being approved for the highest public office by the electorate, as the result of an intra-party leadership contest in between general elections.<sup>68</sup> On the other hand, especially in multiparty parliamentary systems, leaders of smaller parties are not—and so are not chosen as—candidates for prime minister, but rather as potentially effective party spokesperson, opposition figure, cabinet minister in a coalition government, etc. With respect to the majority of parliamentary systems that fall into this category, therefore, this section focuses on selection methods in major party leadership contests.

By contrast, it focuses on selection processes for party candidate for chief executive where these are *separate* from party leadership contests. With the United States as a notable exception, separate contests for party leader and party candidate for chief executive are more common in presidential and semi-presidential systems of government.<sup>69</sup> For example in France, François Hollande ran successfully in the 2011 Parti Socialiste (PS) presidential primary against the-then party leader, Martin Aubry, among others. In 2017, Nicolas Sarkozy, the former President of France and then-leader of the (newly renamed) right-of-center party The Republicans, ran in its presidential primary and lost to former Prime Minister François Fillon.<sup>70</sup> Separate contests do sometimes exist, however, in parliamentary systems. The open primaries for the Italian center-left coalition's candidate for prime minister in both 2005 and 2012 are the best-known examples,<sup>71</sup> although they also occur in parties where the leadership position is incompatible with being a member of the government, as in Belgium.<sup>72</sup>

### B. *Purely Peer Review Systems*

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<sup>68</sup> See *infra* Parts II.B, II.C.2, II.D.2 for the examples of the UK, Israel, and Australia.

<sup>69</sup> In the United States, there are *only* candidate selection processes, because there is no official post of party leader.

<sup>70</sup> See *infra* Part II.E.2.

<sup>71</sup> See *infra* Part II.E.1.

<sup>72</sup> Jean-Benoit Pilet & Bram Wauters, *The Selection of Party Leaders in Belgium*, in THE SELECTION OF POLITICAL PARTY LEADERS IN CONTEMPORARY PARLIAMENTARY DEMOCRACIES 30 (Jean-Benoit Pilet & William P. Cross ed., 2014) [hereinafter SELECTION OF POLITICAL PARTY LEADERS].

Several democracies continue to rely exclusively on peer review to select candidates for chief executive.

In Australia, the mode of selecting the leader of the currently governing Liberal Party (and so the party's candidate for prime minister) has been unchanged since 1965, and is (along with its National Party counterpart in New Zealand) perhaps the most resistant to populism. For in both countries, the leaders of these two center-right parties continue to be elected exclusively by their parliamentary peers and colleagues.<sup>73</sup> The "fusion" of legislative and executive powers that such a "caucus" system contributes to bringing about is, arguably, less problematic in, and coheres better with, a parliamentary than a "separated powers," presidential form of government.<sup>74</sup> The election rules which promote the ease and frequency of changing party leader (contests are held on average every two years), are also set exclusively by the parliamentary group and neither by statute nor by the extra-parliamentary party organization, as is common elsewhere.<sup>75</sup>

Until 2013, the other major party in both countries, Labor (Australia) and Labour (New Zealand), followed suit in a solid regional rejection of the trend towards broader selectorates. In Australia, although the mode of selection had not changed in fifty years, its application has, for the overthrow of party leaders has become more frequent in the past decade, during which three serving prime ministers were ousted by successful leadership challenges.<sup>76</sup> Following his own experience as first deposed and then reinstated leader/prime minister within three years, Kevin Rudd had Labor's election rules changed in 2013 to require a supermajority of its MPs to force a leadership ballot and the use of a form of mixed voting system, described below, for selecting the party's leader. Similarly, in New Zealand, although the leader of the currently governing center-right National Party continues to be elected exclusively by its parliamentary caucus, the

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<sup>73</sup> Anika Gauja, *Party Leaders in Australia*, in *SELECTION OF POLITICAL PARTY LEADERS*, *supra* note 72, at 189, 204–05.

<sup>74</sup> *See supra* note 4.

<sup>75</sup> Gauja, *supra* note 73.

<sup>76</sup> These were Kevin Rudd (Labor) in favor of Julia Gillard in 2010, Julia Gillard in favor of Kevin Rudd in 2013, and Tony Abbott (Liberal) in favor of current incumbent Malcolm Turnbull in 2015.

opposition Labour Party switched to a form of closed primary system that will also be described briefly below for the first time in 2013.

In Germany, the method of selecting the party leader, and thereby its strongly presumptive candidate for Chancellor, is mandated by statute: the Party Law of 1967. As part of the Basic Law's commitment to "militant democracy," state regulation of internal party democracy is the norm, if arguably somewhat outdated in its conception. According to the law, all party leaders (chairpersons) are elected by delegates to the party's national conference every two years. Typically, the parties reach consensus beforehand and present a united front at the conference with the "coronation" of the uncontested leader. Because the law does not in its terms stipulate that a party's leader must also be its candidate for chancellor, the legal possibility of holding some form of primary for the latter exists. Although the center-left Social Democratic Party considered holding a primary in 2013 to determine the top candidate on its party list, given the presence of three politicians with perceived electoral appeal, it ultimately decided against in favor of automatic selection of the party leader. The smaller Green Party did hold such a primary in 2012, the first in Germany. Similarly, in Brazil, a presidential democracy, the major parties select their presidential candidates by the vote of delegates at the party conventions, with no role for rank-and-file members. The only exception is the Workers' Party, which has held some form of primary election since 2002.

Among other parliamentary democracies, the two national liberation movements that transformed themselves into dominant ruling political parties after independence/democracy in India and South Africa respectively have both adhered to their traditional method for selecting the party leader, which, while broader than the parliamentary caucus in Australia, nonetheless relies more-or-less exclusively on peer review. The Indian National Congress still selects its party leader (Congress President) by the same method used to appoint Gandhi and Nehru, which is formally by a vote of the All India Congress Committee (AICC), comprised of approximately one thousand party members elected from state-level Pradesh Congress Committees.<sup>77</sup> In practice, the

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<sup>77</sup> Constitution & Rules of the Indian National Congress, Art. XVIII.

highest executive and policy-making body of the party, the 25 member Congress Working Committee, together with the separate Congress Legislative Party (i.e., Congress party MPs) as well as an incumbent Congress Party Prime Minister, if there is one, have significant influence on who is selected. In 1946, Nehru's selection as Congress President, engineered by Mohandas Gandhi in the face of factional rivalries, made certain his invitation by the outgoing colonial power to be first interim prime minister and then, as incumbent, prime minister of the newly independent nation.<sup>78</sup> On Nehru's death in 1964, the then-Congress President, "kingmaker" K. Kamaraj (who was Nehru's choice for the post), refused to become prime minister himself but worked to have first Lal Bahadur Shastri, and then on Shastri's sudden death two years later, Nehru's daughter Indira Gandhi, accepted as prime minister by the rest of the party leadership. Although after independence, during the period of "one-party democracy,"<sup>79</sup> the new division between the Congress Party and Congress Government resulted in the inevitable Congress Prime Minister becoming the real political leader of the party, this changed again after the party lost its dominant position. Since Indira Gandhi founded her own branch of the Congress Party, Congress (I), in 1978, soon to replace the "official" one, the position of President of Congress has been re-institutionalized as the effective leader of the Party and its strongly presumptive candidate for prime minister. Accordingly, between 1978 and 2004, Congress Party prime ministerial candidates were always also Congress Presidents at the time.<sup>80</sup> The exception is Sonia Gandhi, who has been Congress President since 1998. When she was in position to assume the prime ministership after the party's electoral victory in 2004, she renounced following controversy over her qualification to serve, as an Italian-born former non- Indian citizen. In her place, she recommended Manmohan Singh to the AICC, who became the first Congress party prime minister not to be president since Indira Gandhi in 1966. In 2014, when Singh decided not to run for a third term as prime minister, Sonia Gandhi and the Congress Working Committee chose not to name a prime ministerial candidate before the general election, most likely for fear of tarnishing the future prospects of her

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<sup>78</sup> See STANLEY KOCHANER, *THE CONGRESS PARTY OF INDIA: THE DYNAMICS OF A ONE-PARTY DEMOCRACY* 3–26 (1968).

<sup>79</sup> *Id.*

<sup>80</sup> They were: Indira Gandhi in the election of 1980; Rajiv Gandhi (1984, 1989, 1991); P.V. Narasimha Rao (1996), Sitaram Kesri (1998); Sonia Gandhi (1999, 2004).

son and "heir apparent" Rahul Gandhi in the face of almost certain defeat.<sup>81</sup> Despite being the world's largest party in terms of primary membership, the other major national (and currently governing) party in India, the Hindu nationalist Bharatiya Janata Party (BJP), selects its prime ministerial candidate by an even more exclusive peer review system of election by the twelve person parliamentary party board, which consists of the party's most senior leaders.

Similarly, the African National Congress (ANC) in South Africa continues to elect its leader ("president"), and thereby its candidate for President of the country in the parliamentary general election,<sup>82</sup> by a vote of its party elite. This takes place at the ANC's National Conference, a five-yearly event at which approximately four thousand delegates out of the party's seven hundred thousand or so members elect the leader. In 2007, Jacob Zuma defeated then- incumbent party leader and (term limited) South African president Thabo Mbeki by 2329 to 1505 and, then as incumbent president himself, was easily re-elected by 22983 votes to 991 for his opponent, party Deputy President Kgalema Motlanthe. The upcoming National Conference in December 2017 to select Zuma's successor as party leader and candidate for chief executive (his second and final term as the country's president ends in 2019) is eagerly awaited, given the ANC's declining dominance in recent elections.

### C. *Mixed Systems*

If these democracies have not changed their selection method at all in recent years and continue to rely exclusively on forms of peer review, others have changed theirs in the direction of greater inclusivity but still retain a significant role for peer review. The result is a range of mixed systems, albeit somewhat different from the one in place in the United States between 1912 and 1972.

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<sup>81</sup> *Rahul Gandhi Won't Be PM Nominee but Will Lead Congress Campaign for 2014*, INDIA TODAY ONLINE (Jan. 16, 2014, 11:06 PM), <http://indiatoday.intoday.in/story/rahul-gandhi-wont-be-pm-candidate-will-lead-cong-campaign-for-2014/1/338192.html>.

<sup>82</sup> Although the chief executive is termed President, and also serves as head of state unlike in standard parliamentary systems, in most other respects—there is no direct election of the chief executive, who is the leader of the largest party in parliament and can be ousted from office by a vote of no confidence—South Africa is a parliamentary system.

## 1. The United Kingdom

The United Kingdom has long been a two-party parliamentary system, consisting (since the early 1920s) of the center-right Conservatives and center-left Labour Party. This is due significantly to its first-past-the post electoral system that standardly under-represents third and smaller parties relative to their proportion of the national vote. Although in recent years the complete dominance of the two main parties looked to have declined, with the growth and relative electoral successes of the regional Scottish National Party (now the leading party in Scotland), the Liberal Democrats, who were the junior partner in the coalition government with the Conservatives between 2010 and 2015, and the United Kingdom Independence Party (UKIP), to the surprise of some it reasserted itself in the 2017 general election.<sup>83</sup> The two major parties (as well as the Liberal Democrats) firmly adhere to the longstanding rule that the "leader" of the party is the person who leads the party in parliament ("the parliamentary party"), and so must be a member of it—and, more specifically, of the House of Commons (an "MP"). But they also epitomize the recent shift to greater "intra-party democracy" in the selection of party leader/candidate for prime minister, as both have moved from the traditional process of exclusive selection *by* the parliamentary party to one giving a greater role to rank-and-file party members. Despite this, both parties maintain forms of peer review in the selection although, as recent contests have illustrated, more so—or at least more effectively—with the Conservatives.

Starting with the Conservatives as the current governing party, before 1965 a famously opaque system was employed by which the leader "emerged" after consultations with the senior party figures. Due to dissatisfaction with the choice (the aloof, aristocratic Sir Alec Douglas- Hume) in many party circles that was compounded by electoral defeat, this system was replaced in 1965 by a series of ballots among Conservative MPs until a winner with both an absolute majority and a fifteen per cent margin of victory over the nearest rival was selected. This method continued until 1998, when the current system was introduced following the landslide electoral defeat to Tony Blair the previous year. Under it, the parliamentary party serves as the preliminary

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<sup>83</sup> Between them, the Conservative and Labour parties received 82.4% of votes cast.

selectorate, winnowing the number of candidates down to two through successive ballots, with the final choice between them being made by the full party membership (of currently approximately 150,000 individuals) on a one member one vote basis through a postal ballot.<sup>84</sup> The selection of Theresa May as party leader and thereby prime minister after David Cameron's resignation following the Brexit referendum in June 2016 emphasizes the continuing gate keeping and control function of the parliamentary party. For first the "populist" Boris Johnson surprisingly decided not to run, presumably for predicted lack of support among parliamentary peers, and second, the eventual runner-up quickly dropped out of the contest after the last ballot, leaving nothing for the mass membership to vote on.

Before 1980, the leader of the Labour Party was similarly elected exclusively by its MPs. In 1981, two years after the defeat and transfer of power to Mrs. Thatcher, the party's rules were changed to create an electoral college in which forty percent of the vote went to affiliated trade unions, and thirty percent each to local Constituency Labour Party branches (CLPS) and to MPs, with an absolute majority of weighted votes needed to win at the special meeting attended by delegates. A conspicuous feature of this system was the monolithic "block voting" by the first two members of the electoral college, with unions and CLPS typically mandating their delegates to vote as instructed. In 1993, following the party's fourth general election defeat in a row since 1979, the new leader John Smith instigated a further change in the rules granting equal votes in the electoral college to all three constituent groups and the end of block voting in favor of individual voting by postal ballot. While enhancing the participation of individual union and CLP members, this change also obviously increased the influence of the far smaller number of MPs.<sup>85</sup>

This system survived until 2014 when, under Ed Miliband, who had defeated his brother for the party leadership only with the help of trade union support, the electoral college was abolished in favor of a straight one member (plus affiliates and registered supporters) one vote, with the winner being the first candidate to obtain fifty percent of

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<sup>84</sup> See e.g., Tim Bale & Paul Webb, *The Selection of Party Leaders in the UK*, in SELECTION OF POLITICAL PARTY LEADERS, *supra* note 72, at 12.

<sup>85</sup> *Id.*

the votes cast, using several ballots if necessary. At a stroke, the influence of Labour MPs was drastically reduced from one-third of the total to, after the 2015 general election, 230 votes out of an electorate of nearly 500,000. Under the rules,<sup>86</sup> however, the remaining form of peer review is that nominees are required to have the support of fifteen percent of Labour MPs and Members of the European Parliament combined where there is a leadership vacancy, and twenty percent where there is a challenge to the incumbent. Whether the incumbent is also required to have such support among elected representatives was a central and crucial issue in the most recent leadership contest, a challenge to Jeremy Corbyn following the Brexit referendum, with the party's National Executive Committee narrowly ruling that he did not, a decision challenged in the High Court but upheld.<sup>87</sup> Given the massive vote of no-confidence in Corbyn's leadership by Labour MPs immediately after the Brexit vote, by 172 votes to 40, it was unlikely that he would have been able to muster the necessary twenty percent support. Accordingly, given this ruling and Corbyn's subsequent overwhelming reelection in September 2016 despite this lack of support, a political consequence of the new rules is that the Parliamentary Labour Party had a "leader" foisted upon it for the first time. The differential extent and impact of peer review on the outcomes of the two parties' leadership elections in 2016 could not be clearer.

## 2. Japan

Japan also uses a mixed system for candidate selection, but one in which peer review continues to play a particularly significant role. Japan has a two (or, probably more accurately, a one-and-a-half) party parliamentary system, in which the dominant right-of-center Liberal Democratic Party (LDP) has been out of power only twice since its foundation in 1955 and has only once not been the largest party in the lower house.<sup>88</sup>

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<sup>86</sup> The rules for leadership selection are contained in the Labour Party Rule Book, the first chapter of which is the Labour Party Constitution. The rules can be changed by the party's National Executive Committee, if ratified by the subsequent national party conference.

<sup>87</sup> On July 12, 2016 the NEC voted by 18–14 in a secret ballot that the incumbent leader was automatically entitled to appear on the ballot and not subject to the requirement of receiving the support of 20 percent of the party's MPs and MEPs. This decision was upheld by a High Court judge in *Foster v. McNicol & Corbyn* [2016] EWHC 1966 (QB).

<sup>88</sup> There was a Social Democratic Party-led government from 1993–1996 and a Democratic Party of Japan government from 2009–2012, the latter being the only time the LPD has not been the largest party in the lower house.



The name and identity of the second, left-of-center party has fluctuated over the years, but since its foundation in 1998 until its recent effective dissolution, the mantle had fallen on the Democratic Party of Japan (DPJ).<sup>89</sup>

Prior to 1977, the President, or leader, of the LDP was selected by the parliamentary party alone. But a shift towards greater intra-party democracy was instigated in that year following the party's general election setback, when the LDP failed to win an outright majority in the lower house for the first time. The current LDP and DPJ selection processes are largely similar: All party members have a vote, but both parties retain a highly significant role for peer review.

In both parties, leadership candidates must be incumbent MPs and have the support of at least twenty of their fellow parliamentary party members (in the LDP, party presidents are term-limited to two three-year terms). The LDP's selectorate is all MPs plus all party members who have paid annual dues for three consecutive years. Although the precise allocations have varied slightly from contest to contest, in the first of the two rounds of voting, each MP has one vote and three votes are typically allocated to party members in each of the country's 47 prefectures.<sup>90</sup> In other words, one MP's vote is equivalent to approximately five thousand ordinary party members.<sup>91</sup> If no candidate receives a majority of votes in the first round, the top two candidates then face a run-off in which peer view fully controls: Only MPs vote.<sup>92</sup> In 2012, Shigeru Ishiba came top in the first round but without a majority, and then lost the parliamentary vote in the run-off to Shinzo Abe.

In the DPJ, the selectorate consists of party members and supporters, local councilors, approved party candidates for the next general election, as well as its sitting MPs. In the first round of the January 2015 leadership election, each MP's vote counted

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<sup>89</sup> In 2016, the DPJ merged with two small left-of-center parties, the Japan Innovation Party and Vision of Reform, to form the new Democratic Party (Japan), but for the sake of convenience we refer to both as the DPJ.

<sup>90</sup> Yohei Narita, Ryo Nakai & Keiichi Kubo, *Democratizing Party Leadership Selection in Japan and Taiwan*, in *PARTY PRIMARIES IN COMPARATIVE PERSPECTIVE* 105, 111 (Giulia Sandri, Antonella Seddone & Fulvio Venturino eds., 2015).

<sup>91</sup> Dividing the 800,000 LDP party members in 2012 by 47, and then by 3.

<sup>92</sup> Narita, Nakai & Kubo, *supra* note 90, at 111.

for two points, each approved candidate's vote for one, 141 points were distributed to candidates based on the voting of local councilors, and 354 points for the rank-and-file members in the prefectures, or just under half the total 760 points.<sup>93</sup> If there is a runoff, only MPs and approved candidates vote in it. In the September 2016 election, Rehno Murata became the DPJ's first female president when she easily beat her two male competitors in the first round of voting. Upon her resignation in July 2017 following the party's poor showing in the Tokyo Metropolitan Assembly election, Rehno (as she is known) was replaced as leader by former DJP foreign minister Seiji Maehara, who beat only rival Yukio Edano by 502 to 332 points. In a surprise attempt to unite opposition forces against Prime Minister Abe, Maehara announced on September 28, 2017 that his party would not contest the snap election for the lower house to be held in late October and that caucus members would run instead for the new center-right Party of Hope formed by Tokyo Governor Yorike Koike. When Koike refused to accept some of the more leftist DJP MPs as candidates, Edano proceeded to form the new center-left Constitutional Democratic Party, which replaced the (now defunct) DPJ as the largest opposition party in the lower house after the election.

### 3. Ireland

As Japan demonstrates, one of the fascinating ways peer review is given a significant role in some mixed systems is through the use of one or other form of weighted voting. Ireland is an equally striking example. Ireland is a parliamentary republic with two parties of government (Fine Gael and Fianna Fail) and two additional significant parties: Sinn Fein and Labor. Both major parties have in recent years switched from the traditional leadership selection process by parliamentary caucus alone to a closed primary system with weighted voting. Fine Gael, which is currently in power as a minority government, adopted its new system in 2002 and employed it for the first time in May 2017 following Enda Kenny's resignation as party leader and prime minister. Fianna Fail instituted this new system after the election of current leader Micheal Martin in 2011, but has yet to employ it.

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<sup>93</sup> *Id.* at 114.

The system, contained in Fine Gael's party constitution, creates an electoral college divided into three parts: the parliamentary party, ordinary party members, and the party's local councilors. The vote is heavily weighted in favor of peer review in that the parliamentary party counts for 65 percent, party members 25 percent, and local councilors ten percent. At the time of the election, Fine Gael had 73 members of its parliamentary party, 21,000 ordinary party members, and 235 councilors. Under the rules, leadership candidates must be members of the lower house and nominated by 10 percent of their parliamentary peers.

In the recent, May 2017 election, two candidates competed: Leo Varadkar and Simon Coveney. Although Coveney won the party membership vote by a margin of 2:1, Varadkar won the election overall by 60-40 percent after gaining the votes of 70 percent of the parliamentary party.<sup>94</sup> Accordingly, the votes of fifty-one parliamentarians easily outweighed those of 7000 party members.

As mentioned above, New Zealand's Labour Party provides another example of weighted voting that retains a strong component for judgment by parliamentary peers. Since 2012, the Labour's Party's selection process involves a closed primary in which the vote is divided between the parliamentary caucus, party members, and party affiliates (unions), although in this case in a 40/40/20 split. Likewise, Kevin Rudd's reform of the Labor Party rules in 2013 created a mixed system with weighted voting in which nominees must first receive the support of twenty percent of its MPs, and then both party members and MPs vote separately, with the two pools each counting for fifty percent.<sup>95</sup>

*D. Neither Peer Review Nor Populist Systems*

Certain other countries, while largely dispensing with peer review in recent years, have nonetheless retained a relatively narrow selectorate by empowering ordinary

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<sup>94</sup> *Leo Varadkar: Ireland Set to Have First Gay PM*, BBC NEWS (June 3, 2017), <http://www.bbc.com/news/world-europe-40139428>.

<sup>95</sup> In its first use in October 2013, current party leader Bill Shorten won against Anthony Albanese with the support of 63.95 percent of the party's 86 MPs (55) and 40 percent of its 30,000 members, making 52 to 48 percent overall but 12,251 total votes to the loser's 18,261.

members of the party, but not the mass of its voters, to choose its candidate. Two important examples are Canada and Israel.

### 1. Canada

Although Canada now has three main national parties, the Liberals, Conservatives, and New Democratic Party (NDP), only the first two have governed and so had their leader serve as prime minister. As in most countries, there are no laws governing party leadership contests, although as of 2004 there is public regulation of some aspects of financing campaigns.<sup>96</sup>

Until the early part of the twentieth century, party leaders were selected exclusively by parliamentarians when progressive era reforms began to open up the process, first within the Liberal Party and then the others, to extra-parliamentary actors and organizations in the form of leadership conventions at which delegates formed the selectorate. During the 1960s and 1970s, the role of rank-and-file members at these conventions increased relative to that of party elites, through increasing the numbers of delegates chosen to represent local party members. Following the lead of the provincial Bloc Québécois in 1997, and in response to abuse and criticism of the delegate selection processes, the national parties began to switch to direct, full membership votes beginning with the Conservatives in 1998, the Liberal Party in 2011, and the NDP in 2012. In the case of the Conservatives and Liberals, one member one vote is diluted by traditional concerns for equal representation of Canada's regions and provinces, so that each district (riding) has the same number of votes (points) regardless of how members reside there.

On the one hand, as part of the move towards more inclusive selection methods, the major Canadian parties have largely dispensed with forms of peer review. Thus, the parliamentary parties no longer have an official gate keeping or other privileged role in the leadership selection process: there is no preliminary filtering of candidates, no threshold support requirement, and no weighted vote as under the systems considered

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<sup>96</sup> The information in this section draws heavily on William P. Cross, *Party Leadership in Canada*, in SELECTION OF POLITICAL PARTY LEADERS, *supra* note 72, at 171

in the previous subsection. The only requirements for candidacy are payment of an entrance fee ranging from \$30,000 (NDP) to \$75,000 (Liberals) and, in the case of the Conservatives and NDP, the signatures of a specified number of party members. In addition, candidates are subject to strict spending limits.<sup>97</sup> On the other hand, despite the greater inclusivity, the selectorate remains relatively narrow, a very small percentage of the total electorate. In the case of the Conservatives and the NDP, this selectorate is limited to party members. In their respective 2017 leadership elections, 141,000 Conservative and 65,782 NDP members cast votes out of a total electorate of twenty-five million. In its only post-delegate system leadership election so far, in 2013, the Liberals permitted party "supporters," defined as those who certify they support the party's goals and belong to no other party but do not wish to become a member, to register as voters in addition to party members. Formally perhaps, this transforms the selection method from a closed to a "semi-open" primary,<sup>98</sup> along the lines of those in Italy and France to be discussed in the next subsection, but the actual number of participants involved is significantly lower in Canada. The total number of votes cast in the election was 104,000. Since the change to full membership votes, party leadership contests have typically been highly competitive with an average of five candidates, resulting in the creation of campaign organizations, and tending to last far longer than general election campaigns, often running to ten months or more.

## 2. Israel

Israel is a multiparty parliamentary democracy in which there have always been coalition governments. Party leaders are the parties' candidates for prime minister in the case of the three larger parties, and for senior ministerial office in the coalition government in the case of the smaller parties. Indeed, half of Israel's prime ministers assumed office after becoming party leader but without a general election.<sup>99</sup> Only three political parties have led coalition governments in Israel's history and so are considered

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<sup>97</sup> \$950,000 in Liberal contest of 2013, \$5,000,000 in Conservative and \$1,500,000 in NDP contest in 2017.

<sup>98</sup> WILLIAM P. CROSS, OFER KENIG, SCOTT PRUYSEN & GIDEON RAHAT, *THE PROMISE AND CHALLENGE OF PARTY PRIMARY ELECTIONS: A COMPARATIVE PERSPECTIVE* (2016).

<sup>99</sup> Ofer Kenig & Gideon Rahat, *Selecting Party Leaders in Israel*, in *SELECTION OF POLITICAL PARTY LEADERS*, *supra* note 72, at 206.

the major or governing parties: the longstanding Labour and Likud Parties, which trace their direct roots to pre-statehood political organizations, and Kadima, established in 2005 when Ariel Sharon broke from Likud and formed the new party. Until 1977, Labour was the clearly dominant party but since then, Likud has been in power as the leader of coalition governments more often so that the party system can be referred to as "bi-polar."<sup>100</sup>

Over the period of Israel's history, Labour and Likud have gone through similar gradual processes of opening up their leadership selection processes, with the current situation that all three major parties have virtually identical systems of closed primaries. Until David Ben-Gurion's retirement in 1963, he was essentially the unchallenged "natural leader" of the Labour Party and there were no formal leadership rules. Between 1963 and 1974, his successors, first Levi Eshkol and then Golda Meir, were appointed after informal consultations among the party's elite "old guard," and ratification by the party's central committee. Following widespread opposition and Meir's forced resignation after the near-disaster of the Yom Kippur War, the party formalized selection rules for the first time in instigating an open leadership contest in 1974 for the votes of the 600 members of the party's central committee. In 1977, this was broadened on an ad hoc basis to include the 3000 delegates to the party's convention. Finally, in 1992, after the party's general election defeat in 1988 under Shimon Peres, an internal party campaign for democratization and revitalization largely on the part of supporters of his rival Yitzhak Rabin, who (in the reverse of Peres) had greater support in the broader party than in the party organization, led to the first direct election of the leader by the party's 150,000 or so members. This was also the first multi-candidate contest. The closed primary selection process has in essence remained the same ever since, with some minor tinkering of the rules each time. In 2012, all party members of at least six months standing were eligible to vote. Candidates were required to have a similar minimum period of party membership, signatures of 500 supportive party members and pay a registration fee of NIS 10,000 (around \$2500). To win, a candidate had to receive at least forty percent of the vote in the first round or a majority in the run-off of the top two.

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<sup>100</sup> *Id.*

Likud followed a similar path to a more inclusive process. Menachim Begin was the unchallenged head of the party until his resignation as prime minister and leader in 1983. Yitzhak Shamir replaced him as leader in a two-man contest decided by the party's central committee. After electoral defeat in 1992, the party sought to renew its image and opted to copy Labour's new closed primary system for its perceived potential electoral advantage. In 2012, the only difference was that candidates had to have been party members for three years. In 2008, three years after its creation by self-acclaimed leader Ariel Sharon, Kadima followed suit and adopted the same leadership selection rules as Labor and Likud, although the requirement of thirteen months party membership to vote and run was suspended to allow new members to participate.<sup>101</sup>

Since the two traditional parties shifted to an unweighted closed primary system in 1992, state regulation of leadership contests began and has increased, primarily through the "Party Law," which imposes fairly strict limits for donations to candidates and on expenditures in proportion to the size of the electorate. Although there are no fixed terms, leadership selection contests usually take place several months before the general election. The shift to selection by all party members has resulted in both a larger average number of candidates and a slightly higher margin of victory compared to the more exclusive previous processes, as well as massive new party membership drives at selection time largely organized by the candidates' organizations.<sup>102</sup>

*E. Mostly Populist Systems*

Finally, we turn to examples of countries that now employ a predominantly populist method of selection for at least one of the two major parties.

1. Italy

The history of the Italian parliamentary system is commonly divided between the First Republic, which lasted from 1946 until 1993, and the Second Republic since 1993. The former was characterized by proportional representation, a classic multiparty

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

system, bureaucratized and mass political parties with leaders selected by party congresses of one to three thousand delegates, and chronic government instability but little electoral alternation in office; i.e., a perennial reshuffling of executive positions among the same group of political leaders. The Second Republic, ushered in by a switch to a more majoritarian electoral system in which seventy-five percent of seats were allocated by plurality voting in single-member constituencies and only twenty-five percent by PR,<sup>103</sup> has been characterized by the emergence of two clear party blocs since 1996, pre-election coalitions among the multiple, often changing parties that comprise them (what has been termed "fragmented bipolarism"), and a far higher level of political party alternation in power following elections.

Since 2005, the two major party blocs have employed dramatically different approaches towards selection of both leaders and candidates for chief executive. Centre-left parties have embraced the most highly inclusive process of the open primary, whereas the right-of-center parties have mostly adhered to more traditional and exclusive processes.

In 2005, the six parties forming the center-left "Olive Tree Coalition" held the first such open primary in Western Europe to select its candidate for prime minister in the following year's general election. Candidates had to collect 10,000 voter signatures. Eligibility to vote was extended beyond the general election franchise to include seventeen year-olds and resident foreigners, together with a requirement of endorsing the coalition manifesto and paying a one euro fee at the polling station on election day. Coalition leaders hoped for a turnout of one million voters, but the actual figure was 4.3 million. Seven contested the election and the favorite, Romano Prodi, easily won with 74 percent of votes cast.

Not used in 2008, the open primary was repeated in 2012 by the center-left coalition, then comprising (1) the Democratic Party, formed in 2007 by a merger of several centre-left parties and left-leaning Christian Democrats, together with (2) the

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<sup>103</sup> This new electoral law was substantially changed in 2005 to a closed-list PR system with a "bonus" guaranteeing the winning coalition 55 percent of the seats in the Chamber of Deputies.



Left Ecology Freedom (SEL) Party and (3) the Italian Socialist Party (PSI). The Democratic Party charter states that open primaries are to be the standard process for selection of all party candidates for representative roles. It also contains a rule that only the party leader can run as its candidate in the primary, a significant barrier to an outside, "populist" candidate (although the-then party leader, Pier Luigi Bersani, waived the rule in the face of a popular grassroots campaign for party reform led by challenger and then-mayor of Florence, Matteo Renzi). For the 2012 prime ministerial primary, the center-left bloc employed a two-round system with a potential run-off rather than the plurality vote system of 2005. Twenty-thousand voter signatures were needed to run, and this time pre-registration and a two euro payment were required to vote with a minimum voting age of eighteen. Three million voted in the first round contested by five candidates, in which Bersani came first with forty-five percent of the vote and Renzi second with thirty-five percent. Bersani then won the run-off by sixty-one to thirty-nine percent.<sup>104</sup>

In terms of party leadership selection also, the Democratic Party has used open primaries for its only four contests thus far: in 2007 (won by Walter Veltoni), 2009 (Pier Luigi Bersani), 2013 and 2017 (Matteo Renzi). Renzi became the third "unelected" prime minister in a row in February 2014 when as party leader he instigated and won a Democratic Party vote calling on party co-founder Enrico Letta to resign as incumbent prime minister at the head of a grand coalition government of centre-left and centre-right parties.

By sharp contrast, the highly personalized right-of-center parties of Silvio Berlusconi (Forza Italia, leader 1994-2009; its successor The People of Freedom, leader 2009-2013; and a revived Forza Italia, leader since 2103) and Umberto Bossi (leader of the regional Northern League party from 1989-2012), have continued their norm of uncontested leadership coronations via party congresses and appointment as coalition candidate, although on Bossi's resignation in 2012, the Northern League held its first closed leadership election.

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<sup>104</sup> Marino De Luca & Fulvio Venturino, *Democratizing Candidate Selection in Italy and France*, in PARTY PRIMARIES IN COMPARATIVE PERSPECTIVE, *supra* note 90, at 129, 138.

## 2. France

France has had a semi-presidential system of government under its Fifth Republic since 1958, and a directly elected president since 1962. It employs a two-round majoritarian voting system for both presidential and legislative general elections and, until this year, had a fairly stable two party/bloc system of left-of-centre Socialists and right-of-centre Gaullists, currently called The Republicans. In 2017 for the first time, neither party's candidate made it to the presidential run-off and the victor's brand new La République En Marche! party then won a landslide legislative majority in the lower house two months later. The future of the two traditional major parties remains highly uncertain.

Until 1995, both major parties selected their leaders and presidential candidates by councils or congresses of party elites. Since then, the Parti Socialiste (PS) has twice selected its presidential candidate by closed primary of all party members (in 1995 and 2006) and twice by open primary, in 2011 and 2017.<sup>105</sup> The Gaullist/right-of-centre party held an open primary for the first time this year. The reasons for the switch first from traditional selection by the party elite (the 200 or so members of the PS National Council), then to the broader party membership, and finally to an open primary appear to include the full standard range: to resolve an internal party quarrel (1995), a response to electoral disaster after reverting to the party elite for the 2002 election (2006), a perception that being chosen by voters rather than party members makes a candidate more electable (2011), as well as emulation of the Italian example (2011).

As François Mitterrand's two terms in office were coming to an end in 1995, and following the decisions of its two preferred candidates (Jacques Delors and former prime minister Michel Rocard) not to run, the PS National Council determined to let the party membership resolve the disagreements among its various factions. Only two persons responded to its call for nominations, first Lionel Jospin and then party leader Henri Emmanuelli. Jospin easily won with 65.8 per cent of the 82,000 party member votes cast in the first round, although he lost the general election to Gaullist Jacques

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<sup>105</sup> The 2011 open primary technically chose the presidential candidate of the left coalition, including the smaller Radical Party, rather than the PS alone.

Chirac. In 2002, the National Council saw no need to hold a primary as Jospin, the PS prime minister in a "cohabitation" government with Chirac, appeared to it the only plausible candidate. The ensuing general election was a disaster and a great shock to the PS, and the country as a whole, as Jospin did not survive the first round but was beaten for a place in the run-off against Chirac by Jean-Marie Le Pen, the leader of the extreme right National Front.<sup>106</sup>

After the disaster of 2002, the National Council determined to hold a closed primary for the second time in 2006. Unlike in 1995, candidate qualifications were imposed, in the form of endorsement by thirty of the Council's two hundred members. As a result, only three candidates emerged with sufficient elite support, Segolene Royal, Laurent Fabius and Dominic Strauss- Kahn, and several prominent PS figures were unable to run. The then-party leader François Hollande, partner of the front running Royal at the time, also initially appeared to have a good deal of support among the party elite, but withdrew. This first highly visible and much-covered presidential primary was the occasion for an intensive campaign to recruit new members, including a new low-cost party card, and succeeded in boosting membership from 120,000 to 220,000. Viewed as by far the most likely to challenge the Gaullist candidate Nicholas Sarkozy, Royal won on the first round, with sixty percent of the 180,000 votes. She lost the general election to Sarkozy by 53 to 47 percent in the second round run-off.

Following three successive presidential election defeats, a party report on the potential benefits of an open primary in rendering the party's presidential candidate more electable, highly influenced by the 2005 Italian example of Romano Prodi's general election victory the following year, was approved by a vote of party members.<sup>107</sup> Accordingly, the first open primary was held by the PS in 2011, and the success of its victor in the subsequent general election led not only to its repeat in 2016, and perhaps permanent status, but its adoption by the other major party, The Republicans, for the first time. In 2011, the PS National Council rules required candidates to have at least five per cent support among the parliamentary group, the National Council, regional

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<sup>106</sup> See De Luca & Venturino, *supra* note 104, at 132–33.

<sup>107</sup> *Id.*

councilors, or PS mayors in cities of more than 10,000 inhabitants. All citizens eighteen years or older at the time of the general election who subscribed to the "Charter of Values" of the left coalition and paid a one Euro fee were eligible to vote. Two million six hundred thousand cast ballots in the inconclusive first round, and two hundred thousand more in the second round run-off between PS leader Martin Aubry and Hollande, which the latter won with 56.6 per cent of the votes.

The main right-of-centre party, variously and successively named the Rally for the Republic (RPR) (1976-2002), the Union for a Popular Movement (UMP) (2002-2005), and most recently The Republicans (2015- ), selected its presidential candidate by means of a delegate vote at its party congress until 2007.<sup>108</sup> In that year, following President Chirac's decision not to seek a third term and the selection through closed primary of the PS candidate Segolene Royal, the UMP determined to follow suit and hold a closed primary of its members for the first time. However, after it transpired that Nicholas Sarkozy was the only candidate, party members were asked to vote anyway, with 98 per cent of those voting supporting him, and his nomination was formally announced at the party congress in January 2007. As sitting president, Sarkozy was again unopposed in 2012, so that 2016 was in fact the first contested primary in the party's history.

In February 2016, PS leader Jean-Christophe Cambadélis publicly indicated support for a party primary to select its presidential candidate in 2017, despite incumbent (but unpopular) PS President Hollande. In June, the party's National Council unanimously voted to hold a primary in January 2017, the first time a sitting president has ever had to face one. A few weeks before the scheduled date, Hollande, with record low approval ratings, announced that he would not be a candidate. Candidates were required to secure the support of 5 percent of one of the following groups: members of the National Council; PS MPs; regional and departmental PS

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<sup>108</sup> Edouard Balladur, the incumbent RPR prime minister at the time, ran against the official RPR candidate Jacques Chirac in the 1995 presidential general election. He did so as an individual eligible to do so under the 1962 organic law on qualifications to be a candidate in presidential elections, which include gaining signatures from 500 elected officials, and as largely representing the position of the junior coalition partner party, the UDF.

councillors, or PS mayors representing more than 10,000 people, in at least 4 regions and 10 departments. Seven qualified to contest the first round, four PS members and three from other center-left parties in electoral alliance with it. Benoit Hamon easily won the run-off against Manuel Valls with almost 60 percent of the two million votes cast. The Republicans also held an open primary for the first time, in November 2016. Candidates were required to gain the support of 20 party MPs, 2,500 party members, and 250 other elected representatives to participate. Although former President Sarkozy fared a little better than his successor, he came third in the first round out of the seven candidates and so did not qualify for the run-off, in which Francois Fillon defeated Alain Juppé by a margin of 2:1 with 4.3 million votes cast. Neither of the two finalists in the presidential general election, Emmanuel Macron and Marine Le Pen, faced selection contests, although Le Pen had won a contested closed primary vote among National Front members to succeed her father as leader in 2011.

### 3. Argentina

Argentina is a multiparty presidential democracy, with two main political parties/alliances and many smaller ones. Historically, these have been the Peronist Partido Justicialista (PJ) and the non-Peronist Radical Civic Union (UCR). In recent elections, the PJ has been divided into two separate alliances, with its left-wing factions the dominant partner in the Frente para la Victoria (FPV) alliance and its center-right factions forming the Federal or Dissident Peronist alliance. In 2015, the UCR alliance ("Cambiamos") with a newer center-right party, Republican Proposal (PRO), was victorious in the presidential elections, thereby ending the twelve year Kirchner/FPV regime (Nestor Kirchner, president 2003-07; Christina Fernandez de Kirchner, 2007-2015). For presidential general elections, Argentina has since 1994 employed a two-round majoritarian voting system, although a second round run-off between the top two candidates was not needed until the 2015 election, and for legislative elections slightly different version of PR for the chamber of deputies and senate.

In December 2009, the Kirchners sponsored and Congress (while still with a FPV majority) enacted the "Law of Democratization of Political Representation,

Transparency and Electoral Equity," which radically overhauled campaigns for presidential elections, as well as for most other public offices. In relevant part, the law, first used in the 2011 presidential campaign, (1) mandates all political parties to hold an open primary for their presidential candidate; (2) requires the primaries to be held simultaneously, eleven weeks before the first round of the general election in October, and subjects them to the same compulsory voting rule for all citizens aged 18 to 69 applying to general elections (voters may choose in which primary to cast their one vote); (3) requires parties to receive more than 1.5 percent of votes cast for all primary candidates for president in order to run a candidate in the general election; and (4) substantially reduces the role of private money in presidential campaigns by having all television and radio air time (the principal expenditure item in previous campaigns) distributed exclusively by the federal government, with one half divided equally among candidates and the other half allocated proportionally based on percentage of the party's vote in the previous chamber of deputies election.<sup>109</sup>

The law was in part a response to widespread calls for reform of the fragmented, party elite- and private money-dominated system of selecting candidates for public office, and in part a calculated act to improve the chances of reelection of one or other of the husband and wife Kirchner team in 2011 and perhaps also 2015, and continuation of their regime. Knowing that a second round run-off would likely unite the votes of the two anti-FPV alliances, victory in the election depended on keeping them split and winning in the first round, which requires either receiving 45 percent of the vote or 40 percent with a minimum 10 percent lead over the nearest rival. By reducing the number of candidates to a likely four to six as compared with the fourteen in 2007, the 1.5 percent threshold decreased fragmentation of the vote and made the 40 percent mark more attainable. Sure of the FPV nomination themselves, the two loser main opposition alliances/coalitions were faced with the prospect of potentially divisive primaries that could lead to defections in the general election. The law also potentially kept the opposition alliances from knowing who their presidential candidate would be until eleven weeks before the general election, which might well weaken their challenge.

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<sup>109</sup> Mark P. Jones, *Argentina 2011*, AM. Q. (2010), <http://www.americasquarterly.org/node/1898>.

Finally, experience in 2007 had shown that the Kirchners' media advantage flowing from controlling the government and state apparatuses could be negated by wealthy individuals.<sup>110</sup>

On August 14, 2011 citizens voted in the first open primary under the new law. Ten presidential "pre-candidates" were on the ballot, representing ten different parties or alliances. Accordingly, as each party or alliance had only one candidate, there were no intra-party contests.<sup>111</sup> Effectively, each party/alliance bypassed the primary and selected its candidate according to its traditional, mostly more elitist method, so that as a primary election per se it was largely a farce. The closest thing to an intra-party contest was among the Federal/Dissident Peronist alliance, which had held a regional primary in Buenos Aires in April but with no clear winner, so that its two main pre-candidates—both also members of the PJ—eventually ran for separate Federal/Dissident Peronist parties (the Popular Front and the Federal Commitment) in both the national primary in August and the general election in October. As a result three Peronists were running under separate party banners. Christina Kirchner and the FPV won slightly over fifty percent of the vote, with the UCR candidate second at 12.2 percent. The primary did serve as a useful national public opinion poll shortly before the general election, with an 81 percent turnout, and also weeded out three of the candidates who failed to reach the threshold. In October, Christina Kirchner won on the first round with 54 percent of the vote.

In 2015, Kirchner could not run again because the constitution contains a two-term limit, and her attempt to amend it to permit a third failed to attract the necessary two-thirds votes in Congress. Several prominent FPV politicians announced their pre-candidacies, but the president subsequently asked all of them to withdraw in favor of Daniel Scioli, vice-president under her husband Nestor between 2003 and 2007 and currently governor of Buenos Aires province, who was therefore the only FPV candidate on the primary ballot in August. Unlike in 2011, however, three other alliances had more

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<sup>110</sup> *Id.*

<sup>111</sup> Celina Andreassi, *Primary Elections: What Are We Voting?*, ARG. INDEP. (Aug. 11, 2011), <http://www.argentinaindependent.com/currentaffairs/analysis/primary-elections-what-are-we-voting/>.

than one candidate on the ballot, although only one of these intra-party contests was competitive: the successful Workers' Left Front candidate won by under 20,000 votes out of nearly 733,000 cast for the party. But the other two did involve the main opposition alliances: "Cambiamos," the centre-right non-Peronist coalition of the RCU and PRO, for which Mauricio Macri easily won selection with over 81 percent of the nearly 6.8 million votes cast for the alliance; and "United for a New Alternative" (UNA), the centre-right Federal/Dissident Peronist coalition, for which Sergio Massa defeated Jose Manuel de la Sota by seventy to thirty percent of the party's vote. Although the primary reduced the field from fifteen to six candidates, the general election proved the Kirchners' concerns correct. Scioli won the first round but with only 37 percent of the vote to Cambiamos' 33 percent and UNA's 21.3, and then lost to Macri in the first-ever run-off by 51.34 percent to 48.66, thus ending the Kirchner regime.<sup>112</sup>

#### 4. South Korea

Under its current Sixth Republic and 1987 constitution, the year it returned to civilian from military rule, South Korea is a presidential democracy with two main, but weakly institutionalized political parties that are subject to frequent change in name and organization, and several smaller ones. Currently, these two parties are the center-right Liberty Korea Party, founded in 1997 and formerly known as the Grand National Party (GNP) and Saenuri (literally New Frontier) Party, which held the presidency until Park Geun-hye's impeachment in March 2017, and the center-left Democratic or Minjoo Party of Korea, founded in 2014 and the successor party via certain mergers to the Democratic United Party (DUP), the United New Democratic Party, and the earlier Millennium Democratic Party (MDP), which holds a majority in the legislature and won the recent presidential election to fill the vacancy. In this election, the candidate of the centrist People's Party, founded in 2016, was also a serious contender; at one point, opinion polls showed him closing quickly on the eventual winner, Moon, Jae-in of the Democratic Party.

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<sup>112</sup> Mark P. Jones, *Here's What You Need to Know About Argentina's 2015 Federal Elections*, WASH. POST (Aug. 20, 2015), [https://www.washingtonpost.com/news/monkey-cage/wp/2015/08/20/heres-what-you-need-to-know-about-argentinas-2015-federal-elections/?utm\\_term=.12c9e859f652](https://www.washingtonpost.com/news/monkey-cage/wp/2015/08/20/heres-what-you-need-to-know-about-argentinas-2015-federal-elections/?utm_term=.12c9e859f652).



Prior to 2002, party candidates for president in both main parties were selected at the party convention by delegates from the various electoral districts. Under this system, party leaders wielded great influence, both in the selection of delegates and the choice of nominee, and conventions were frequently characterized by factional fights and strategic negotiations.<sup>113</sup> In 2002, both the then-ruling MDP and the GNP decided to hold primaries for the first time. The MDP decision came a bit earlier, in the first months of 2002, when the incumbent MDP President of Korea, Kim Dae-jung, unable to run again due to the constitution's one-term limit, agreed to primaries after the different factions of the party could not reach consensus on a candidate. The party had also suffered a sharp decline in popularity, due to allegations of corruption surrounding the president's sons and close advisors, so that holding a primary was perceived as the best way to transform its public image. Supporters of the eventual winner, the "outsider" Roh Moo-Hyun, also pushed for a primary, knowing it was the only way he could win.

Primary elections were held from March to April 2002 in sixteen different cities and provinces. A distinctive feature was their hybrid nature as a mixture of peer review as well as closed and partially open primaries: 20 percent of the vote was allocated to the party's precinct level delegates, 30 percent to randomly selected party members from the local district party members pool, and 50 percent to randomly selected voters from those who submitted applications to participate in the primary.<sup>114</sup> As a fairly clear example of contagion effect, the GNP then felt bound to follow suit, although their similarly organized primary was not competitive.

In the 2012 presidential election, the DUP held the first fully open primary, which also featured "mobile voting" via electronic devices. 614,000 voters out of a total of 40 million registered voters participated in the four candidate contest. By contrast, the (renamed) Saenuri Party adhered to the existing hybrid model. The result was a similarly uncompetitive race as in 2002, with Park Geun-hye winning with 83.97

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<sup>113</sup> Eui Hang Shin, *Presidential Elections, Internet Politics, and Citizens' Organizations in South Korea*, 34 DEV. & SOC'Y 25 (2005).

<sup>114</sup> Seven candidates began the contest, which was eventually narrowed down to two through intense intra-party competition, with Roh Moo-Hyun emerging in the end as the clear winner, victorious in eleven of the 16 primaries, aided by a novel grassroots internet-based movement (NOZMO). *Id.* at 32–34.

percent of the 103,000 votes cast, although in 2007 Park had narrowly lost a very close primary to Lee Myung-bak, who went on to win the presidency in December.

In the recent, somewhat hastily organized presidential election that was brought forward by seven months due to Park Geun-hye's impeachment in March, the three main parties adopted candidate selection systems that involved different degrees of peer review. The (successful) Democratic Party held a series of four open primaries in which four candidates ran and 1.64 million people voted—compared to approximately 29 million cast in the general election. In the centrist People's Party, the party's executive officers, members of congress, and regional chairs acted first as a gate keeper by voting to reduce the field of registered candidates from six to three, ousting the least known and experienced. After this peer-review filtering had taken place, the party then held an open primary that counted for 80 percent of the result, with the other 20 percent based on random opinion polls of voters. Finally, the Liberty Korea Party selected its candidate by a weighted system of 50 percent based on votes cast by delegates at the party convention and 50 percent based on spot opinion polling of non-members.

As the French, Argentinian, and Korean (and to a lesser extent the Italian) experiences show, even systems that we call “mostly populist,” because they rely on open primaries, often still build in important mechanisms of peer review that distinguish these systems from the American one. The French require a certain level of support among the party's senior or elected officials. In South Korea, the Korean People's Party employed pre-screening by the party's organizational apparatus in 2017 to reduce the number of candidates and select the best qualified and most competent. These are both examples of peer-review filtering that determines who can get on the ballot that the populist party electorate then gets to vote on in the open primary.

Even these open primaries also differ from the system in the United States in another important respect: The “open primaries” of other systems typically involve far fewer voters, relative to the general electorate, than in the United States. For example, in France a total of 6.3 million voters cast ballots in the PS and Republican primaries combined in 2016/17, while 36 million people voted in the general election; i.e., around

16 percent. Similarly, in South Korea, 1.64 million participated in the Democratic Party primaries out of 13 million who voted for it in the general election. In the United States, approximately 60 million voters participated in Republican and Democratic primaries combined and 130 million in the general election; i.e., around 45 per cent. Accordingly, despite the open primaries, it cannot really be said, as it can of the U.S., that the selection process has been turned over to the mass of voters.

*E. Why the Recent Trend Towards Somewhat Greater Inclusivity?*

As we have seen, over the past decade or so there has been a general trend towards more inclusive methods for selecting party candidates for Chief Executive. Depending mostly on whether a country has a parliamentary or presidential system of government, this has involved opening up to broader "selectorates" than previously either contests for the position of party leader or of party candidate for the public office of chief executive. These more inclusive selection methods than the traditional choice by party elites—usually the party's legislative caucus (or parliamentary party) or delegates to the party convention—are, from less to more inclusive: (1) closed primaries with a system of weighted voting among the party's various constituencies, (2) closed primaries with a system of equal voting among party members (one member one vote), and (3) open primaries. Notwithstanding this clear trend, three points emerge clearly from the previous analysis, by comparison with the populist selection method in the United States. First, the general trend towards *greater* popular control has not always or everywhere resulted in *complete* popular control, but has been quite varied in terms of the extent and forms of peer review that remain. Second, this trend is not universal. Several major democracies, including India, Germany, South Africa, Brazil, and Australia have thus far resisted it more or less entirely and retained selection methods that rely almost exclusively on peer review. Third, as just noted, the U.S. primary system has by far the broadest selectorate of any major democracy, and so is the most truly populist. The ability of a party to control or influence outcomes is diminished as the size of the selectorate expands.

A variety of reasons help to explain the trend, but the main driving force seems to have been the strategic political calculations of party elites rather than any large-scale pressure for change from the grassroots membership. Although the trend predates the populist surge of the past few years, and even though disillusionment with the mainstream parties has undoubtedly been fueling it, most of this alienation appears to reflect more substantive, policy-based concerns— economic decline and inequality, immigration, national identity, social change, etc.—than procedural or voice-based ones, although of course the two are not hermetically sealed.<sup>115</sup> Also, although this range of reasons is not dissimilar to those that explain the shift to populism in the United States, imitating or copying the United States is generally not one of them.

Most obviously and commonly, the expansion of selectorates has been an almost reflex response to massive electoral defeat and, in this context, viewed as a way to quickly refresh/revitalize the party's popular image. As we saw, this was the case for both the UK's Conservatives in 1965 and 1998 and Labour in 1981 and 1993, the PS in France after the catastrophe of 2002, and the LDP in Japan in 1977 following its first ever failure to secure a majority in the lower house. In South Korea, the step was taken preemptively following a sharp loss of popularity of the ruling MDP before the 2002 election.

A more structural reason is that "intra-party democracy" responds to—although at the same time it also further enhances—the growing personalization (in parliamentary systems, the "presidentialization") of politics, in which the focus is increasingly on individuals and personality rather than parties and policies as part of the more general sound-bite, Twitter, celebrity culture we live in. Decline in political party membership has been a near-universal symptom of this process, as well of course of more recent specifically populist alienation, so that by giving voice to rank-and-file members and thereby incentives to join the party, closed primaries at least are an attempt to counteract it. Some expansions of the selectorate have resulted from party elite conflict, with an appeal to the broader membership as the way to break factional

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<sup>115</sup> See, e.g., Amanda Taub, *Behind More Success for the Far-Right*, N.Y. TIMES, Sept. 27, 2017, at A11.

deadlock (PS in 1995, Korean MDP in 2002), and others from strategic partisanship on the part of supporters of a candidate facing an opponent who is a party organization insider.

Examples here are Yitzhak Rabin versus Shimon Peres in Israel, Ed Miliband in the UK, and Roh Moo-Hyun in Korea. Finally, intra-party democracy within major (but not, generally, minor) parties has a contagion effect. With the exceptions of Italy and New Zealand, it has appeared too politically costly for the second party not to shift in the same direction as the first mover. Most frequently, though not universally, this latter has been the left-of-center party, followed sooner or later by the right-of-center.

*F. Other Contextual Factors Resulting in Greater Party Control Outside the United States*

The existence and extent of peer review/party control versus populism in candidate selection for Chief Executive is not only a function of the specific rules and selectorates employed, but also of other, more general features of the political system within which the selection takes place. Many of these features are ones in which, from a comparative perspective, the United States is also relatively exceptional so that they provide an additional explanatory layer for what makes the United States such an extreme version of a populist selection system in which peer review plays, at most, a limited and indirect role.

The first is the near unique absence in the United States of a distinction (or very much of one) between being a party member and a party voter. For most ordinary citizens, at least, to be a party “member” is to be a “registered voter” for the party.<sup>116</sup> Accordingly, the much looser and more generic requirements of party affiliation in the United States mean that, from a comparative standpoint, even formally “closed” primaries involve much larger electorates than elsewhere. By the standards of other countries, such primaries are already quasi-open. (Open primaries in the countries

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<sup>116</sup> If there ever were “card-carrying members” of political parties (other than perhaps the Communists), the modern primary system in the US has helped to ensure those days are long gone.

surveyed above typically require voters to affirm sympathy with its platform and sometimes pay a small fee, which is perhaps as onerous as registering to vote as a Republican or Democrat in the United States.) In other words, because the number of party members in other countries is almost always far smaller than the number of its voters, closed primaries outside the United States can be seen as exercises in "intra-party democracy" without also thereby becoming "populist." For example, those eligible to vote in each of the Labour and Conservative leadership elections in the UK (i.e., party members) are less than one percent of all registered voters; a far higher percentage of registered voters are eligible to vote in U.S. primaries. The prospects for greater party control and formal or informal peer review are likely to be inversely related to the size of the electorate.

Second, whether by law or practice, most public and private funding for primary (and general) elections outside the United States is channeled through party organizations and, given money's growing importance everywhere, this inevitably enhances party control of the process. By comparison, the vast majority of funds are raised and effectively controlled by individual campaigns in the United States, which adds significantly to the loss of party control and the prospects of a "hostile takeover," whether by populist or other forces. Third, in a reversal of regulatory roles, U.S. primaries are "public elections," organized and paid for by the state, and their rules are significantly (albeit variably) fashioned and regulated by state and federal law. By contrast, selection processes elsewhere are typically deemed exclusively "private" matters and their rules set by the party itself—either in its constitution or by its national executive committee (or equivalent). Obviously, here as elsewhere, control of the rules is, *ceteris paribus*, likely to have some influence on outcomes. Overwhelmingly, party elites have endorsed and instigated the various shifts towards intra-party democracy themselves, where and when in context they are perceived as serving the interests of the party or some section of it, rather than being forced to accept such changes as demanded by outside pressure, law or grassroots memberships. Fourth, the decentralized nature of political parties in the United States is in contrast with the typically more centralized national political parties elsewhere, even in robust federal systems. Clearly, the structure of both primary and general elections for president as

conducted state by state rather than nationally in the United States is an important independent variable here; nonetheless, it does not entirely explain or compel such party decentralization. Where a party is essentially a "they" not an "it," it makes it more difficult to assert control by *the* party. Fifth, the near-unique absence of the office of party leader in the United States also contributes to relative lack of control. The point here is not the lack of a "Kirchner" to handpick the party's candidate or that by being the presumptive candidate an incumbent party leader manifests party control (in presidential primaries, the French examples show there is not much presumption). It is rather that during the extraordinarily long U.S. primary season, there is almost no ongoing, continuous party leadership, identity, or collective policy platform; rather, each of the candidates offers an alternative individual version to the voter/consumer, who will make the choice.

Sixth, in most countries, there is a fairly well-understood track, in terms of qualifications and experience, towards becoming the party's candidate for chief executive. This may include educational background, working in and for the political party in various (junior, then more senior) capacities, time spent as an elected representative or official. France of course is an extreme version of this phenomenon: even Macron, the ultimate "outsider" candidate without a political party is a graduate of Sciences Po and ENA, was a fast-track civil servant, and then a senior member of President Hollande's staff before being appointed a minister. Most other countries have a somewhat more varied, flexible, or diverse track, but candidates are generally "insiders," and often party insiders, of one sort or another. This inevitably creates a form of informal peer review and/or party control—as well as perhaps a marker of competence—as to who becomes its candidate for chief executive. By contrast, the anti-government, anti-insider general political culture of the United States militates against this, either by permitting or encouraging genuine outsiders to run for office—often with little or no political experience—or by requiring insiders to adopt the guise, demeanor and political rhetoric of the outsider. In both cases, the language par excellence for this is "populism." Being perceived as the product of peer review and party control can be fatal.

In a sense, the proof of the pudding for all of these comparative differences combined is the fact that outside the United States, populist leaders riding the current wave have tended to form their own political parties rather than attempt to capture an existing, mainstream one. Well-known examples include the National Front in France, the Five Star Movement in Italy, UKIP in the UK, Geert Wilders' Party for Freedom (PVV) in the Netherlands, the Freedom Party in Austria, the Alternative for Germany party, and the (currently governing) Law and Justice party in Poland.<sup>117</sup> There is no doubt that a PR voting system is partly responsible for this strategy, as its emphasis on representation rewards rather than penalizes smaller parties, as long as there is no threshold or they are confident of meeting it. On the other hand, both the National Front and UKIP have been successful within majoritarian/two party systems. But a key part of the story is also that a major political party with greater peer review and party control of candidate selection is more difficult to capture and take over than one without; it becomes "populist-resistant." It is not only hard to imagine Marine Le Pen emulating Donald Trump and becoming the Gaullist party presidential candidate or Nigel Farage the Conservative leader, but very hard to pull off.

This raises a fundamental issue of whether effectively channeling populists toward forming their own parties (as peer review does) rather than incentivizing them to try and capture a major party (as in the United States) is a better containment strategy, to the extent this is deemed part of the appropriate response to some or all forms of populism. We believe that it is. For preventing illiberal, authoritarian populists from gaining power is the most urgent task, even if there are, of course, no guarantees of success<sup>118</sup> and the process of capture involves some dilution and accommodation of populist policies. Better a purer but minority populist party than a populist leader in power. A mixed system involving some form of peer review that creates a significant

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<sup>117</sup> Law and Justice, or abbreviated in Polish to PiS, was founded in 2001 by the Kaczynski twins and largely operates as the near-personal organization of the surviving one, who holds all the power as undisputed leader behind the scenes, choosing who the party's "front men" as prime ministerial and presidential candidates will be. Jaroslaw Kaczynski was re-elected as party leader in 2016, a post he has held since 2003, by the votes of 1,008 of 1,015 party delegates.

<sup>118</sup> Because for example, the distinct populist party manages to win power itself, as for example in Poland and Venezuela. Although not originally formed as a specifically populist party, Fidesz in Hungary has effectively become a personal platform for its co-founder and uncontested leader since 1993, Viktor Orban, who has transformed the country it governs into a model "illiberal democracy" since winning a supermajority of legislative seats in 2010.



barrier to populists gaining power through capturing a major party is, and can be, only part of the "solution" to populism, given that disillusionment with traditional, more centrist parties and their ability to represent ordinary voters is one of the causes of the populist surge worldwide.<sup>119</sup> But, we think, an important part. Other parts of the solution must address these underlying causes directly, especially more responsive social and economic policies on the part of non-populist parties,<sup>120</sup> insofar as they are consistent with constitutional democracy.<sup>121</sup> Even if the rise and election of populist leaders is deemed a symptom and not a cause of populism, some symptoms are themselves so dangerous, harmful, and costly that they must be resisted.

### CONCLUSION

The structures through which democratic systems choose their leading candidates to become President or Prime Minister are among the most consequential elements in the institutional design of democracy. These structures influence the kind of candidates who choose to run, as well as how the system of democratic governance functions once one of these candidates becomes head of government. Yet these selection structures have largely flown under the radar of democratic theory and much of the scholarship on democratic institutional design. The fundamental choice across democratic systems involves how much weight selection methods give to aspects of peer review, in which elected party leaders have special weight, and to aspects of participation more generally from party members or from an even more inclusive electorate.

With the current alienation from mainstream political parties and the "elites" who lead them that is reflected in democratic politics throughout the West, it can be difficult to see the virtues in selection systems that maintain a significant role for peer

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<sup>119</sup> See *supra* note 3.

<sup>120</sup> See, e.g., Bojan Bugarcic, *The Populists at the Gate: Constitutional Democracy under Siege?* (unpublished manuscript) (on file with authors)

<sup>121</sup> There may also be a role for other prophylactic institutional and constitutional design measures aimed at slowing or preventing "abusive constitutionalism." See, e.g., David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013); David Landau & Rosalind Dixon, *Tiered Constitutional Design*, 86 G.W. L. REV. (forthcoming 2017).

review—even though most mature democracies, with the exception of the United States, do retain such a role. Yet one’s perspective on this issue depends heavily on what one considers are the greatest risks against which democracies need to guard. Back in 2003, one of us proclaimed that era “the Age of Democracy,”<sup>122</sup> as over the previous generation a third major wave of democratization had led more new democracies (all constitutional ones) to be forged than in any comparable historical period. But the ensuing 15 years have not been as kind to democracy. Some commentators have gone so far as to claim that democracy is now in “retreat” in many places around the globe; more modestly, others have argued that we must face up to the “democratic recession” that is occurring. In particular, the striking and unanticipated rise of authoritarian, populist governments in Hungary, Poland, and Venezuela that, once elected through democratic processes, have then sought to use the levers of state power to eliminate effective political competition and insulate one-party rule from meaningful checks and balances has sounded perhaps the loudest alarm bell about the risks that democratic regimes might lapse back into undemocratic rule.

The comparative legal scholars Tom Ginsburg and Aziz Huq have argued that perhaps the most significant process through which democracies have collapsed is through a path they call “constitutional regression.”<sup>123</sup> This is an incremental process, which occurs slowly “through an accumulation of piecemeal changes,” in which political leaders first prevail in the electoral process, then gradually undermine competitive elections, fundamental political rights of speech and association, and the capacity of independent judicial institutions to enforce the rule of law. Yet their helpful analysis does not ask the prior and perhaps much more important question: *how* do the individual figures who lead these antiliberal, populist movements or parties manage to get into power in the first place—and is there anything in the design of democratic processes that can reduce the risk that such figures will come to power.

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<sup>122</sup> Richard H. Pildes, *The Supreme Court 2003 Term, Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29 (2004).

<sup>123</sup> Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. (forthcoming 2018) (manuscript at 6) (suggesting the “threat of constitutional retrogression may in fact pose a more pressing and consequential challenge” to liberal democracies than a sudden, “wholesale, rapid collapse into authoritarianism”).

This Article should be read against the rise of the populist forces, including illiberal and authoritarian ones, that are currently roiling numerous long-established democracies. Populist alienation, anger, and hostility toward government and political elites are not unexpected in the aftermath of the financial crisis that began in 2007; as economic historians have shown in studies of democracies going back to 1870, financial recessions—which endure much longer and are therefore more painful than ordinary economic recessions—regularly spawn a rise in populist politics and parties, in left and right variations. Add to these economic dislocations the cultural challenges posed in many countries by the dramatic rates of increase of immigration (legal and illegal) in recent years, as well as the opportunities created by the rise of social media,<sup>124</sup> and the challenge to traditional politics and parties is even less surprising. But how directly and immediately these organic political forces get translated and channeled into elections and governance is a function of the institutional framework within which democratic politics takes place in different countries.

In the United States, which abandoned any formal role for peer review in the 1970s in the selection of the presidential nominees of the major parties, these populist forces can now find immediate and decisive expression through broadly participatory primary elections, which lower the barriers to populist candidates becoming the nominees of one or both of the major parties. In contrast, countries which maintain significant components of peer review in the process of selecting candidates for party leader or chief executive contain mediating devices that create mixed systems combining direct popular political input with the judgment of elected party figures. The resulting candidates, for party leader or chief executive, will reflect a mix of “elite” and “popular” judgments that vary depending on how the contributions of these two elements are titrated in different systems. Particularly with the rise of illiberal, authoritarian forms of populism through the electoral process that have come to threaten democracies in recent decades, it is worth considering whether abandoning any

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<sup>124</sup> For the distinctive and important role of social media in the rise of “new populism,” see Ming-Sung Kuo, *Against Instantaneous Democracy* (unpublished manuscript) (on file with authors).

role for peer review in the selection of major party leaders or nominees for chief executive should be celebrated as an advance for democracy.

