

should regard the current two-party system as a basic element of America's Constitution.

For over a century, framework statutes regulating the American administrative state have explicitly taken political parties into account in an effort to maintain a carefully balanced two-party system. The Federal Election Commission, which was redesigned after the Court's 1976 ruling in *Buckley v. Valeo*, contains an even number of voting members—six, to be precise. By law, no more than three commissioners “may be affiliated with the same political party.” Various other statutes governing commissions comprising an uneven number of members—typically five or seven—have tried to prohibit any political party from controlling more than a bare majority of commissioners. Of the seven seats on the United States Sentencing Commission, for example, no more than four may be held by “members of the same political party.” Likewise, the notable 1914 law creating the Federal Trade Commission provides that no more than three of its five commissioners “shall be members of the same political party.” Identical language appears in the statutes creating the Federal Energy Regulatory Commission (a reorganized version of the earlier Federal Power Commission), the Equal Employment Opportunity Commission, the Commodity Futures Trading Commission, the Nuclear Regulatory Commission, and several other independent agencies—including the Securities and Exchange Commission, whose enabling statute also provides that “in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.” The Federal Communications Commission statute has slightly different wording, but it, too, prohibits any party from having more than three out of five members. The statute structuring the Consumer Product Safety Commission features language regulating party “affiliat[ion]” rather than “member[ship]”; thus, no more than three of the five commissioners may be “affiliated with the same political party.” Deploying yet another verbal formula echoing the landmark 1887 act that established the once famous, but now defunct, Interstate Commerce Commission, the enabling statute of the Federal Maritime Commission proclaims that no more than three of its five members may be “appointed from the same political party.” This language also appears verbatim in the statute creating the National Transportation Safety Board.¹⁶

Most of these statutes might at first seem easy to evade. Formally, a

- ¹⁵ Cf. Jack M. Balkin, *Living Originalism* (2011), 261-262 ("New amendments may alter the relationships between other parts of the Constitution, sometimes...in quite unexpected ways....[S]tructural principles might emerge from the constitutional system that no single person or generation intended.").
- ¹⁶ For the FEC, see 2 U.S.C. 437c(a)(1); for the USSC, see 28 U.S.C. 991(a); for the FTC, see 15 U.S.C. 41; for FERC, see 42 U.S.C. 7171(b)(1); for the EEOC, see 42 U.S.C. 2000e-4; for the CFTC, see 7 U.S.C. 2(a)(2)(A); for the NRC, see 42 U.S.C. 5841(b)(2); for the earlier FPC, see the Federal Power Commission Reorganization Act of 1930, 46 Stat. 797; for the SEC, see 15 U.S.C. 78d(a); for the FCC, see 47 U.S.C. 154(b)(5); for the CPSC, see 15 U.S.C. 2053(c); for the old ICC, see sec. 11 of the Interstate Commerce Act of 1887, 24 Stat. 379, 383; for the FMC, see 46 U.S.C. 301(b)(1); for the NTSB, see 49 U.S.C. 1111(b). Note also that "not more than 3 of the members of the Board of Directors [of the Federal Deposit Insurance Corporation] may be members of the same political party." 12 U.S.C. 1812(a)(2). For still more statutes with similar provisions, see Jamin B. Raskin, "A Complicated and Indirect Encroachment: Is the Federal Election Commission Unconstitutionally Composed?," *Administrative LR* 52 (2000): 609, 621-622 & n. 51.
- ¹⁷ See Neal Devins and David E. Lewis, "Not-so Independent Agencies: Party Polarization and the Limits of Institutional Design," *Boston U. LR* 88 (2008): 459.
- ¹⁸ For example, House Rule X5(a)(3)(A) provides for equal party membership on a key ethics committee, regardless of which party happens to control the chamber as a whole. House Rule X5(a)(1) and X5(b)(1) dramatize the formal role that party membership plays in committee assignments generally: "Membership on a standing committee during the course of a Congress shall be contingent on continuing membership in the party caucus or conference that nominated the Member." The Senate's rules governing its committees also formally pivot on party membership. For example, under Senate Rule XXVI(3), "If the chairman of any such committee is not present at any...meeting of the committee, the ranking member of the majority party on the committee who is present shall preside." On the formal role of parties in structuring the allocation of committee staffers, see Senate Rule XXVII(3) and House Rules X9(a)(2) and X9(i). For complementary statutory provisions concerning congressional committee staff, with elaborate references to the respective entitlements of the majority and the minority, see 2 U.S.C. 72a.
- ¹⁹ See Maurice Duverger, *Political Parties*, 2d ed., Barbara North and Robert North, trans., (1962 [1951]), 216-228; V. O. Key, *Politics, Parties, and Pressure Groups* (1952), 224-231; Anthony Downs, *An Economic Theory of Democracy* (1957), 114-125; Doug Rae, *The Political Consequences of Electoral Laws* (1967), 95-96.
- ²⁰ Act of June 5, 1842, sec. 2, 5 Stat. 491 (emphasis added); Act of Dec. 14, 1967, 81 Stat. 581, 2 U.S.C. 2c.