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It's the State, not Parties: Why Legitimate Opposition is a Preeminent Constitutional Principle

The practice of legitimate opposition is under siege. In countries ranging from Venezuela to Turkey to Hungary, organized opponents of the government face legal sanction or impossible institutional barriers to winning power. By legitimate opposition, I do mean not all forms of opposition. I mean the practice in which individuals and groups seek formal power via a regulated, regular and peaceful process of political contestation, a process that is not under the thumb of any single individual or group. Legitimate opposition distinguishes flawed democracies from electoral autocracies. And it was the practice called into question when the President of the United States threatened to prosecute and jail his opponent during the last presidential campaign.

Our understanding of legitimate opposition, its origins and its relationship to partisanship has been fixed for the last 60 years, at least since Richard Hofstadter published his classic treatment of the topic: *The Idea of a Party System—The Rise of Legitimate Opposition in the United States, 1780-1840*.¹ On Hofstadter's now-canonical view, legitimate opposition and party contestation are one and the same. They emerged together—opposition was accepted, on this view, once political actors realized that political parties were a fixed feature of representative government. My paper shows that this conclusion is mistaken. And that mistake leads us to systematically misunderstand the nature of opposition, its relationship to partisanship and its value. Moreover, by misunderstanding opposition, we will misinterpret the critical challenges of our present, turbulent political moment.

Focused on the political thought of figures like Bolingbroke, Hume, Burke and Madison, my paper reconsiders the intellectual revolution ushering in the era of party-based competition. As I show, contra the traditional view, a non-partisan form of electoral legitimate opposition was already expected in both Britain and the United States. That is, opposition was considered legitimate even if parties were not. It would be impossible to make sense of the vigorous electoral contests of this period if opposition was not already an accepted feature of political life. The acceptance of a distinctively *partisan* or *organized* mode of opposition, therefore, is distinct from the acceptance of opposition. The former process was driven, as I show, by the practical failure of a widely accepted constitutional principle: the separation of powers. The acceptance of party opposition turned on the recognition that in modern regimes, with executives wielding the resources to co-opt opponents, bully past institutional boundaries and break free of the bonds imposed by the separation of powers, organized oppositions had to do the grunt work of limiting the government's influence. I make this intellectual dynamic clear via a reconsideration of the canonical theorists mentioned above.

Why does this historical about-face matter? As a practical matter, I believe understanding current challenges to opposition requires grasping that the heart of modern opposition is not ideological or intellectual; it is not the realization that others possess a right to contest for power or that sovereignty is divisible. It is organizational—strong parties are required to counter the power of the modern state. Given the resources of the modern state, effective opposition requires organization. This is why, for instance, autocrats can allow elections. Impairing critics' capacity to organize, autocrats and aspiring autocrats use elections to assess, advance and demonstrate their overwhelming dominance (Gandhi and Lust-Okar 2009; Simpser 2013). Normatively, understanding the critical relation between parties and the state will give us a better grip on what it means to engage in good or responsible opposition. In other words, the character of “responsible” opposition is not fixed, but depends on the resources and character of those in power.