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COMPLEMENTARY CONSTRAINTS: SEPARATION OF POWERS, RATIONAL VOTING, AND CONSTITUTIONAL DESIGN

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SEPARATION OF POWERS, RATIONAL VOTING, AND CONSTITUTIONAL DESIGN

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This Article explores how the separation of powers affects voters' electoral strategies, and how this interaction influences the performance of different institutional arrangements. We show that when one political agent, such as the President, acts unilaterally, voters are likely to respond asymmetrically to policy successes and failures in order to offset the risk that the President may be biased or "captured" by special interest groups. When political agents act in concert — such as when the President seeks congressional authorization for a policy initiative — voters prefer a more refined strategy, with less acute asymmetries between political rewards and punishments. Our analysis has positive and normative implications. First, it suggests that presidents do not always prefer to operate with as little congressional interference as possible. Second, it provides a rationalist account for "responsibility shifting" by elected officials — behavior that is usually thought to derive from voter confusion or irrationality. Third, it suggests that separation of powers does not necessarily induce "gridlock" or otherwise reduce the likelihood of policy change. Fourth, it suggests that although separation of powers enhances the efficacy of the electoral constraint on politicians, voter welfare is higher when separation of powers is "optional" rather than mandatory, as when the President may seek congressional authorization for policy initiatives but is not required to do so.

The voter, the political theorist V.O. Key once observed, is the "rational god of vengeance and of reward."[1] The extent to which voters can influence policy choices by rewarding or punishing politicians has long been a central concern for both political science and legal scholarship. Few political systems, however, rely solely on voter

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[1] V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 568 (5th ed. 1964). Ironically, Key's specific usage of this famous and oft-misquoted phrase was skeptical: "The Founding Fathers, by the provision for midterm elections, built into the constitutional system a procedure whose strange consequences lack explanation in any theory that personifies the electorate as a rational god of vengeance and of reward." *Id.* Nonetheless, as Professor Larry Bartels has observed, this phrase has become commonly associated with V.O. Key's more optimistic account of the rational retrospective voter spelled out in *The Responsible Electorate* in 1966. *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY 126 n.29 (2008).

discipline to constrain elected policymakers. Instead, most advanced democracies rely on a combination of both electoral discipline and some form of internal separation of powers to reduce political "agency slack" (the deviation between the behavior of political agents and what the voter-principals would prefer). Electoral accountability ameliorates agency slack by punishing poorly performing incumbents and rewarding successful ones.[2] Separation of powers ameliorates agency slack by reducing the possibility that a biased or parochial interest group will be able to use the power of the state for its own ends.[3]

While the academic literature contains numerous sophisticated treatments of both elections and separation of powers, the literature has paid surprisingly little attention to how these different forms of institutional control interact.[4] The possibility of such interaction raises a

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[2] *See generally, e.g.*, TIMOTHY BESLEY, PRINCIPLED AGENTS? (2006); MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981); G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY (2000); David Austen-Smith & Jeffrey Banks, *Electoral Accountability and Incumbency*, *in* MODELS OF STRATEGIC CHOICE IN POLITICS 121 (Peter C. Ordeshook ed., 1989); George W. Downs & David M. Rocke, *Conflict, Agency, and Gambling for Resurrection: The Principal-Agent Problem Goes to War*, 38 AM. J. POL. SCI. 362 (1994); James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55 (Adam Przeworski et al. eds., 1999); John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5 (1986); G. Bingham Powell, Jr. & Guy D. Whitten, *A Cross-National Analysis of Economic Voting: Taking Account of the Political Context*, 37 AM. J. POL. SCI. 391 (1993).

[3] *See, e.g.*, THE FEDERALIST NO. 51, at 289–90 (James Madison) (Clinton Rossiter ed., 1999) ("[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."); *see also, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION 63–64 (2005) (arguing that separation of powers not only prevents tyranny, but also facilitates a division of labor that promotes government efficiency); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 10 (4th ed., rev. 1997) ("Without the power to resist encroachments by another branch, a department might find its powers drained to the point of extinction."); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were To Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 487–506 (1991) (advocating the enforcement of separation of powers to prevent tyranny and bolster democracy); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 43 (1985) ("[T]he separation of powers scheme was designed with the recognition that even national representatives may be prone to the influence of 'interests' that are inconsistent with the public welfare."); *cf.* Witold J. Henisz, *The Institutional Environment for Economic Growth*, 12 ECON. & POL. 1 (2000); George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289 (1995).

[4] There are some notable exceptions to this general statement. *See* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. (forthcoming Apr. 2010); Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining Before an Audience*, 45 AM. J. POL. SCI. 100 (2001); Timothy Hellwig & David Samuels, *Electoral Accountability and the Variety of Democratic Regimes*, 38 BRIT. J. POL. SCI. 65 (2008); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); Torsten Persson et al., *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163 (1997); David J. Samuels & Matthew Soberg Shugart, *Presiden-*

number of important questions. To what extent does the separation of powers influence how voters wield their electoral power to reward or punish incumbent politicians? Is the separation of powers principally a *substitute* for electoral discipline, restraining biased government actors when voters are not able to do so effectively? Or might certain separation of powers regimes *complement* electoral accountability, making electoral discipline more effective than it would be otherwise? The answers to these questions bear on a more significant question: What institutional configuration best serves voter welfare? Are voters better off when one institution has exclusive control over a policy decision? Are they better off when two or more institutions *must* act together, as when the President must get congressional authorization or Congress must secure presidential approval? Or would rational voters prefer a system in which the different branches of government have the *option* of acting jointly or unilaterally?

While this Article does not aspire to provide comprehensive answers to these questions, it contributes to our understanding of these issues by analyzing how separation of powers and electoral accountability interact in a particular political environment. We consider a setting in which rational retrospective voters can observe both ex post policy outcomes and the decisionmaking process — including which institutions participated and the positions that they took — but voters can observe neither politicians' true preferences nor whether the decision taken was the correct one from an ex ante perspective. Moreover, we assume that while voters cannot observe whether a politician is biased, voters can infer (from the politician's party affiliation or other information) the likely direction of any such bias.[5] In this environment, we show that rational voters will adjust their punishment and

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tialism, Elections and Representation, 15 J. THEORETICAL POL. 33 (2003); Justin Fox & Richard Van Weelden, Partisanship and the Effectiveness of Oversight (May 20, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325580; Razvan Vlaicu, Executive Performance Under Direct and Hierarchical Accountability Structures: Theory and Evidence (Dec. 1, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1051661; Razvan Vlaicu, Legislative Spending Bias, Fragmentation of Fiscal Power and Electoral Accountability (Feb. 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079882. For our own prior contributions to the study of the interaction between separation of powers and electoral behavior, see Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907 (2007); Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379 (2004); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008); and Matthew C. Stephenson & Jide O. Nzelibe, *Political Accountability Under Alternative Institutional Regimes*, 22 J. THEORETICAL POL. (forthcoming 2010).

[5] For clarification, we use the term *bias* to capture any difference between the President's preferences and those of the median voter. Thus, in our stylized illustrations in Part II, the source of the President's bias is due to the capture of the President by an interest group; otherwise, the President and the median voter would have the same preferences and the President would be considered *unbiased.*

reward strategies to compensate for the expected bias of the political decisionmakers but will do so in markedly different ways under different separation of powers regimes. This interaction between the institutional regime and rational voters' electoral strategies has positive implications for political behavior as well as normative implications for optimal institutional design.

A sketch of our argument is as follows. Consider as a baseline case a situation in which all authority over some policy decision is concentrated in a single elected official, such as the President. The President may be biased, but the voters are not sure whether he is. The voters are also unsure about which policy would best serve their interests. In this case, a rational voter would prefer an asymmetric reward and punishment strategy: When the President takes an action that is consistent with his possible biases, voters will reward him less generously if the policy succeeds and punish him more harshly if it fails. (For example, voters who suspect that the President might be excessively enthusiastic about military interventions abroad might punish the President more harshly if an intervention fails and reward the President less generously if it succeeds.) In contrast, if the President's action goes against his likely biases, voters will reward success more generously and punish failure less harshly. In this way, voters offset (imperfectly) the biases to which the President may fall prey.

This asymmetric strategy, however, has significant costs. These costs are due to the voters' uncertainty about both the correct policy choice and the true magnitude of the President's bias. If the incumbent President is more biased in favor of a particular policy than the voters expected, the voters' electoral strategy will not adequately deter unwarranted action (resulting in "false positives"). On the other hand, if the President turns out to be less biased than expected, the voters' electoral strategy will deter action even in some cases where that action would have been in the voters' interest ("false negatives").

An institutional separation of powers allows for a more refined strategy, reducing the probability of false positives and false negatives. The reason is that when voters can use electoral rewards and punishments to manipulate the incentives of *two* actors rather than one, they do not need to impose such large asymmetries in the rewards for success and the punishments for failure. So, for example, when independent branches make policy jointly — as when the President seeks and receives congressional authorization for a military intervention abroad — rational retrospective voters can employ a more nuanced strategy, with less of an asymmetry in the magnitude of political credit and blame, because Congress will screen out some of the President's undesirable policies. This dynamic, upon which we elaborate in Part II, has a number of implications for both positive and normative constitutional theory. Four in particular stand out:

First, our analysis casts doubt on the oft-repeated claim that presidents will usually oppose sharing power with Congress. On the contrary, presidents will often forego the opportunity to act unilaterally because doing so reduces their political risk.

Second, our analysis provides a rationalist account for forms of political behavior that are sometimes thought to derive from voter confusion or irrationality, such as the apparent ability of politicians to "shift responsibility" for unpopular or risky actions by involving other political actors in the decision. Whereas the more conventional responsibility-shifting explanations imply that the separation of powers tends to undermine electoral accountability, our alternative hypothesis suggests that behavioral patterns that superficially resemble responsibility shifting may actually indicate that the separation of powers is facilitating effective electoral control.

Third, contrary to conventional wisdom, we show that separation of powers does not necessarily increase "gridlock" or "status quo bias" — or at least that claims to this effect may be exaggerated. In a system in which one actor (say, the President) has authority to act unilaterally, the President has great formal flexibility to choose whatever policy he wants, but rational voters will punish the President's policy failures quite harshly in order to offset the President's possible bias. Adding another veto player — for example, by requiring congressional approval of presidential initiatives — has two effects. The first-order effect is to reduce the President's freedom of action because there are some policies an unconstrained President would prefer to enact that Congress would oppose. The second-order effect derives from rational voters' awareness of the first-order effect: because voters know that Congress will block some fraction of undesirable presidential initiatives, voters do not need to punish the President for policy failure as harshly in order to compensate for his possible bias. This second effect — the relaxation of the electoral deterrent to action — tends to increase the President's propensity to initiate policy change. While there is no guarantee that this second-order effect will fully offset the first-order effect of adding a veto player, such a result is possible. Thus, claims that the separation of powers necessarily reduces the quantity or frequency of policy change may need to be reconsidered.

Fourth, and perhaps most importantly, our analysis suggests that voters may be better off under a system of separated powers in which the agenda-setting political actor (for example, the President) has the *option* to seek the approval of another branch (for example, Congress) than under a regime in which such joint approval is *required*. We also contend that a system of separated powers (whether mandatory or optional) is better for voter welfare than one in which all political authority in some policy domain is concentrated in one branch of government. The intuition for this result is that voters are better off when they can employ more nuanced electoral strategies. When one actor

(say, the President) has unilateral authority in some policy domain, the voters have only one lever at their disposal: their electoral support for the actor with authority over the policy decision. By contrast, under a mandatory separation of powers regime (for example, when both the President and Congress must agree to enact a new policy), the voters have two levers at their disposal: their electoral support for each of the two agents. In a regime where one branch (for example, the President) *may* seek the permission of another branch (for example, Congress), but may also act unilaterally, the voters can assign the primary decisionmaker different levels of electoral support depending not only on the ultimate outcome of the policy, but also on whether that branch acted unilaterally or with authorization from the other branch. Thus, an optional separated powers system gives the voters *three* levers with which to calibrate their electoral strategies: electoral support for the President in the case of unilateral action, electoral support for the President in the case of joint action, and electoral support for Congress.[6]

While our analysis focuses on the benefits to voters of increasing the number of ways a policy choice might be made, we recognize that this additional complexity also has costs. As institutional complexity increases, voters are likely to face greater difficulty in attributing responsibility for policy decisions. Thus, despite our central normative claim, we do not think that increasing the level of institutional complexity or power diffusion will always benefit voters. To put this point another way, adding more actors to the policymaking process has two effects on the efficacy of external electoral accountability, and these two effects cut in opposite directions. On one hand, the participation of a greater number of elected agents in a policy decision enables voters to use more refined electoral strategies, so long as voters can assess not only the ultimate policy outcome, but also the process that led to that outcome. On the other hand, the greater the complexity of the process and the larger the number of actors involved, the greater the informational burden on voters. If this burden becomes too great, voters might not be able to correctly attribute responsibility for different decisions, and this may undermine electoral discipline as a constraint on incumbents.

This latter "clarity-of-responsibility" effect has received more attention than the former effect,[7] which is the subject of our analysis.

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[6] Our model employs the simplifying assumption that Congress cannot enact the new policy unilaterally. If it could, then voters would have a fourth lever of control — electoral support for Congress in case of unilateral (as opposed to joint) action.

[7] *See, e.g.*, Gersen, *Unbundled Powers*, *supra* note 4; Juan J. Linz, *The Perils of Presidentialism*, J. DEMOCRACY, Winter 1990, at 51; Powell & Whitten, *supra* note 2; Thomas J. Rudolph, *Institutional Context and the Assignment of Political Responsibility*, 65 J. POL. 190 (2003); Ethan

While we acknowledge the clarity-of-responsibility problem — indeed, it is the principal reason why our analysis would *not* support the creation of an arbitrarily large number of government branches — we conjecture that this effect is not overwhelming in a simple separation of powers system with only two or three institutional actors. We suggest that, at least for high-salience policy issues, the benefits to voters of being able to employ a more refined reward and punishment strategy exceed the informational costs associated with the added institutional complexity.

This Article proceeds as follows. Part I briefly reviews the existing literature on how separation of powers interacts with electoral accountability. Part II elaborates our basic theoretical argument, and Part III outlines the argument's main positive and normative implications. Part IV discusses some of the key assumptions and limitations of the analysis. A brief conclusion follows.

I. SEPARATION OF POWERS AND ELECTORAL ACCOUNTABILITY: AN OVERVIEW

Political leaders are supposed to use the power of the state to promote the welfare of the citizenry, yet leaders may be tempted to pursue their own agenda or to serve parochial interests at the expense of public welfare. Political systems may address this agency problem through two methods. The first is competitive elections. Elections can reduce agency slack in government in two ways. First, voters can try to select "good types."[8] That is, voters may vote *prospectively* in order to put into office officials who are competent and who share the voters' values. Second, voters can try to sanction poor performance.[9] That is, voters may vote *retrospectively*, rewarding incumbents for good policy outcomes and punishing them for bad ones, in order to create stronger incentives for incumbent politicians to advance the voters' interests.

A second strategy for reducing political agency slack focuses on institutional separation of powers. The classic Madisonian justification for the separation of powers is that ambition will counteract ambition, with the institutional and political rivalries between the branches of government serving to check the excesses or abuses of any one branch.[10] There are numerous modern variants on this line of argu-

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Bueno de Mesquita & Dimitri Landa, An Equilibrium Theory of Clarity of Responsibility (Jan. 22, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

   [8] *See* Fearon, *supra* note 2, at 55–60.

   [9] *See id. See generally* Forejohn, *supra* note 2.

   [10] *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 3. *But cf.* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950–53 (2005) (observing that electoral incentives of members of Congress often conflict with empire-building con-

ment, but the essential idea is that the "principals" (the citizens) can mitigate the political agency problem by employing multiple agents whose potential biases are at least partially uncorrelated.[11]

Separation of powers is sometimes characterized as a partial *substitute* for electoral accountability. That is, some contributions to constitutional theory (in both the legal and the political economy fields) suggest that robust electoral accountability obviates the need for an entrenched separation of powers, but reliance on separation of powers becomes necessary when electoral discipline is ineffective.[12] Thus, James Madison argued in the *Federalist Papers* that although elections would be the "primary control" on government, separation of powers was an important "auxiliary precaution" in light of the imperfection of electoral control.[13]

While there are undoubtedly cases in which electoral accountability and separation of powers act as substitutes in this way, the separation of powers constraints and electoral constraints may also *complement* one another. Some strands of the literature have recognized this possibility. The existing claims regarding how the separation of powers regime might affect the efficacy of electoral discipline can be divided loosely into two lines of argument, one more pessimistic about the impact of separation of powers on electoral accountability, and the other more optimistic.

The more pessimistic view emphasizes the so-called "clarity-of-responsibility" problem.[14] According to this view, diffusion of authority among multiple government actors makes it difficult for voters to figure out whom to blame or reward, thereby weakening electoral incentives across the board. As a result, politicians may be excessively reluctant to undertake socially desirable policies because they will receive only a fraction of the credit. Leading constitutional scholars and comparative political scientists, at least as far back as Woodrow Wilson, have invoked a version of this argument to claim that the American-style separation of powers hinders effective governance.[15] The clarity-of-responsibility problem may also make politicians more likely

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cerns); Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1000 (2006) (same).

  [11] *See, e.g.*, Sunstein, *supra* note 3, at 42–44.

  [12] *See, e.g.*, James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN'S L. REV. 293 (2005); Levinson, *supra* note 10, at 959–60; Persson et al., *supra* note 4.

  [13] THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 290.

  [14] *See* sources cited *supra* note 7.

  [15] *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT 281–82 (Transaction Publishers 2002) (15th ed. 1900) ("Each branch of the government is fitted out with a small section of responsibility, whose limited opportunities afford to the conscience of each many easy escapes. Every suspected culprit may shift the responsibility upon his fellows.").

to take actions that benefit parochial interests at the expense of a majority of voters. For example, Congress might delegate controversial or unpopular decisions to executive agencies, while continuing to influence these decisions behind the scenes, so as to deliver rents to special interest groups while blaming the agency for unpopular policies.[16] Another alleged example of this sort of blame-shifting involves attempts by the federal government to induce or compel state governments to implement unpopular federal policies, thereby exploiting the federal structure of the government to evade electoral accountability for these decisions.[17] Those who emphasize the clarity-of-responsibility problem tend to prefer Westminster-style parliamentarianism or to welcome the ascent of strong political parties, or both.[18]

The more optimistic view is that the separation of powers can improve electoral accountability because the competition between the branches encourages disclosure of relevant information regarding the merits of different policy initiatives. This variant on the classic Madisonian argument emphasizes the ability of each branch of government to check the others by monitoring them and disclosing information to voters, thereby enhancing the efficacy of electoral discipline.[19] Such monitoring and disclosure is especially likely when different branches are controlled by partisan political adversaries.[20]

Both of the above lines of argument emphasize how the separation of powers might affect the efficacy of electoral accountability by altering the amount of information available to voters. On the pessimistic account, separation of powers reduces information about true responsibility because voters cannot figure out which agents were responsible for adopting or blocking a given policy. On the optimistic account, separation of powers increases voter information because rival branches have an incentive to supply such information. Although these hypo-

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[16] *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–62 (1982); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–52 (1982); *see also* Alberto Alesina & Guido Tabellini, *Bureaucrats or Politicians?* (pt. 2), 92 J. PUB. ECON. 426 (2008).

[17] *See* Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 598 (2000) (arguing that cooperative federalism programs "reduce political transparency[,] obscure political responsibility[,] and facilitate political blame-shifting" because the public can never be sure which level of government is responsible for failures in government programs).

[18] *See* James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POL. SCI. Q. 613, 616–31 (1988–1989) (summarizing the literature in support of united government); *see also* Linz, *supra* note 7; G. Bingham Powell, Jr., *Constitutional Design and Citizen Electoral Control*, 1 J. THEORETICAL POL. 107 (1989).

[19] *See* Persson et al., *supra* note 4; *cf.* Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong To Prefer the German to the U.S. Constitution,* 18 CONST. COMMENT. 51, 56–57 (2001); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 300 (1996).

[20] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

theses are in tension with one another, both may capture important features of the real political world. Nonetheless, we argue that these analyses are incomplete because they neglect *another* way that the institutional separation of powers might affect the efficacy of electoral discipline in reducing political agency slack: separation of powers — in particular, the participation of multiple, independently elected actors in the decision to enact a new policy — expands the set of observable political decisions on which voters can condition their electoral responses. This institutional feature facilitates rational retrospective voting by enabling voters to fine-tune their reward and punishment strategies.

II. How Separation of Powers Affects Rational Retrospective Voting

When certain critical assumptions hold, voters can vary their ex post political-support level for incumbent government officials in order to induce better ex ante incentives with respect to policy choice. Furthermore, voters can exploit an institutional separation of powers to enhance the efficacy of this electoral strategy. In Part IV, we elaborate the most important and problematic of the necessary assumptions and explain how and why they limit the domain of our argument. Here, however, we lay out the basic theoretical argument, stating the key assumptions as we go.[21]

A. *The Baseline Case: A Single Elected Agent*

Consider a simple political system with a single elected agent — the President — who has the sole authority to make policy decisions. Elections supply the only external constraint on the President's choices; in this case, there is no separation of powers. We will represent the electoral check by considering the behavior of a single representative voter, who might be thought of as the median voter in the electorate or some other pivotal voting bloc.

Suppose that the President must decide whether to launch a military attack on an unfriendly nation. One might reasonably assume that the voter's view on the desirability of the attack depends crucially on its expected outcome. For simplicity, let us make the (unrealistic) assumption that the military intervention can lead to one of two possible outcomes: either the intervention is a "success" (a quick and decisive victory over an adversary that posed a substantial threat) or a "failure" (a prolonged and costly military entanglement with a target

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[21] The discussion in this section is based on, and derived from, our more formal analysis in Stephenson & Nzelibe, *supra* note 4. Readers interested in formal statement and proof of our more general propositions should consult that paper. This Article illustrates our most important conclusions using numerical examples.

that turns out to have posed little threat). Let us suppose, again arbitrarily and purely for expositional simplicity, that the voter would receive 1 unit of utility if the military intervention succeeds, 0 units of utility if the military intervention fails, and 0.5 units of utility if the government eschews military action.

If it were known in advance whether the intervention would succeed or fail, the decision would be a trivial one from the voter's perspective. But many policy decisions are more like lotteries: there is some probability they will succeed, but also some probability they will fail; so at the moment of decision, enacting the new policy is a gamble. Still, there are good gambles and bad gambles. Given the simplifying assumptions stated above, the voter would favor military intervention if and only if the probability of success were greater than 50%. Therefore, if the voter knew the probability that the intervention would succeed, the problem would again be trivial: the voter could demand that the President launch an attack if this probability exceeded 50%, demand that the President refrain from attacking if the probability of success were lower than 50%, and vote out of office any President who behaved inconsistently with these demands. Likewise, if the President and the voter had identical preferences, the voter could always trust the President's judgment.

Let us suppose, however, that the voter is confronted with an agency problem: the President has better information than the voter about the true probability of success, and the President's preferences might diverge from the voter's. We can incorporate the informational asymmetry in simplified form by assuming that the President knows the probability of success, but the voter does not. The voter, instead, views any probability between 0% and 100% as equally likely. Although this radical information asymmetry is unrealistic, it captures the idea that political leaders often have access to information that is unavailable to the general public as well as greater capacity to translate this information into something like a probability estimate.

To capture the fact that the President's policy preferences might diverge from those of the voter, let us suppose that there is some parochial interest group — say, arms dealers, oil companies, neo-imperialists, or exiled dissidents from the potential target country — that has a stronger "taste" for military intervention than does the voter. Let us further suppose (arbitrarily) that there is a 25% probability that this interest group will succeed in "capturing" the President. If the President is captured, then (again using arbitrary numbers) he gets 1.4 units of utility from a successful intervention, 0.4 units of utility even from a failed intervention, and 0.5 units of utility from staying out. If the interest group does not capture the President — if the President is "unbiased" — then the President's utility payoffs are the same as the voter's: 1 for success, 0.5 for nonintervention, and 0 for failure.

Let us next assume that after the President decides whether to attack, and after the voter observes the outcome of any such attack, there is an election that pits the incumbent against some challenger. The benefit to the President of remaining in office is 1 unit of utility. A crucial assumption of our analysis is that the voter employs a rational retrospective voting strategy designed to induce optimal ex ante incentives for the President.[22] In particular, the voter will reelect the President with some probability that depends entirely on the President's prior policy choice and the observed outcome. The voter thus uses the election as a way to reward or punish the President. For instance, suppose that a voter who observes a military success always reelects the President. That strategy is equivalent to the voter rewarding the President with 1 unit of utility when the intervention succeeds. Alternatively, suppose that if the President opts for nonintervention, the voter's probability of supporting the President's reelection is 60%. That strategy is equivalent to the voter offering the President 0.6 units of utility if the President abstains from military action.

What electoral strategy would be optimal for the voter under these assumptions? If the voter knew for sure that the President was unbiased, she could simply reelect the President regardless of the decision or outcome, since the President's utility payoffs would be the same as the voter's. If the voter knew for certain that the President had been captured by the pro-war faction, she could ensure that the President takes the correct action by adopting the following electoral strategy: if the President launches a successful military intervention, always reelect the President; if the President launches a military intervention that fails, always replace the President; if the President takes no action, reelect the President 90% of the time. If the voter adopts this strategy, the President's expected utility from nonintervention is 1.4 units of utility: 0.5 units from the policy outcome and 0.9 units from the expected outcome of the election. Further, the (captured) President's utility from launching the invasion is the probability that the policy will succeed (expressed as a value between 0 and 1) times the total utility payoff from success (2 units, one from the success itself and the other from the guaranteed reelection), plus 0.4. So, the President in this case will launch an invasion if, but only if, the ex ante probability of success exceeds 50% — exactly what the voter would want.[23]

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[22] See *infra* section IV.A, pp. 647–49, for a discussion of this assumption.

[23] Other voter strategies would also yield a similar result in this case, as all the voter needs to do is ensure that the biased President's probability of reelection is forty percentage points lower if the President launches an invasion than if the President takes no action. So, for example, the voter could achieve the same result by reelecting the President with a 70% probability if the President takes no action and reelecting the President with a 30% probability if the President launches an attack, regardless of the outcome. We focus in the main text on the case in which the voter

The problem for the voter, though, is that she is unsure whether the parochial interest group has succeeded in biasing the President in favor of war. Let us continue to assume that the probability of capture is 25%. If the voter were to reelect the President no matter what (the optimal strategy when the President is unbiased), then if the President is captured (an event with a 25% likelihood) and the probability of success is between 10% and 50% (which the voter anticipates will occur 40% of the time), the result is a "false positive": the President launches a war even though a fully informed voter would prefer no action. In contrast, if the voter were to adopt the electoral strategy that is optimal in those cases in which the President is *definitely* captured, then in those cases where the President is in fact unbiased (true 75% of the time) and the probability of success is between 50% and 70% (true 20% of the time), the voter's aggressive electoral strategy will induce a "false negative," deterring a military intervention that a fully informed voter would have favored.

What should the voter do in this case? It turns out that, under these simplifying assumptions, the voter would maximize her expected utility by adopting the following strategy: always reelect a President who launches a successful military intervention; never reelect a President who launches a failed military intervention; and reelect a President who takes no action 60% of the time.[24] This electoral strategy means that an unbiased President will launch the attack if the ex ante probability of success exceeds 55%, while the captured President will launch the attack if the ex ante probability of success exceeds 35%. This strategy is not perfect: when the President is captured and the probability of success is between 35% and 50%, there will still be a false positive (that is, an unjustified invasion), and when the President is unbiased and the probability of success is between 50% and 55%, there will still be a false negative (that is, unjustified inaction). But this is the best the voter can do under the circumstances.[25]

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rewards success with reelection and punishes failure with replacement because, as we will see, these features characterize the voter's optimal electoral strategy once we introduce some voter uncertainty about whether the President has been captured by the special interest faction.

[24] The idea that the voter would *always* reelect a President whose policy initiative is successful, and *always* throw out a President whose policy initiative is unsuccessful, may appear unrealistic — which it is. This result derives principally from the fact that in our simplified analysis, there is only one policy choice, and the decision to enact the new proposal results in an unambiguous success or failure. In the real world, the basic dynamic we describe would be attenuated by the voter's need to balance results on multiple issues and to assess conflicting evidence about policy performance. The basic dynamic we outline, though, is still likely to be present.

[25] More formally, we can define p as the President's ex ante estimate of the probability (expressed as a value between 0 and 1, rather than in percentage points) that military intervention will succeed; define q as the probability that the President is biased; and define b as the additional utility units a biased President derives from initiating military action. In the numerical example given in the text, p is drawn from a uniform distribution between 0 and 1, $q = 0.25$, and $b = 0.4$.

Observe that the voter's electoral strategy is *asymmetric*, in that the political "blame" for failure (defined as the difference between the President's probability of winning reelection in the case of inaction and his probability of winning reelection in the case of policy failure) is greater than the political "credit" for policy success (defined analogously as the difference between the President's probability of winning reelection after policy success and the probability of winning reelection following inaction). Thus defined, the magnitude of "blame for failure" (in utility units) is 0.6 (0.6 minus 0), while "credit for success" is 0.4 (1 minus 0.6). The reason for this asymmetry is that the voter knows the President may be biased in favor of intervention, and the voter partially offsets this risk by increasing the relative attractiveness to the President of inaction.[26]

B. *The Impact of Separation of Powers on Electoral Strategies and Political Behavior*

The voter's behavior in the case of a unitary policymaker establishes a baseline case. What if there is a separation of powers? Let us suppose that Congress must approve any proposed military intervention in order for it to go forward. (We bracket collective choice complications by representing Congress as a single entity, which we might think of as the pivotal member of Congress.) Let us further suppose that the parochial pro-war interest group will try to capture both the President and Congress. The effect of capture is the same — the value to a captured branch of going to war increases by 0.4 units of utility — and the probability that the interest group will capture either branch is 25%. However, we will assume that these probabilities of capture are statistically independent, such that the probability the faction captures *both* the President and Congress is 6.25%.[27] Our model thus incorpo-

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As we show in Stephenson & Nzelibe, *supra* note 4, the median voter's optimal electoral strategy in this case is to reelect the President if the intervention succeeds, replace the President if the intervention fails, and reelect the President with probability $0.5 + qb$, which in this example is equal to 0.6. The *unbiased* President's optimal strategy, in response to this anticipated behavior by the voters, is to take military action if, but only if, p (the probability of success) is greater than $0.5 + (qb/2)$, which in this example is equal to 0.55. The *biased* President, by contrast, launches the invasion if the probability of success is greater than $0.5 - ((1 - q)b/2)$, here equal to 0.35. We further show that the median voter's expected utility in this case, when all players use their optimal strategies, can be expressed as $5/8 - q(1 - q)b^2/8$, which in this numerical example yields an expected utility to the voter of 0.62125.

[26] If the voter fears that the incumbent President might be too dovish rather than too hawkish, the asymmetry would run in the other direction. Our discussion here focuses on the case where the President may be too hawkish, but the analysis is basically the same in the opposite case.

[27] The assumption of complete statistical independence is obviously a simplification, but as long as the probabilities of capture are not perfectly correlated, our central qualitative results will hold. Because our model considers only the capture of both political branches by an interest group in favor of the policy, we do not discuss issues related to the distinctions between unified

rates, in stylized form, a classic Madisonian argument in favor of the separation of powers: it is more difficult for a faction to capture two branches of government than to capture only one. Finally, we assume that although voters are uncertain whether a politician has been captured, each politician is aware of the preferences and motives of other politicians.[28]

How would a rational voter behave under these conditions? First, the voter would impose asymmetric punishments and rewards on the President in order to partially offset the risk of a hawkish bias, but this asymmetry would be less pronounced than in the baseline case of unilateral presidential authority. Specifically, the probability the voter reelects the President remains 100% when the intervention succeeds and 0% when the intervention fails, but the probability of reelection in the case of inaction is now (approximately) 53% (down from 60% in the baseline unilateral authority case). Thus, political blame for failure is now 0.53, while credit for success is now 0.47 — still asymmetric, but less so than the 0.6–0.4 difference in the unilateral case. Meanwhile, the voter does not introduce any asymmetry with respect to Congress's rewards and punishments for policy success or failure. That is, the voter would let Congress make whatever decision it wants, without using electoral incentives to influence Congress's decision. This electoral strategy yields a higher expected utility for the voter than in the unilateral authority case.[29]

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and divided government. If we assume, however, that because of divided government Congress and the President may be biased in opposite directions, then it would be important to know which party controlled which branches of government. The working paper version of our companion piece considers such an extension, but the results in that paper do not alter our main conclusion. *See* Matthew C. Stephenson & Jide Nzelibe, *Political Accountability Under Alternative Institutional Regimes* 20–23 (John M. Olin Ctr. for Law, Econ. & Bus., Harvard Law Sch., Discussion Paper No. 615, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152452.

[28] Like many of our other assumptions, this simplification is unrealistic, but we think it captures in stark form an important feature of the real political world. As participants in the policy-making process, politicians from both branches of government have the opportunity to acquire information about each other's true preferences. Voters, by contrast, often do not have the resources or incentives to observe closely the complexities and intricacies of the behind-the-scenes bargaining that drives policy output.

[29] More precisely, as we show in Stephenson & Nzelibe, *supra* note 4, in this regime the median voter's optimal strategy is to reelect the incumbent President and Congress with certainty if the intervention succeeds; to replace both of them if the intervention fails; and if no intervention occurs (that is, if the President does not propose it or if Congress blocks it), to reelect Congress with probability 0.5 and to reelect the President with probability $1/2 + q^2 b/(q^2 - q + 1)$, which in this example (where $q = 0.25$ and $b = 0.4$) is approximately equal to 0.53. Given this anticipated electoral behavior by the voter, the unbiased President launches the invasion if and only if $p > 1/2 + q^2 b/[2(q^2 - q + 1)]$ (here approximately equal to 0.515). Conversely, the biased President invades if and only if $p > 1/2 - (1 - q)b/[2(q^2 - q + 1)]$ (here approximately equal to 0.315); an unbiased Congress approves a presidential proposal to invade if $p > 1/2$, while a biased Congress approves such a proposal if $p > (1 - b)/2$ (here equal to 0.3). When the voter uses this electoral strategy and the President and Congress respond rationally, then the voter's expected utility

The reason the voter relaxes the asymmetry in the President's electoral rewards and punishments is that the voter expects Congress to screen out some of the President's undesirable policy initiatives. More specifically, if the President is biased but Congress is not, the voter is better off under a separation of powers, as Congress will block all initiatives that the captured President would favor but a fully informed voter would oppose. In this scenario, distortions in the voter's electoral strategy are not necessary to check the President. Of course, if the President and Congress are both captured, the voter is worse off than she would have been with a more asymmetric electoral strategy, but this dual capture occurs relatively infrequently. If the President is unbiased, then the modest asymmetry in voter rewards and punishments will overdeter the President from taking action in some cases, but this overdeterrence problem is less acute than in the case of unilateral presidential authority because the asymmetry in the voter's electoral strategy is less extreme.

Now, consider what happens in the case in which the President may seek congressional approval for the military intervention but may also choose to act unilaterally.[30] What is the voter's optimal strategy in this case? As was true in the preceding cases, a rational voter would use electoral rewards and punishments to offset the risk that the parochial interest group has biased the government in favor of war. In this case, though, there are two ways that the government might reach the decision to go to war. First, the President might propose military intervention to Congress, which Congress then approves. Second, the

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payoff can be expressed as $5/8 - q^2(1 - q)b^2/[8(q^2 - q + 1)]$, which in this example is equal to approximately 0.62385, which is greater than the voter's expected utility in the baseline case of unilateral authority by approximately 0.00260 units. The magnitude of this difference may appear small, but it is worth keeping in mind that these numerical values are arbitrary, as are the assumptions about the values and distributions of the other variables in the example, so it is hard to interpret things like voter utility payoffs as "small" or "large" in absolute terms. What matters is the *relative* expected utility payoff under different regimes.

[30] This "optional" separation of powers model corresponds to a number of real-world situations, such as our running military intervention example. While the Constitution vests the power to declare war in Congress, it makes the President the Commander in Chief. As a practical matter, this means that while the President can seek congressional authorization for his initiatives, he sometimes initiates military action unilaterally, and for a variety of reasons it is difficult for Congress to constrain such unilateral initiatives. *Cf.* Nzelibe, *supra* note 4, at 913–14 (elaborating on the "electoral disincentives that members of Congress might face in constraining the President's military initiatives," *id.* at 913). An optional separation of powers may also capture certain aspects of domestic policy, as when the President can advance his policy agenda by pushing legislation through Congress, but can also initiate administrative agency action in ways that do not require congressional authorization (and which are practically difficult for Congress to overturn). *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341 (2001). More broadly, Professors Terry Moe and William Howell have highlighted numerous ways in which the President can advance his policy agenda unilaterally. *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

President might authorize military intervention unilaterally, without going to Congress or (equivalently for purposes of this analysis) over congressional objection. Likewise, there are two ways the government might reach the decision *not* to go to war. First, the President might decline to propose military action. Second, the President might propose intervention to Congress, face congressional opposition, and back down.

The fact that there are different ways that the government might select each of the two possible policy decisions is important because it enables the voter to condition her electoral support for the President and Congress not only on the policy choice (war/no war), but also on the manner in which that policy was selected. Thus, using the (arbitrary) numbers from the previous examples, the voter's optimal electoral strategy is as follows: if the government initiates a military intervention that succeeds, reelect both the President and Congress with certainty; if the government initiates a military intervention that fails, replace both the President and Congress with certainty; if the President declines to propose military action, reelect the incumbent President and Congress with 50% probability; if the President proposes military action, Congress opposes it, and the President then backs down, reelect the President with 90% probability and reelect Congress with 54% probability. The voter's expected utility in this example is higher than in the baseline case of unilateral presidential authority, and it is also higher than in the case in which congressional approval was required.[31] The voter's strategy under this "optional" separation of powers regime has several notable features:

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[31] Formally, the voter under this regime would adopt the following strategy: if the President initiates military action unilaterally, without congressional assent or over congressional objection, reelect the President if the intervention succeeds and replace the President if the intervention fails; if the President and Congress jointly approve military action, reelect both if the intervention succeeds and replace both if the intervention fails; if the President does not propose military intervention, reelect the President with 50% probability; if the President proposes military intervention to Congress, Congress disapproves, and the President relents, reelect the President with probability $1/2 + b$ (here equal to 0.9) and reelect Congress with probability $1/2 + q^2b/[q^2 + (1 - q)^2]$ (here equal to 0.54). If the voter uses this electoral strategy, an unbiased Congress would approve a proposed military intervention if $p > 1/2 + q^2b/[2(q^2 + (1 - q)^2)]$ (here equal to 0.52), while a biased Congress would approve a military intervention if $p > 1/2 - (1 - q)^2b/[2(q^2 + (1 - q)^2)]$ (here equal to 0.32). An unbiased President, anticipating this behavior by the voter and by Congress, proposes the policy to Congress if $p > 1/2$ and Congress is expected to approve the policy, or if Congress is expected to veto the policy and $p \leq (1 + b)/2$ (here equal to 0.7). The unbiased President refrains from proposing military action if Congress is expected to approve such a proposal but $p < 1/2$ and the unbiased President unilaterally initiates military intervention if Congress would veto a proposal but $p > (1 + b)/2$ (here equal to 0.7). The biased President proposes the policy to Congress if Congress is expected to approve and $p > (1 - b)/2$ (here equal to 0.3) or if Congress is expected to veto the proposal and $p \leq 1/2$. The biased President takes no action if Congress would approve a proposal but $p < (1 - b)/2$ (here equal to 0.3), and the biased President acts unilaterally if Congress is expected to veto a proposal but $p > 1/2$.

First, it guarantees that if the President prefers not to intervene, and knows that Congress also opposes intervention, the President will "posture" by proposing military action, provoking congressional opposition, and then "respecting" that opposition by eschewing unilateral action. Perhaps nonintuitively, this sequence of decisions substantially increases the President's reelection probability over the baseline in which the President makes no proposal (from 50% to 90%). Note that a corollary to this observation is that if the President prefers not to intervene but anticipates Congress would approve a proposed intervention, the President would not propose intervention. Otherwise, he would be stuck between a rock and a hard place, having either to launch a military attack that he views as too militarily or politically risky, or to back down from his own proposal without the political "cover" of congressional opposition.

Second, the strategy outlined above makes the President's political rewards and punishments for unilateral action *extremely* asymmetric, while there is no asymmetry at all if the President secures congressional approval: if the President acts unilaterally or over congressional opposition, a policy success increases the President's probability of reelection by only 10 percentage points over the baseline case in which the President acquiesces in the face of congressional opposition (from 90% to 100%), while a policy failure causes the President's reelection probability to plummet from the baseline probability of 90% to 0%. By contrast, if the President secures congressional approval for a military intervention, then the political rewards and punishments for success and failure are symmetric: if the President acts with congressional approval, a success increases the President's probability of reelection by 50 percentage points over the baseline case in which the President refrains from military action (from 50% to 100%), while a policy failure causes the President's reelection probability to decrease by an equivalent amount (from 50% to 0%).

Third, in addition to manipulating the President's incentives, the voter in this scenario also manipulates Congress's incentives, using an

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Given these strategies, the voter's expected utility is $5/8 - q^2(1-q)^2 b^2/[8(q^2 + (1-q)^2)]$, which in this example is equal to 0.62388. This expected utility payoff is higher than the payoff under either the unilateral authority regime or the regime in which congressional approval of the President's proposal was mandatory. This optional separation of powers regime is always the best of the three for the voter, as we demonstrate formally in Stephenson & Nzelibe, *supra* note 4, and as we discuss further in section III.D. In our numerical example, the expected utility difference between the optional and mandatory separation of powers regimes seems very small — only about 0.00003 units of expected utility — but as noted earlier, *see supra* note 29, the artificial assumptions used to simplify the numerical example make it difficult to interpret this difference as "large" or "small" in real-world terms. In our view, what is more interesting is the *relative ranking* of these different regimes in terms of expected voter utility. For a more general and formal treatment, see Stephenson & Nzelibe, *supra* note 4.

asymmetric electoral strategy to make congressional opposition to a presidential proposal more attractive. This asymmetry, however, is relatively mild: if Congress approves a successful military intervention, Congress's reelection probability increases by 46 percentage points over the baseline reelection probability of 54% that would obtain if Congress opposed the President's proposal; if Congress approves a failed military intervention, Congress's reelection probability drops 54 percentage points (from 54% to 0%). The voter imposes this asymmetry because the voter is concerned that Congress might be biased in favor of military intervention. The asymmetry is relatively mild because congressional bias matters only if the hawkish interest group succeeds in capturing *both* the President *and* Congress — something that the voter expects to occur relatively infrequently (only 6.25% of the time).

III. IMPLICATIONS OF THE ANALYSIS

The preceding discussion is based on a highly simplified (though not, alas, simple) model of political behavior. The purpose of this stylized analysis is not to provide a nuanced or comprehensive account of real-world political behavior — if it were, it would be a hopeless failure. Rather, this abstract analysis is meant to sharpen and refine our intuitions about strategic political behavior, as well as to suggest novel hypotheses, which we can then carry with us when we turn to consideration of real-world cases. In this Part, we examine the implications of our analysis for several ongoing debates in the literature on constitutional theory and institutional design. We focus on four salient questions: (1) whether presidents relentlessly seek to expand their own power when they have the ability to do so; (2) whether separation of powers induces undesirable responsibility shifting by the political branches; (3) whether separation of powers produces gridlock (or "status quo bias"); and (4) what form of separation of powers best advances voter welfare. For each of these questions, our stylized theoretical analysis suggests novel conclusions that run against the grain of much of the received wisdom on these topics.

Although we lack the evidence we would need to test our hypotheses, we illustrate several of our arguments with real-world examples, drawn principally though not exclusively from decisions regarding the use of military force. Use-of-force decisions are appropriate test cases for our hypotheses for three reasons. First, the role of Congress often varies across conflicts. Second, use-of-force decisions are highly salient policy decisions, and their outcomes often affect the po-

litical survival of presidents.[32]   Third, presidential military engagements are rife with speculation about political bias, including concerns that presidents might deploy high-minded nationalist rhetoric to cloak risky military initiatives that serve narrow partisan, parochial, or personal interests.[33]   While our analysis of selected examples is far from conclusive, these examples suggest that our stylized theoretical arguments may capture important aspects of real-world political behavior.

A. *Presidential Empire Building*

Contemporary critics of Madison's vision of institutional balancing often argue that presidents undermine this balance by pressing for expansions of their power, which Congress is unwilling or unable to restrain.[34]   On this view, presidents are "empire builders" who resist sharing power with Congress unless forced to do so. Others have expressed skepticism about this empire-building hypothesis.[35]   Our analysis lends further support to the skeptical view by highlighting the fact that presidents will sometimes see power-sharing with Congress as a valuable mechanism for reducing political risk. The logic is simple: because of the voter's asymmetric strategy, the President faces different, and more severe, electoral risks when he acts unilaterally or otherwise pushes the boundaries of his authority. Thus, we should expect presidents to prefer collaborating with Congress on highly visible issues that entail a significant risk of policy failure. Such collaboration comes at a cost, of course, especially since Congress might reject the President's initiatives. Our analysis is sensitive to this cost, and indeed our analysis predicts that presidents will sometimes prefer unilateral action because of it. But our analysis also predicts that because presi-

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[32] *See* Bruce Bueno de Mesquita & Randolph M. Siverson, *War and the Survival of Political Leaders: A Comparative Study of Regime Types and Political Accountability*, 89 AM. POL. SCI. REV. 841 (1995); *see also* Timothy Y.C. Cotton, *War and American Democracy: Electoral Costs of the Last Five Wars*, 30 J. CONFLICT RESOL. 616, 619, 632 (1986) (finding that unpopular wars have had a detrimental effect on elected officials from the initiating President's party).

[33] For instance, President Clinton was accused of using attacks against alleged al Qaeda targets in Sudan in 1998 to deflect attention from scandals concerning his personal life. Similarly, President Bush has been blamed for embarking on the 2003 invasion of Iraq to benefit political allies in the oil industry, or simply to avenge personal grievances.

[34] *See* Moe & Howell, *supra* note 30, at 134–35 ("[P]residents have strong incentives to push this [constitutional] ambiguity relentlessly . . . to expand their own powers, and . . . for reasons rooted in the nature of their institutions, neither Congress nor the courts are likely to stop them."); *see also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); Kagan, *supra* note 30, at 2341; Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007); Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 CO-LUM. L. REV. 263, 267 (2006).

[35] For a leading, thoroughgoing critique, see Levinson, *supra* note 10. *See also* JOHN HART ELY, WAR AND RESPONSIBILITY (1993).

dents have a powerful political incentive to seek congressional acquiescence, they will often do so.

Of course, the hypothesis that presidents will voluntarily share power is difficult to evaluate empirically because it is hard to tell whether presidential consultation with Congress is truly "voluntary" (and for purposes of reducing political risk), or whether it is due to externally imposed institutional constraints. Nevertheless, apparent self-constraint by the executive branch occurs frequently enough to raise questions about the assumption that presidents invariably prefer unilateral action if given the choice. For example, although there is widespread agreement that presidents have considerable latitude to act unilaterally in national security matters,[36] presidents have routinely sought congressional authorization for their military initiatives even when they were not legally compelled to do so.[37] Furthermore, modern presidents continue to avail themselves of the Article II treaty procedure, which requires a two-thirds majority vote from the Senate for binding international commitments, even though as a practical matter this procedure is both unnecessary and increases the chance of legislative defeat.[38]

Professors David Samuels and Matthew Shugart's comparative study of presidentialism lends further support to the view that presidents often have strong electoral incentives to share power. Samuels and Shugart find that strong presidents tend to seek broad coalition cabinets in order to link legislators with policy programs.[39] Such coalition-building, they argue, "is a means of making congress more co-responsible for national governance than would otherwise be the case, given the high presidential legislative authority."[40] Although Samuels and Shugart emphasize the President's need to diffuse responsibility, presidents in such systems may benefit politically from coalition cabinets because such cabinets are likely to screen out policy initiatives that are biased against the voters' interests, which in turn reduces the political consequences of policy failure.

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[36] *See* Moe & Howell, *supra* note 30, at 161–62.

[37] *See* Nzelibe, *supra* note 4, at 919; *see also* David P. Auerswald & Peter F. Cowhey, *Ballot-box Diplomacy: The War Powers Resolution and the Use of Force*, 41 INT'L STUD. Q. 505, 507 (1997) (finding that since the passage of the War Powers Resolution, presidents rarely deploy troops for more than sixty days without congressional authorization).

[38] *See* Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRESIDENTIAL STUD. Q. 440, 445–47 (2005) (describing other strategic reasons why the President may seek to use treaties rather than executive agreements); John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5 (2002) (same).

[39] *See* Samuels & Shugart, *supra* note 4, at 51.

[40] *Id.*

If electoral incentives often motivate presidents to share authority with Congress, what normative or doctrinal implications follow? One tentative conclusion is that giving the President some flexibility — perhaps by creating some ambiguity as to whether or when the President must seek congressional approval — is less likely to result in excessive concentration of decisionmaking authority in the President than the traditional empire-building view would predict. That said, we do not mean to advance the naïve suggestion that judicial or congressional intervention is never appropriate in the context of separation of powers disputes. Exclusive reliance on electoral sanctions will often fail to generate the correct mix of incentives for the President. Our more modest argument is that mindfulness of the electoral deterrent to presidential concentration of power may, in some important subset of cases, alter our conclusions about the necessity or advisability of strict, externally enforced limits on the President's power to act unilaterally.

B. *Responsibility Shifting*

The preceding section focused on one critique of the separation of powers: that it is ineffective because presidents have both the ability and the incentive to arrogate more power to themselves. Our analysis suggests that concern may be exaggerated because rational voters can give presidents an electoral incentive to share decisionmaking authority with Congress. That observation, though, might raise a different concern about the separation of powers that is also prominent in the literature: that U.S.-style separation of powers undermines democratic accountability by obscuring responsibility for policy outcomes.[41] According to one variant of this hypothesis, politicians have both the opportunity and the incentive to exploit the separation of powers to confuse or obscure responsibility for difficult decisions, enabling the politicians to claim credit for policy successes and to avoid blame for policy failures.[42] Thus, Congress might seek to delegate to the courts or to administrative agencies,[43] or (as suggested in the preceding sec-

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[41] *See supra* pp. 625–26.

[42] *See* Powell & Whitten, *supra* note 2; Rudolph, *supra* note 7, at 196; R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 372, 387–88 (1986); *see also* Charles O. Jones, *The Diffusion of Responsibility: An Alternative Perspective for National Policy Politics in the US*, 4 GOVERNANCE 150 (1991). Some commentators have argued that such blame-evasion strategies become particularly pronounced during periods of divided government. *See, e.g.*, Sundquist, *supra* note 18, at 630 (observing that the President will tend to blame the opposition during divided government for policy failures like the deficit whereas the majority party in Congress will tend to blame the President).

[43] *See* Aranson et al., *supra* note 16 (discussing strategic legislation delegation to agencies); Alberto Alesina & Guido Tabellini, *Why Do Politicians Delegate?* (Nat'l Bureau of Econ. Research, Working Paper No. 11531, 2005), *available at* http://www.nber.org/papers/w11531 (same); *cf.* Eli

tion) the President might seek congressional authorization as political insurance for some of his high-risk policy initiatives.[44]

Our analysis suggests an alternative, and more optimistic, explanation for behavior that superficially looks like "responsibility shifting" or "blame avoidance." Rather than being the result of voter confusion or uncertainty about political responsibility, such behavior may in fact reflect a rational political response to voters' electoral strategies. In our framework, voters manipulate the incentives of an agenda setter (like the President) to discourage excessive unilateral action and to encourage the agenda setter to seek the assent of other agents before undertaking controversial policy initiatives. Politicians who respond to these incentives by sharing power are not "fooling" the voters about responsibility for policy; on the contrary, they are responding to voter strategies designed to reduce political agency slack. Understood this way, our framework helps explain (1) why the President (or other agenda setter) can reduce his political risk by seeking and obtaining the approval of another government branch, but will dramatically increase his political risk if he acts unilaterally;[45] and (2) why the President (or other agenda setter) may sometimes "posture" by proposing actions he does not actually want to take, compelling another branch to state its opposition.[46]

As an empirical matter, presidential use-of-force decisions, and the political response to them, are broadly consistent with our argument. Although presidents sometimes act unilaterally, they frequently seek congressional approval, and when they do, the adverse political fallout from interventions that go bad is lessened. Of course, seeking congressional authorization does not ensure that a President and his party will not suffer any backlash from a failed military engagement; the President is the agenda setter in national security issues and bears the bulk

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M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349 (1993) (discussing strategic legislative delegation to courts). However, a significant weakness in the blame-deflection theory of delegation to courts and independent agencies is that it assumes an electorate sophisticated enough to recognize the delegation, but not sophisticated enough to recognize the delegator's complicity in it. *See* Matthew C. Stephenson, *"When The Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 62–63 (2003).

[44] *See* Nzelibe, *supra* note 4.

[45] *See* Jones, *supra* note 42, at 150–55.

[46] The latter observation is broadly consistent with the claim by Professors Tim Groseclose and Nolan McCarty that an agenda setter can improve its standing by proposing policies that are vetoed, because doing so makes the agenda setter look moderate and the veto player look more extreme. *See* Groseclose & McCarty, *supra* note 4. The causal mechanism in our framework is different, however. Voters in our analysis do not acquire additional information about the President's type. Rather, in our analysis voters provide greater support in order to offset the President's incentives to embark on unilateral action.

of the blame for military failure.[47]   Nonetheless, presidents typically suffer much more adverse political consequences from unpopular military engagements when the President initiated the engagement without congressional support.[48]   That said, the fact that presidents can reduce their exposure to political risk is only marginally helpful in comparing our hypothesis about voter-induced decisionmaking to the more conventional clarity-of-responsibility argument, since with respect to the political consequences to the President of policy failure, these competing hypotheses make observationally equivalent predictions. How can we assess whether seeking the involvement of another branch is a way for politicians to *evade* voter discipline, as the conventional clarity-of-responsibility hypothesis suggests, or whether this responsibility-shifting behavior is actually *induced* by voter discipline, as our alternative framework suggests?

The short answer is that we cannot, at least not with the existing data, but we can find some suggestive evidence by looking at the political consequences to the President when the President acts unilaterally and the policy outcome is generally viewed as a success. If the clarity-of-responsibility hypothesis is correct, the President's increased downside risk when a unilateral intervention fails ought to be offset by political rewards of roughly equivalent magnitude when a unilateral intervention succeeds. In contrast, if the reduction in political blame is due to a rational voter strategy designed to increase incentives for joint as opposed to unilateral action, then the President's political benefit from unilateral policy success ought to be relatively modest compared to the blame the President would suffer in the event of unilateral policy failure.

While we are cautious about making any broad conclusions, there are at least some cases that seem to conform more closely to the latter prediction. Take, for instance, President Clinton's NATO-led intervention in Kosovo in March 1999.[49]   Congress never formally ap-

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[47] *See* Cotton, *supra* note 32, at 630–33 (observing that voters punished Democratic presidential candidates more than they punished Democratic members of Congress during the Vietnam and Korean wars); Nzelibe, *supra* note 4, at 924.

[48] Contrast, for example, the Democrats' rather tepid response to the unpopular, but congressionally authorized Iraq occupation in 2004, with President Truman's experience during the unauthorized Korean War. Once that war started to become unpopular, Truman was besieged by the political opposition and saw his public approval ratings slip to the twenties. *See* WILLIAM G. HOWELL & JON C. PEVEHOUSE, WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS 12–13 (2007) (describing congressional reaction to Truman's decision to intervene in Korea). Moreover, voter disillusionment with Truman's war efforts also contributed in part to Eisenhower's dramatic electoral landslide in 1952. *Id.*

[49] For a brief factual background of the Kosovo intervention, in which President Clinton ordered air strikes against Serbian forces in Kosovo in order to protect ethnic Albanians from Serbian aggression, see *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000). For an analysis of the international law and constitutional implications of the Kosovo intervention, see John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000).

proved the Kosovo operation, and President Clinton justified his unilateral action as an exercise of his constitutional authority as chief executive and Commander in Chief.[50] But while the Kosovo intervention was largely judged a success by the popular media,[51] Clinton's approval ratings did not budge, and President Clinton failed to reap any palpable political benefits from the intervention.[52] While we cannot observe the counterfactual world in which the result differed, public commentary during the period suggests that President Clinton's approval ratings would have declined dramatically had the intervention ended in a stalemate or failure.[53]

Even when presidents enjoy popular support from successful unilateral interventions, such support is often short-lived and rarely transferable to their other foreign policy initiatives. President Reagan's unilateral intervention in Grenada is a case in point. President Reagan ordered the intervention on the Caribbean island on October 25, 1983, approximately two days after the bombing of the Marine barracks in Lebanon — a tragedy that left 241 U.S. servicemen dead and dozens injured.[54] Given the unfavorable domestic political climate surrounding the Beirut bombings, initial congressional criticism of the Grenada intervention was pronounced, with even key congressional Republicans publicly expressing strong misgivings.[55] But as the spectacle of rescued American medical students filled television screens in the wake of the intervention, President Reagan's favorable opinion polls tempo-

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  [50] *See* Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 PUB. PAPERS 459 (Mar. 26, 1999). President Clinton received some congressional political insurance when the Senate (but not the House) passed a resolution the day before he ordered the attack authorizing the President to conduct military air operations in conjunction with other NATO forces. S. Con. Res. 21, 106th Cong. (1999). The House rejected the Senate resolution authorizing the conflict by a tie vote of 213–213. *Campbell*, 203 F.3d at 20. Moreover, the House also rejected a resolution providing for the declaration of war by a vote of 427–2. *Id.*; *see* H.R.J. Res. 44, 106th Cong. (1999).

  [51] *See, e.g.*, Javier Solana, *NATO's Success in Kosovo*, FOREIGN AFF., Nov.–Dec. 1999, at 114.

  [52] MATTHEW A. BAUM, SOFT NEWS GOES TO WAR 328 n.8 (2003) ("President Clinton's public approval remained flat following NATO's victory in Kosovo.").

  [53] *See, e.g.*, *The Capital Gang* (CNN television broadcast June 5, 1999) (statement of Margaret Carlson) ("[The potential benefit of a NATO victory is] not as big a plus as it would have been a minus [if the intervention had failed].");*see also* Jane Perlez, *Clinton's Quandary: No Approach To End War Is Fast or Certain of Success*, N.Y. TIMES, Apr. 29, 1999, at A16. Also, after sidestepping staunch Republican opposition in Congress, the Clinton Administration went to great lengths to forestall any political fallout from the Kosovo intervention by making casualty avoidance a political priority. *See* BAUM, *supra* note 52, at 286–87; *see also* WESLEY K. CLARK, WAGING MODERN WAR 419 (2001) (observing that the Kosovo intervention was characterized by "the exclusive reliance on [high-tech] airpower, the reluctance to accept friendly casualties, the horror of civilian casualties on any side, . . . and the impact of the media").

  [54] Joel Brinkley, *House Study Finds Officers at Fault in Beirut Bombing*, N.Y. TIMES, Dec. 20, 1983, at A1.

  [55] Nzelibe, *supra* note 10, at 1037 (discussing the opposition to the Grenada invasion by certain Republican legislators).

rarily soared.[56] The intervention also had a brief spillover effect: President Reagan enjoyed a bump in the polls for the Lebanon deployment. But the euphoria surrounding the intervention fizzled by early 1984.[57] Any illusions that the successful Grenada intervention would help shore up support for the Lebanon deployment were put to rest shortly thereafter.[58]

Again, we are not suggesting that presidents will never obtain substantial political credit for their unilateral military initiatives. Indeed, our stylized analysis in Part II implies that the President *will* sometimes act unilaterally, over congressional opposition, when he has the option to do so, and will receive some political benefit when he does so and the outcome is deemed a success. That said, our analysis implies that, given the increased political risks associated with unilateral military initiatives, presidents are unlikely to embark on such initiatives unless they involve relatively low-stakes situations in which the public has little interest, or the President anticipates both congressional opposition and a very high likelihood of military success.[59] While the existing evidence does not clearly distinguish our hypothesis from the more familiar versions of the responsibility-shifting argument, our analysis does offer a different — and more optimistic — account for behavior patterns that look like responsibility shifting.

C. Gridlock

We have shown how our analysis suggests a guardedly optimistic response to two common critiques of the separation of powers — that separation of powers is *ineffective*, because the President has incentives to expand his own authority that cannot be effectively checked, and that separation of powers *undermines accountability* by enabling political actors to obscure responsibility for policy decisions. We now consider yet a third common critique of U.S.-style separation of powers: that additional checks and balances — in the lingo of contempo-

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[56] *Id.* at 1038.

[57] In a January 1984 Gallup poll, about 52% of the respondents said they thought it was a mistake for the United States to send the Marines to Lebanon, in contrast to 45% in the immediate aftermath of the Grenada intervention. *See* THE GALLUP POLL: PUBLIC OPINION 1984, at 21–22 (1985).

[58] By early 1984, Democratic members of Congress started introducing legislation that would ostensibly cut off funding for the deployment in Lebanon. *See* Nzelibe, *supra* note 10, at 1031–32; *see also* Steven V. Roberts, *House Democrats Draft Resolution on Beirut Pullout*, N.Y. TIMES, Feb. 1, 1984, at A1. Under congressional pressure, President Reagan formally ended the American deployment in Lebanon in March 1984. Richard Halloran, *U.S. Withdrawing Its Military Force on Lebanon Coast*, N.Y. TIMES, Mar. 31, 1984, at 1.

[59] In this respect, President Truman's unilateral foray into Korea was something of a historical anomaly. For the most part, as public awareness of an international crisis becomes more pronounced, we would anticipate presidents to be leery of escalating the crisis unless they are assured of either formal congressional support or a relatively quick and easy victory.

rary political science, additional "veto players" — tend to create "grid-lock" or "status quo bias."[60] The prevailing positive account of policy gridlock is straightforward: multiple veto points increase constraints on policy change because the veto players (for example, the median member of Congress and the President) will often have conflicting pre-ferences.[61] Thus, all else equal, we should expect more frequent policy change when power is concentrated in one institution, or when the government is unified under a disciplined political party.[62] Yet again, our theoretical analysis suggests conclusions that are different from — and more optimistic than — the conventional wisdom: the addition of another veto player need not substantially increase status quo bias — indeed, under some conditions, it may not increase status quo bias at all.

Although adding a veto player (for example, Congress) has the straightforward first-order effect of blocking some initiatives that the agenda setter (for example, the President) would otherwise have pre-ferred to adopt, which reduces the frequency of policy change all else equal, all else is *not* equal. The voters are aware that Congress will screen out some presidential initiatives, and as a result, the voters will rationally readjust their electoral strategies. Recall that in the case of unilateral presidential authority, voters partially compensate for the risk that the President may be biased by using an asymmetric electoral strategy that makes the new policy less attractive. In a separation of powers regime, the voters reduce this asymmetry, which in turn in-creases the frequency of policy change, all else equal. This second-order effect — the change in voter strategy — may partially or fully offset the first-order effect of the additional veto player.

It is therefore difficult to state with confidence whether the addi-tion of a veto player reduces the ex ante expected level of policy out-put, which means that relying on either divided government or the se-

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[60] Traditionally, commentators have viewed policy gridlock as one of the prominent failings of both the United States's constitutional structure and its weak political parties. One such early example is SIDNEY GEORGE FISHER, THE TRIAL OF THE CONSTITUTION (Philadelphia, J.B. Lippincott & Co. 1862). For a detailed analysis of Fisher's thesis and its shortcomings, see William H. Riker, *Sidney George Fisher and the Separation of Powers During the Civil War*, 15 J. HIST. IDEAS 397 (1954). Perhaps the classic statement of this problem can be found in WOOD-ROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54–81 (Transac-tion Publishers 2002) (1908).

[61] *See* Gary W. Cox & Mathew D. McCubbins, *The Institutional Determinants of Economic Policy Outcomes*, *in* PRESIDENTS, PARLIAMENTS, AND POLICY 21, 61–63 (Stephan Haggard & Mathew D. McCubbins eds., 2001); Tsebelis, *supra* note 3, at 296–97. *See generally* GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING (2d ed. 1997).

[62] *Cf.* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 8–10 (2003) (arguing that we now live in an era of divided government in which radical policy initiatives by the political branches are unlikely); Levinson & Pildes, *supra* note 20, at 2340–41 (suggesting that divided gov-ernment will make it more difficult for a government to implement significant legislation).

paration of powers as a predictor for lower policy output might be misguided. We do not have the data that would allow us to conduct rigorous comparative empirical tests of the hypothesis that voters off-set the addition of veto players by changing their electoral strategies. That said, our theoretical conjectures are broadly consistent with some of the findings in the literature exploring the effects of divided government on legislative output. In a sweeping review of legislation passed by Congress since 1946, Professor David Mayhew evaluated and rejected the received wisdom that certain features of the separation of powers — such as divided government — hinder legislative productivity.[63] Another piece of suggestive evidence is that, during periods of divided government, presidents suffer less blame for policy failure.[64] While this evidence is broadly consistent with the notion that elected politicians engage in responsibility shifting, it is also consistent with the hypothesis that voters do not need to rely as extensively on asymmetric political punishments to constrain the President during times of divided government. Either way, the implication is that a meaningful separation of powers reduces the President's downside electoral risks from policy initiatives, which should lead, all else equal, to a greater willingness to pursue such policies.

D. *Voter Welfare*

One traditional justification for the separation of powers asserts that separation of powers benefits voters by limiting the degree to which politicians cater to narrow interest groups.[65] Our analysis builds on this argument, showing another advantage of the separation of powers: it allows voters more levers to influence the conditions under which new policies can be adopted. Our analysis differs from the traditional argument in one crucial respect: in our model, voters are best off under a regime in which the agenda setter has the *option* to

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[63] DAVID R. MAYHEW, DIVIDED WE GOVERN 1–7 (2d ed. 2005) (arguing that there is no correlation between the passage of major legislation and the existence of one-party or divided government); *cf.* LOUIS FISHER, THE POLITICS OF SHARED POWER, at xi (4th ed. 1998) (observing that permanent impasses in the American system are exceedingly rare). *But see* William Howell et al., *Divided Government and the Legislative Productivity of Congress, 1945–94*, 25 LEGIS. STUD. Q. 285, 300 (2000) (concluding that divided government depresses "landmark" legislation, has no effect on important nonlandmark legislation, and has a positive effect on trivial legislation).

[64] *See* Stephen P. Nicholson, Gary M. Segura & Nathan D. Woods, *Presidential Approval and the Mixed Blessing of Divided Government*, 64 J. POL. 701, 703 (2002).

[65] *See, e.g.*, THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 290 ("[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights."); *cf.* KEITH KREHBIEL, PIVOTAL POLITICS 84–85 (1998) (arguing that large, bipartisan coalitions tend to have greater success breaking through the divisions inherent to U.S. lawmaking).

seek the approval of another branch, rather than a regime in which such joint approval is *required*.

At first glance, the notion that an "optional" separation of powers might be better than a mandatory one for controlling agency slack seems counterintuitive. After all, one would expect that increasing the number of mandatory veto points would decrease the opportunities for politicians to be captured by interest groups. But as our analysis shows, there are two types of costs associated with agency slack: (1) those costs associated with adopting policies that create private benefits for politicians but hurt the median voter (false positives) and (2) those costs associated with preventing policy changes that benefit the median voter but create private harms for politicians (false negatives). An optional separation of powers is more effective at minimizing these costs than is a mandatory separation (and both are more effective than a unilateral regime).

The basic intuition for this proposition is as follows: When voters are able to observe not only the policy outcome, but also the decisions that led to the adoption of the final policy, the structure of the separation of powers affects the number of degrees of freedom voters have to influence government decisions. Imperfectly informed voters can adopt more refined strategies when they can condition their voting strategies on a larger number of observed paths to a policy outcome. In the unilateral authority case, voters only have one lever — the relative credit and blame assigned to the President for policy success and failure, respectively. In the mandatory separation of powers regime, voters have two levers at their disposal: the relative credit and blame assigned to the President, and the relative credit and blame assigned to Congress. Finally, in the voluntary separation of powers regime, voters can assign the President different levels of relative credit and blame depending on whether the President acted unilaterally or with congressional authorization. This gives the voters more flexibility to "fine-tune" the conditions under which a new policy will be adopted.

To illustrate, consider the decision of a President to embark on a foreign military initiative. In a unilateral system, voters can mediate the risks of false positives (unjustified military interventions) through an asymmetric sanctioning strategy. However, such a strategy will not completely eliminate the risk of false positives and will increase the risk of false negatives. By contrast, in a mandatory separation of powers system, an unbiased Congress will screen out false positives — voters need only worry about false positives in situations in which *both* the President *and* Congress are biased in favor of war, which occur with lower frequency than do situations in which the President alone is biased. Voters can therefore reduce the asymmetry in their electoral sanctioning strategy, which in turn reduces the risk of false negatives. In an optional system of separated powers, the institutional dynamics are more complex, but also more advantageous to the voters.

Under mandatory separation of powers, voters' main costs are those from false positives, which occur when both the President and Congress are captured by the pro-war faction, and from false negatives, which occur when the President is unbiased but the voters' asymmetric punishment strategy deters the President from acting. When the President has the option of acting unilaterally *or* going to Congress, the voters can use a *different* sanctioning strategy in each of these circumstances. The voters can make joint decisionmaking relatively attractive to the President, which in turn allows the voters to use an asymmetric sanctioning strategy in order to offset Congress's possible bias without causing an excessive increase in the frequency of false negatives. The optional system thus enables the voter to encourage the President to adopt consensual decisionmaking procedures when such procedures are likely to pull policy toward the voter's preferred outcome. The President *may* act unilaterally, but since the President's choice to act unilaterally is costly from an electoral perspective, he will likely choose to act unilaterally only in those rare circumstances in which he is relatively sure of an outcome favored by voters. In sum, our central normative conjecture is that, when circumstances consistent with the principal assumptions of our analysis obtain, increasing the number of levers through which voters can influence policy outcomes will decrease the risks of policy abuse, all else equal.

IV. LIMITATIONS OF THE ARGUMENT

The analysis in Part II relied on a number of strong assumptions. Many of these assumptions, while unrealistic, are benign simplifications. Other assumptions, however, are more substantive. In this Part, we elaborate three of the most important assumptions that undergird our theoretical analysis: (1) the rationality of retrospective electoral sanctioning; (2) the efficacy of electoral incentives in disciplining politicians; and (3) voters' capacity to observe not only what policy was chosen, but also how (that is, through what institutional pathway) that policy was chosen. Our objectives in elaborating these assumptions are twofold. First, we want to delineate carefully the conditions under which our theoretical argument may apply — and, correlatively, the conditions under which it would *not* apply. Second, we want to suggest why these conditions, while not universal, are sufficiently common that our theoretical argument has real-world applicability.

A. Rational Retrospective Voting

We assume that voters are rational and that they vote retrospectively, rewarding or punishing incumbent politicians on the basis of their past behavior in office. Furthermore, we assume that voters adopt whatever retrospective voting strategy will induce the best achievable ex ante incentives for incumbent politicians. The assump-

tion that voters vote retrospectively rather than prospectively has significant empirical and theoretical support.[66] The assumption that voters' retrospective voting strategies are tailored to induce optimal ex ante incentives, however, is more problematic and controversial. An important contrary argument holds that voters' electoral behavior is driven principally by a desire to "elect good types," rather than to punish poor performance, and that what looks like retrospective sanctioning actually derives from the fact that voters learn important information about likely future behavior from past performance in office.[67] This contrary argument draws support from a powerful theoretical critique of our assumption, which we want to acknowledge and make as transparent as possible. That critique points out that our assumption requires a rational voter to make an electoral decision — retaining or rejecting an incumbent — in order to affect behavior that, at the time of the voter's electoral decision, has already occurred. But if a rational voter prefers one candidate to the other at the time of the election, how could that voter follow through on her threat (or promise) to punish (or reward) the incumbent on the basis of past performance?

There are three main lines of response to this critique. First, there may be conditions under which it is plausible to assume that some critical mass of voters is *indifferent* between the incumbent and the challenger with respect to expected future performance. (Any voter who is indifferent between the incumbent and the challenger at the moment of the election can vote any way she wants without violating the axioms of rational behavior.) This indifference might arise, for example, if the median voter thinks that all politicians are basically the same — that they all have some susceptibility to venality, incompetence, or capture, but that this propensity is basically constant across politicians. Further, at least for a subset of the electorate (probably at or near the median), the ideological differences between the candidates may not matter, because although the candidates may differ ideologically, they may diverge from the centrist voters by the same amount. It is more plausible to expect that such voters would adopt a voting strategy that maximizes their ex ante expected welfare.

Second, it might be possible for voters to commit to particular electoral strategies in advance. If such precommitment is possible, then as long as the incentives to deviate ex post are not too strong, retrospective voting may be consistent with rational behavior. It is not entirely

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[66] *See* FIORINA, *supra* note 2, at 6, 20–43; POWELL, *supra* note 2, at 47–51. Professor John Ferejohn has also argued that since politicians tend to have an informational advantage over voters in understanding the political landscape, voters economize by relying heavily on a politician's actual performance rather than his campaign promises. *See* Ferejohn, *supra* note 2, at 13.

[67] *See* Fearon, *supra* note 2, at 69.

clear, however, what devices voters might use to precommit themselves to an electoral strategy that is suboptimal ex post. Perhaps voters can condition themselves psychologically to follow through on their precommitment. Or perhaps organized interest groups can rely on reputational mechanisms by declaring in advance — in some way that would be costly to ignore later on — how they will react to various outcomes. We are skeptical about the plausibility of these sorts of commitment mechanisms, but we note that they are possible.

The third response is less theoretical than empirical. There does seem to be some degree of observed retrospective sanctioning behavior in actual elections. Some of this retrospective voting may in fact be prospective, in that voters may be using past performance to predict future performance, but there are some cases in which some voters appeared willing to vote against their interests in order to punish an incumbent for performance in office. Consider Democratic voters in 1968 who stayed home rather than vote for Hubert Humphrey, despite their clear preference for Humphrey over Richard Nixon, in order to punish the incumbent Democratic administration for the Vietnam War.[68] A more recent example might be Republicans and conservative independent voters who either stayed home or supported Barack Obama, despite a prospective preference for John McCain, in order to punish the Republican party for perceived incompetence and malfeasance under the George W. Bush Administration.[69] It is of course possible that this sort of retrospective voting, when it occurs, is emotional rather than rational, which raises legitimate questions about whether it is appropriate to study such behavior using a rational choice framework. While we acknowledge this concern, we think that one could alternatively interpret this phenomenon as evidence that a subset of rational voters have found some way, psychologically or institutionally, to overcome their commitment problem.

In the end, while we are aware of the problems with the assumption of rational retrospective voter sanctioning and the limits it imposes on our analysis, we nonetheless think that the pure sanctioning assumption is a reasonable starting point for exploring how alternative political institutions interact with voter behavior.

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[68] *See* E.M. Schreiber, *Vietnam Policy Preferences and Withheld 1968 Presidential Votes*, 37 PUB. OPINION Q. 91, 91 (1973) ("[D]isaffected Vietnam doves insisted in arguing that . . . the best vote for those of dovish persuasion would be no vote at all.").

[69] Sarah Baxter, *Republicans Defect to the Obama Camp*, SUNDAY TIMES (London), May 6, 2007, at 1-27 ("Disillusioned supporters of President George W. Bush are defecting to Barack Obama.").

B. *Effective Electoral Discipline*

Our analysis is premised on the idea that voters' anticipated electoral behavior can influence incumbents' policy choices. Several potential problems, however, might undermine the effectiveness of the electoral constraint. One obvious difficulty is that elections often involve a multitude of issues but only present the voter with a binary choice. Because voters have to base their decisions on a bundle of policy issues, an elected official might have some latitude to ignore the voters' preferences on some of those issues without significant risk of punishment.[70] This problem, though real, should not be overstated. Any politician who anticipates a close election will care about the political consequences of all her decisions. More importantly, in light of our key assumption (discussed further in section C) that voters can observe the decisions of each institutional actor involved in the policymaking process, our analysis will pertain principally to a relatively small number of high-profile, high-stakes issues where such voter attentiveness is plausible.[71] Those issues are likely to be particularly salient to voters' electoral decisions, so it will be harder for politicians to get away with bad policy choices on these issues by performing well on other issues.

The second possible problem with our assumption that elections are an effective constraint on incumbent politicians is that some incumbents might not seek, or might not be eligible for, reelection (for example, second-term presidents). But this concern should also not be overstated. As Professors Charles Ostrom and Dennis Simon have pointed out, "the [President's] need for public support never abates," even in his second term.[72] There are a number of reasons for this. First, presidential approval is very important for the success of the President's domestic and foreign policy initiatives.[73] Second, presi-

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[70] Professors Christopher Berry and Jacob Gersen suggest that one way to address this problem would be to create a plural executive in which discrete authority for each policy area is taken from the President and given exclusively to a directly elected executive official. *See* Berry & Gersen, *supra* note 4; *see also* Gersen, *supra* note 4 (taking this argument a step further by suggesting unbundling of authority across issue areas ought to be augmented by combining functional authority within issue areas into a single decisionmaker).

[71] To be sure, it is likely that politicians care not only about those issues that are contemporaneously salient to voters, but also about those issues that are likely to be salient during the next election. But since politicians may not always anticipate correctly all the potentially salient issues, it is plausible that they may err on the side of caution and be overinclusive in their judgments with respect to such issues. If so, the scope of issues affected by our analysis may actually be more extensive than we suggest.

[72] Charles W. Ostrom, Jr. & Dennis M. Simon, *Promise and Performance: A Dynamic Model of Presidential Popularity*, 79 AM. POL. SCI. REV. 334, 335 (1985).

[73] *See* Robin F. Marra, Charles W. Ostrom, Jr. & Dennis M. Simon, *Foreign Policy and Presidential Popularity: Creating Windows of Opportunity in the Perpetual Election*, 34 J. CONFLICT RESOL. 588, 589–91 (1990) (summarizing literature on how presidential popularity affects legislative productivity).

dents are motivated by legacy concerns and thus have an incentive to maintain legislative and personal influence during their waning days in office.[74] Finally, presidents have an interest in the electoral fortunes of their copartisans, including the fortunes of the party's successor-candidate.[75]

The third potential problem with the assumption that electoral discipline constrains incumbents concerns the assumption that voters have information about policy success or failure prior to the election. If there are significant lags between a policy decision and its observable effects, however, political leaders might be able to manipulate the institutional environment to avoid electoral punishment, at least in the short run. Thus, a President might decide to embark on an imprudent policy decision right before or after an election because he realizes that the consequences of the policy will not be observed before the election or will be forgotten by the time the next election occurs.

Our claims about the effect of different separation of powers regimes on voter behavior and incumbent incentives apply only in those cases where meaningful information about a policy's success or failure will become available before the election. That requirement does not mean that voters have to be able to observe the full effect of the policy — something that may never be completely known. (As the Chinese Premier Zhou Enlai reportedly remarked when asked in 1972 about the effects of the French Revolution, "It's too early to tell.") What it does mean is that there must be some meaningful feedback that the voters can use to decide whether to punish or reward the incumbent — for example, whether the war is going well or badly, whether the financial system has recovered or collapsed, and so forth.

Finally, it is worth observing that when electoral discipline is ineffective, questions about the degree to which different separation of powers regimes *complement* electoral discipline are rendered largely irrelevant. In such cases, the relevant questions about institutional design will likely turn on which separation of powers arrangements will best *substitute* for electoral discipline as a check on political agency slack. The institutional structures that may be most effective in complementing electoral discipline (when such discipline can impose meaningful constraints on politicians) may look quite different from the institutional structures that provide the most effective substitute constraints. Because this Article is concerned principally with exploring the former issue, we do not pursue this observation further, but we note that the possible distinction, or even tension, between institutions

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[74] *See* Levinson, *supra* note 10, at 956–57.

[75] Alberto Alesina & Stephen E. Spear, *An Overlapping Generations Model of Electoral Competition*, 37 J. PUB. ECON. 359, 361 (1988).

designed to complement and institutions designed to substitute for electoral control is an important and underexplored issue in the separation of powers literature.

C. Clarity of Responsibility

A crucial assumption of our analysis — indeed, the assumption that drives our most important results — is that voters observe not only the policy choice and the policy outcome, but also the way in which the policy was adopted: which institutions supported it, which opposed it, whether the President acted unilaterally or with congressional support, whether the proposal died due to lack of presidential support or due to congressional opposition, and so forth. But one might reasonably question whether, or under what conditions, a sufficient portion of the electorate is able to make such careful distinctions.

We acknowledge this limitation, and we make two observations about its implications for our conclusions. First, we do not think that our assumption that voters can observe how the policy choice was made is too stringent, at least for high-salience policy decisions. While the empirical evidence on voter confusion in attributing accountability under various institutional arrangements is mixed,[76] recent comparative studies regarding the effects of economic policy and outcomes on electoral choice tend to support our conjecture. For instance, Professor Christopher Anderson's study of the politics of blame in five European democracies found that voters tend to take a nuanced view of the institutional context when sanctioning political actors for economic outcomes.[77] Likewise, Professor Thomas Rudolph's more recent empirical study concludes that "citizens have the capacity to act as discriminating and sensible consumers of contextual information when making judgments of political responsibility."[78] We recognize, however, that our current knowledge about how voters attribute responsibility for policy outcomes under different institutional contexts remains imperfect, and thus our assumption here is necessarily speculative.

Second, we embrace the observation that adding too many participants to the decisionmaking process would make that process so complex that rational voters could not implement the kind of tailored electoral strategy we propose. (Without this consideration, our theoretical

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[76] *Compare* Bernard Manin et al., *Elections and Representation, in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 2, at 29, 47 (explaining that accountability is more difficult under coalition governments and divided government), *with* Helmut Norpoth, *Divided Government and Economic Voting*, 63 J. POL. 414, 426 (2001) ("There is no evidence that the American electorate is incapable of assigning responsibility for the economy because the executive and legislative branches of government are in different partisan hands.").

[77] *See* CHRISTOPHER ANDERSON, BLAMING THE GOVERNMENT 199–211 (1995).

[78] Thomas J. Rudolph, *Who's Responsible for the Economy? The Formation and Consequences of Responsibility Attributions*, 47 AM. J. POL. SCI. 698, 710 (2003).

analysis would imply the seemingly absurd hypothesis that arbitrarily increasing the degree of power diffusion and complexity in the policy process would always increase voter welfare.) Very few voters, regardless of their sophistication, would be able to make much headway in assigning blame or credit in a system in which a dozen or more government branches participated in proposing or vetoing policy initiatives. These complexity costs mean that the optimal number of policymaking pathways is finite and probably relatively small. That said, we do not think this consideration necessarily undermines the significance of our central normative claim regarding the benefits of an optional system of separated powers with only two branches.

CONCLUSION

Public law scholarship generally, and American constitutional law scholarship in particular, has not adequately explored how institutional factors such as the separation of powers influence voter behavior. Existing commentary tends to focus on the limitations or strengths of either electoral accountability or the separation of powers, but not on how these two regime characteristics interact. And, the extant scholarship that does focus on the relationship between these two control mechanisms has emphasized (and evaluated) the degree to which they are substitutes.

This Article suggests that rational voter behavior is shaped by how institutions diffuse political authority. When faced with an institutional context that affords elected officials more opportunities to pursue private or partisan objectives at the expense of the public welfare, voters will compensate by adopting a sanctioning and reward strategy that discourages the abuse of power. For example, voters will punish presidents more (and reward them less) for their policy decisions when they act unilaterally, but adopt a more refined strategy when presidents act jointly with Congress. Thus, this Article is intended as a contribution to a small but growing literature that considers the ways in which separation of powers institutions and elections might function as complements.

Our analysis has implications for ongoing debates in both positive and normative constitutional theory. In contrast to the claim that avaricious presidential empire building will undermine the separation of powers regime, our analysis suggests that electoral constraints will often lead presidents to share power with Congress. In contrast to the claim that responsibility-shifting behavior in separation of powers systems shows that such systems undermine electoral accountability, our analysis suggests that rational voter strategies may induce behavior that looks like responsibility shifting, meaning that such behavior may be evidence that electoral accountability is working well, not poorly. In contrast to the claim that separation of powers induces status quo

bias, our analysis suggests that although the addition of another veto player may create an impediment to policy change, this effect may be partly or fully offset by a rational relaxation of the electoral deterrent to policy change.

Perhaps most significantly, we argue that voters are better off when they have more levers for controlling agency slack and that a separation of powers may therefore enhance voter welfare by increasing the number of policymaking "pathways" on which voters can condition their electoral responses. This hypothesis further implies that a system of optional separation of powers may sometimes be more beneficial for the electorate than a mandatory separation of powers system. We want to be appropriately cautious in advancing this hypothesis — we are *not* arguing for wholesale abandonment of strict power-sharing requirements. That said, this insight, and the reasoning behind it, may add an important dimension to ongoing discussions about optimal constitutional design.