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THE SUPREME COURT  
2015 TERM

FOREWORD:  
LOOKING FOR POWER IN PUBLIC LAW

*Daryl J. Levinson*

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INTRODUCTION

Constitutionalism is the project of creating, allocating, and constraining state power. Doing any of these things successfully requires constitutional designers and interpreters to determine how power should best be distributed among political actors and institutions, how much power these actors and institutions in fact possess, and how power shifts in response to legal and political arrangements and interventions. Yet, for all the attention that issues relating to power have received in U.S. constitutional law, courts and theorists seem surprisingly at sea about basic questions of where power is located in the American political system, how it should be distributed or redistributed, and even what “power” means or which kinds of power should matter for different purposes.

To begin, the focus of structural constitutional law — encompassing separation of powers, presidential power, federalism, and the administrative state — has been on how power is distributed between and among government institutions. Constitutional law polices the power of the presidency, Congress, administrative agencies, and the national government as a whole (*vis-à-vis* the states) with the aim of preventing these institutional actors from “aggrandizing” themselves at the expense of their “rivals,” or “concentrating” too much power and thereby upsetting the constitutional “balance” or “equilibrium.” From the Founding to the present, the central organizing principle of the structural constitution has been that power must be divided, diffused, or balanced to prevent — as Madison put it, in language that has become a maxim of structural constitutional law — the “accumulation of

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all powers . . . in the same hands,” which “may justly be pronounced the very definition of tyranny.”<sup>1</sup>

Managing the structural constitution in this way depends on a clear understanding of where power in government is located and how it shifts in response to changing circumstances. Yet that understanding has been conspicuously elusive. Consider debates about presidential power. Many see the President as increasingly “imperial,”<sup>2</sup> helming “the most dangerous branch,”<sup>3</sup> unimpeded by the separation of powers,<sup>4</sup> and even posing an existential threat to constitutional democracy.<sup>5</sup> Others see the presidency not as imperial but “imperiled,”<sup>6</sup> “manifestly underpowered,”<sup>7</sup> “enervated [and] splintered,”<sup>8</sup> subservient to “boundless . . . Congressional power,”<sup>9</sup> and indeed so “constitutional[ly] and practical[ly] weak[ly]” as to pose — once again — “a threat to American democracy.”<sup>10</sup> At the same time, still others perceive the President to be tightly constrained by “plebiscitary” responsiveness to public opinion and popular demands,<sup>11</sup> or by a “synopticon” of legal and political

<sup>1</sup> THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003); see also MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE *passim* (1995) (emphasizing “the Framers’ virtual obsession with the concentration of power,” *id.* at 106, and embracing that obsession as the core value of the structural constitution).

<sup>2</sup> See, e.g., BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 188 (2010) (“Almost forty years ago, Arthur Schlesinger, Jr. sounded the alarm in *The Imperial Presidency* (1973). Yet the presidency has become far more dangerous today.”); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007).

<sup>3</sup> Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1731 (1996); see also William P. Marshall, *Warning!: Self-Help and the Presidency*, 124 YALE L.J.F. 95, 98 (2014) (“The modern presidency has . . . ascended to the role of the most dangerous branch.”).

<sup>4</sup> See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 4 (2010) (“We live in a regime of executive-centered government, in an age after the separation of powers”).

<sup>5</sup> See ACKERMAN, *supra* note 2, at 4, 188 (describing the presidency as a “serious threat to our constitutional tradition,” *id.* at 4, and to “constitutional democracy,” *id.* at 188).

<sup>6</sup> ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 425 (2004) (quoting Gerald R. Ford & Richard Nixon, *Two Ex-Presidents Assess the Job*, TIME, Nov. 10, 1980, at 30 (statement of Gerald Ford)).

<sup>7</sup> WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY 172 (2016).

<sup>8</sup> Saikrishna Bangalore Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021, 1029 (2008) (describing the President in these terms when it comes to matters of law execution).

<sup>9</sup> JACK GOLDSMITH, THE TERROR PRESIDENCY 87 (2007) (quoting S. REP. NO. 100-216, at 457 (1989) (Min. Rep.)) (reflecting the views of certain minority members, including then-Representative Richard Cheney).

<sup>10</sup> Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2612 (2006).

<sup>11</sup> THEODORE J. LOWI, THE PERSONAL PRESIDENT, at xi (1985); see also POSNER & VERMEULE, *supra* note 4, at 12–13; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001).

“watchers” who monitor and check his every action.<sup>12</sup> It is unclear, however, whether these constraints are supposed to alleviate “tyrannophobic” fears of unchecked presidential power<sup>13</sup> or “strengthen” a “bigger and bigger presidency”<sup>14</sup> — or, somehow, both.<sup>15</sup>

Similar disagreements or confusions abound in other areas of structural constitutional law. In separation of powers cases, the Supreme Court has constructed a jurisprudence that “focuses on the danger of one branch’s aggrandizing its power at the expense of another branch,”<sup>16</sup> and of Congress in particular doing so.<sup>17</sup> Yet the Court has also taken notice of the fact that the post–New Deal “growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life,”<sup>18</sup> is a product of Congress’s apparent propensity to “yield up its own powers” by delegating policymaking authority to the executive — giving rise to competing constitutional concerns about Congress’s “[a]bduction of responsibility.”<sup>19</sup> In the “standard view” of American federalism, state and local power have been inexorably subsumed by an increasingly dominant national government.<sup>20</sup> That view may or may not be compatible with an emerging school of thought emphasizing the power states wield in their role as agents of the national government — the “power of the servant,” as opposed to the “power of the sovereign.”<sup>21</sup> Longstanding fears of “government by judiciary” have been based on the belief “that much of the task of governance and policymaking has been . . . commandeered by an unelected federal judiciary, in particular the Supreme Court,”<sup>22</sup> an institution that has seized for itself “*super*-legislative power.”<sup>23</sup> This

<sup>12</sup> JACK GOLDSMITH, *POWER AND CONSTRAINT 207–11* (2012).

<sup>13</sup> See POSNER & VERMEULE, *supra* note 4, at 176–77.

<sup>14</sup> GOLDSMITH, *supra* note 12, at xv.

<sup>15</sup> See *id.* at 252.

<sup>16</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 535 (2010) (Breyer, J., dissenting) (emphasis omitted) (quoting *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991)).

<sup>17</sup> See *id.*

<sup>18</sup> *Id.* at 499.

<sup>19</sup> See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring) (“[O]ne Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design.” (quoting *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring))).

<sup>20</sup> William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1356 (1994).

<sup>21</sup> See Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 33 (2010).

<sup>22</sup> Frederick Schauer, *The Supreme Court, 2005 Term — Foreword: The Court’s Agenda — and the Nation’s*, 120 HARV. L. REV. 4, 7 (2006); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 2 (1991) (presenting the view that the Court is “powerful, vigorous, and potent” in governing society).

<sup>23</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) (internal punctuation omitted); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 249 (2004) (observing that the Court has “made its grab for power” by asserting judicial supremacy). *But cf. Obergefell*,

is the same Supreme Court that has long been viewed as the “least dangerous branch,”<sup>24</sup> subservient to the political branches and popular majorities,<sup>25</sup> lacking effective power to effectuate political or social change,<sup>26</sup> and playing at best a marginal role in national policymaking.<sup>27</sup> These and many other conflicting claims and observations about power proliferate, but it is unclear what, if anything, courts and commentators are really disagreeing about, or how divergent opinions might be adjudicated or reconciled.

A further, and deeper, ambiguity lies in how the power of government institutions at the level of constitutional structure is supposed to relate to the power of “democratic”-level political actors such as voters, interest groups, political parties, and cohesive minorities. We are told by Madison that the accumulation of too much power in the same hands is tantamount to tyranny — but in *whose* hands? It is one thing to ensure that power is divided between the President and Congress. It is quite another to ensure that power is divided between Democrats and Republicans, the rich and the poor, or racial or religious majorities and minorities, or to prevent one such group from tyrannizing the other. At the institutional level, Madison promised that the constitutional design of government would allow “[a]mbition” to “counteract ambition,” resulting in a balanced equilibrium in which no branch could accumulate tyrannical power.<sup>28</sup> At the level of interests and social groups, Madison suggested an analogous mechanism for balancing power: shifting authority to the national government of an extended republic would create pluralist political competition among many different factions, preventing any one from becoming tyrannically dominant.<sup>29</sup> How these two sets of ideas about balancing power — *Federalist No. 51* on the power of institutions, *Federalist No. 10* on the power of interests — were supposed to relate to one another was left unexplained.

Contemporary constitutional law has perpetuated the same divide. The law and theory of constitutional structure remains fixated on the

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135 S. Ct. at 2631 (Scalia, J., dissenting) (warning of the Court’s “impotence” if it loses political backing).

<sup>24</sup> See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); see also THE FEDERALIST NO. 78, *supra* note 1, at 464 (Alexander Hamilton).

<sup>25</sup> See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

<sup>26</sup> See ROSENBERG, *supra* note 22, at 3.

<sup>27</sup> See Schauer, *supra* note 22, at 11; see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS 7* (2004) (arguing for a “middle ground” view of the influence and efficacy of Supreme Court decisions).

<sup>28</sup> THE FEDERALIST NO. 51, *supra* note 1, at 319 (James Madison).

<sup>29</sup> THE FEDERALIST NO. 10, *supra* note 1, at 75–79 (James Madison); see also THE FEDERALIST NO. 51, *supra* note 1, at 319–20 (James Madison).

distribution of power among government institutions, maintaining “a deep and enduring commitment to separating, checking, and balancing state power in whatever form that power happens to take.”<sup>30</sup> Yet beyond ritualistic citation of the Madisonian maxim about the accumulation of power and tyranny, courts and scholars seldom pause to ask or explain what purpose the (re)distribution of power is supposed to serve or why institutionally concentrated power is so dangerous.<sup>31</sup> Whatever the answer to these questions, it apparently has nothing to do with the kind of factional tyranny Madison was worried about in *Federalist No. 10*, as the power of interests and social groups is seldom any part of structural constitutional analysis. Concerns about the distribution of democratic-level power, to the limited extent they register at all in constitutional law, have been relegated to and scattered among a number of different areas of doctrine and theory. For example, the constitutional and statutory “law of democracy” allocates, and to some extent equalizes, electoral power with an eye toward ensuring that at least some types of groups — political parties, electoral majorities, and racial minorities — receive their fair share. And in the domain of constitutional rights, *Carolene Products* theory counsels that groups without adequate political power be granted special protection against discrimination and disadvantage.<sup>32</sup> But political process theory and voting rights jurisprudence are typically viewed as their own enterprises, disconnected from the separation of powers, federalism, or the overarching structural goal of diffusing and balancing power.

That disconnect becomes strikingly evident in how constitutional law addresses — or ignores — some of the most glaring power imbalances in American society. In both its law of democracy and equal protection cases, for instance, the Supreme Court has purported to care about equalizing the political power of citizens or protecting “politically powerless” groups against discrimination. Yet evidence that some

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<sup>30</sup> Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 517 (2015); see also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2348 (2006) (embracing “the dominant perspective of constitutional law and theory, taking for granted that some substantial measure of intragovernmental competition . . . and checks and balances is desirable”).

<sup>31</sup> See JEREMY WALDRON, *POLITICAL POLITICAL THEORY* 55–62 (2016) (lamenting the lack of any explanation for why the institutional concentration of power should be viewed as inherently tyrannical in Madison, Montesquieu, or other canonical sources); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 165–66 (2015) (expressing puzzlement at the lack of any concrete analysis of what the separation of powers is supposed to be accomplishing by dispersing power among the branches); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 629 (2001) (noting with similar puzzlement the lack of attention in constitutional law to the question of why we should care about the balance of power among the branches).

<sup>32</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

groups in society seem to have little or no political influence is viewed as beside the point of constitutional analysis. In light of the much-cited Madisonian maxim, for instance, one might think that the increasing concentration of economic and political power in the hands of what many now describe as an “oligarchy” or a “moneyed aristocracy” in recent decades would be a constitutional problem of some urgency.<sup>33</sup> Yet it is not clear how, if at all, constitutional law might speak to this kind of power imbalance.<sup>34</sup> The apparent facts that “government policy bears absolutely no relationship to the degree of support or opposition among the poor”<sup>35</sup> and that “the preferences of the vast majority of Americans . . . have essentially no impact on which policies government does or doesn’t adopt”<sup>36</sup> have not been understood to raise voting rights, equal protection, or any other kind of constitutional problems. In constitutional law and theory as it currently stands, even the most extreme claim that concentrated wealth has so completely captured control of government that America is no longer a “republic” somehow passes the Madisonian maxim in the night.<sup>37</sup>

This Foreword attempts to make better sense of how power is, and should be, understood, located, and distributed in public law. More specifically, the Foreword argues that constitutional law and theory have been looking for power in the wrong places. At one level, this is because assessing the power of government institutions for purposes of structural constitutional analysis is a much more complex and challenging enterprise than courts and commentators seem to recognize. More fundamentally, the ultimate holders of power in American democracy are not government institutions like Congress and the President but democratic-level interests. Because constitutional analysis seldom looks beyond structural-level institutions, descriptive accounts of the location of power and normative commitments to diffusing and balancing power are both critically misplaced.

The project starts with the meaning of “power.” That term is used so promiscuously in constitutional and political discourse that it might

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<sup>33</sup> See Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671–72 (2014) (arguing that the concentration of economic and political power was once and should again be understood as a constitutional problem, while recognizing that this understanding has gone missing from current constitutional law).

<sup>34</sup> For innovative scholarly efforts to identify resources in constitutional law and theory that might be brought to bear, see generally *id.*; Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015); and Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. (forthcoming 2016) (on file with the Harvard Law School Library).

<sup>35</sup> MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 81 (2012).

<sup>36</sup> *Id.* at 1.

<sup>37</sup> For a version of the claim that the corrupting influence of wealth has undermined the American republic, see LAWRENCE LESSIG, *REPUBLIC, LOST* (2011).



seem hopeless to insist on a single definition. But, in fact, there is a simple and intuitive understanding of power that captures most of what concerns courts and theorists in the constitutional domain. For most (though not all) purposes, “power” in public law should be understood to refer to the ability of political actors to control the outcomes of contested decisionmaking processes and secure their preferred policies.<sup>38</sup> When we talk about power in political life and in constitutional law, this is the kind of power we are typically talking about: the ability to effect substantive policy outcomes by influencing what the government will or will not do.<sup>39</sup> Asking who has power in this sense is equivalent to asking, in Professor Robert Dahl’s famous formulation, “Who [g]overns?”<sup>40</sup>

Having established that conceptual focus, the Foreword continues in three Parts. Part I examines how the “Who governs?” question has been answered at the level of constitutional structure, where it has been directed toward government institutions — Congress, the President, administrative agencies, and the like. Courts and theorists have invested a great deal of effort in attempting to identify where, at the institutional level, power is located and relocated. Unfortunately, as the examples above illustrate, these efforts have been beset by confusion about how to identify and accurately map power. Focusing on the straightforward question of who decides policy outcomes, Part I aims

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<sup>38</sup> “Control” need not be complete; it can be shared among multiple actors. When this is the case, “influence” may be a better term.

<sup>39</sup> This understanding of power coheres with the most influential definitions in the social sciences. The ability of political actors to control governance outcomes and make others do what they want is one institutional manifestation of the “intuitive idea of power” influentially encapsulated by political scientist Robert Dahl: “*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do.” Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201, 202–03 (1957); see also 1 MAX WEBER, *ECONOMY AND SOCIETY* 53 (Guenther Roth & Claus Wittich eds., 1978) (defining power as “the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance”). The focus of attention here, as in Dahl’s and Weber’s work, is on power exercised through politics and government, as opposed to other social relations and processes. A broader view of power, beyond the scope of this project, would encompass other spheres of society or modes of social interaction. See, e.g., Michel Foucault, *Afterword: The Subject and Power*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208 (Hubert L. Dreyfus & Paul Rabinow eds., 2d ed. 1983) (conceptualizing power through “governance” as a pervasive feature of social life not limited to the state).

A follow-on literature in the social sciences expands upon Dahl’s definition of power. See Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947–49 (1962) (identifying a second “face of power,” *id.* at 949, beyond the ability of political actors to enact and veto policy, in controlling the policy agenda and preventing some possibilities from ever being considered); see also STEVEN LUKES, *POWER: A RADICAL VIEW* (1974) (identifying a third “face” in the ability of *A* to manipulate *B* to want or agree to a policy that does not serve his objective interests). All three faces of power could be encompassed by the working definition introduced in the text.

<sup>40</sup> ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (David Horne ed., 1961).

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to clarify where there is genuine disagreement and clear a pathway through a minefield of common misconceptions about the location and dynamics of power in the structure of government. In so doing, the discussion casts considerable doubt on the veracity of many conventional understandings of who is wielding or accumulating power within government and, by implication, on the ability of courts and other armchair observers to make such judgments with any reliability.

In any event, if the question of “Who governs?” is understood to mean who has power over policy outcomes, even accurate answers at the level of Congress or the President will only scratch the surface. The foundational power holders in American democracy are the coalitions of policy-seeking political actors — comprising officials, voters, parties, politicians, interest groups, and other democratic-level actors — that compete for control of these government institutions and direct their decisionmaking. As Part II elaborates, parsing power requires “passing it through” government institutions to the underlying democratic interests. Because structural constitutional analysis seldom takes this second step, its analysis of power is not only dubious in accuracy but also superstructural in import. When the analysis is fully carried through, it reveals that the distribution of power at the structural level seldom bears any systematic relation to the distribution of power at the level of interests.

The disconnect between the power of institutions and the power of interests calls into question constitutional law’s preoccupation with balancing or diffusing power at the level of branches and units of government. That disconnect also highlights constitutional law’s relative inattention to the distribution of interest-level power. Part III suggests that concerns about diffusing and equalizing power might be better directed toward the democratic rather than the structural level. While constitutional structure is at best a blunt instrument for distributing power among political interests and social groups, as this Part describes, other areas of constitutional and public law have more directly, albeit sporadically, taken up that task. The law of democracy, the *Carolene Products* approach to rights, and judicial interventions and institutional design strategies to prevent interest group “capture” of the administrative process are all mechanisms through which public law seeks to redistribute and balance power over government decisionmaking. In addition, taking a more expansive view of the sources of political power, any number of regulatory regimes that affect the distribution of money, mobilization, and other resources that can be leveraged into political influence might be seen in the same light. Part III discusses some of the possibilities and limitations of these different areas of public law in the hope of showing how they might be constructively viewed in a common frame, together with constitutional structure, as part of a broader jurisprudential agenda of distributing, diffusing, and balancing power.

In case it does not go without saying, this project bears no special relationship to the Supreme Court's most recent Term. But the 2015 Term did contribute at least its fair share to constitutional discussions of power. The Court issued a pair of terse but highly consequential decisions about power at the level of constitutional structure, imposing limits on executive "power grabs." The decision to block the Obama Administration's Clean Power Plan<sup>41</sup> cast doubt on the viability of the Paris Agreement and also on the President's power to act unilaterally and efficaciously on both the domestic and international fronts.<sup>42</sup> The Court's deadlock on the legality of the Administration's immigration reform plan<sup>43</sup> dealt a further blow to executive power and, more broadly, to the capacity of the national government to address major social problems under conditions of partisan gridlock — a different kind of power left depleted.

The Court's deadlock in that case and others this Term is a reminder that the Court itself has been a conversation piece for power in the structural constitution. Another manifestation of partisan gridlock, the Senate's unwillingness to act on the President's nomination of a Justice to fill the vacancy left by Justice Scalia, resulted in a series of 4–4 stalemates,<sup>44</sup> along with other cases in which the Justices reached agreement only by way of minimalist compromises.<sup>45</sup> Less capable of deciding significant policy questions, a "less than robust"<sup>46</sup> Court has been "diminished"<sup>47</sup> — or, we might say, disempowered.<sup>48</sup>

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<sup>41</sup> *Basin Elec. Power Coop. v. EPA*, 136 S. Ct. 998 (2016) (mem.).

<sup>42</sup> See Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), <http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html> [https://perma.cc/4AFQ-B4JL].

<sup>43</sup> *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>44</sup> See *id.*; see also *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (mem.) (per curiam); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.) (per curiam); *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072 (2016) (mem.) (per curiam).

<sup>45</sup> See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam) (remanding for consideration of a compromise solution that would provide insurance coverage for contraceptives to employees of religious organizations without requiring the organizations to take actions that would make them complicit, in violation of their religious beliefs).

<sup>46</sup> Linda Greenhouse, *The Supreme Court's Post-Scalia Term*, N.Y. TIMES (June 23, 2016), <http://www.nytimes.com/2016/06/23/opinion/the-supreme-courts-post-scalia-term.html> [https://perma.cc/KQ4B-L6KS] (commenting on the Court's "less than robust performance" owing to a lack of "blockbuster" decisions).

<sup>47</sup> Adam Liptak, *A Supreme Court Not So Much Deadlocked as Diminished*, N.Y. TIMES (May 17, 2016), <http://www.nytimes.com/2016/05/18/us/politics/consensus-supreme-court-roberts.html> [https://perma.cc/7VFC-UL9J].

<sup>48</sup> The future of the Court now rests on a presidential election campaign that itself has focused attention on issues of structural power, provoking unusual alarm in some quarters about how the imperial power of the presidency might be put to use. See, e.g., Marc Fisher, *Donald Trump and the Expanding Power of the Presidency*, WASH. POST (July 30, 2016), <https://www.washingtonpost.com/politics/donald-trump-and-the-dangers-of-a-strong-residency>

The short-staffed Court did manage to reach unanimity in two other major cases dealing not with the power of government institutions but with the power of voters and constituents. In *Evenwel v. Abbott*,<sup>49</sup> the Court rejected an attempt to reinterpret “one-person, one-vote” to require that election districts be drawn with equal numbers of eligible voters, as opposed to the standard practice of equalizing total population.<sup>50</sup> Justice Alito’s concurring opinion called attention to the fact that “fight[s] over apportionment” have always been about “naked power,”<sup>51</sup> and that this case was no exception.<sup>52</sup> The transparent political stakes of counting only eligible voters would be to suppress the voting power of urban areas with large populations of noncitizens and hence to shift power from Democrats to Republicans.<sup>53</sup> In *McDonnell v. United States*,<sup>54</sup> the Court overturned the corruption conviction of the former governor of Virginia, who had accepted gifts from a business owner in exchange for political favors.<sup>55</sup> The broader question implicated by the case, signaled by the defendant’s reliance on *Citizens United*,<sup>56</sup> is what kind of government influence wealthy individuals and groups will, or must, be allowed to buy, and what uses of public power for private ends will be considered “corrupt.”<sup>57</sup>

And then there were a number of other cases that might not seem to have anything to do with political or governmental power, but — as this Foreword will suggest — should be understood as of a piece.<sup>58</sup> In *Friedrichs v. California Teachers Ass’n*,<sup>59</sup> the Court came within a vote of doing away with mandatory representation fees and thereby deci-

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/2016/07/30/69cfc686-55be-11e6-b7de-dfe509430c39\_story.html [https://perma.cc/ZAR5-6JPQ]; Conor Friedersdorf, *End the Imperial Presidency Before It's Too Late*, THE ATLANTIC (May 23, 2016), <http://www.theatlantic.com/politics/archive/2016/05/donald-trump-is-coming/483578> [https://perma.cc/8WWH-BEND]; Eric Posner, *And if Elected: What President Trump Could or Couldn't Do*, N.Y. TIMES (June 3, 2016), <http://www.nytimes.com/2016/06/04/opinion/campaign-stops/and-if-elected-what-president-trump-could-or-couldnt-do.html> [https://perma.cc/3VR8-92VC].

<sup>49</sup> 136 S. Ct. 1120 (2016).

<sup>50</sup> *Id.* at 1126–27.

<sup>51</sup> *Id.* at 1146 (Alito, J., concurring).

<sup>52</sup> *See id.* at 1149.

<sup>53</sup> *See* Adam Liptak, *Supreme Court Rejects Challenge on "One Person One Vote"*, N.Y. TIMES (Apr. 4, 2016), <http://www.nytimes.com/2016/04/05/us/politics/supreme-court-one-person-one-vote.html> [https://perma.cc/G7NW-GCAN] (“Had the justices required that only eligible voters be counted, the ruling would have shifted political power from cities to rural areas, a move that would have benefited Republicans.”).

<sup>54</sup> 136 S. Ct. 2355 (2016).

<sup>55</sup> *Id.* at 2361, 2375.

<sup>56</sup> Brief for the Petitioner at 25, *McDonnell*, 136 S. Ct. 2355 (No. 15–474) (citing *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

<sup>57</sup> *See generally* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA (2014).

<sup>58</sup> *See infra* notes 467–469 and accompanying text.

<sup>59</sup> 136 S. Ct. 1083 (2016) (mem.) (per curiam).

mating public sector unions.<sup>60</sup> Given the role that unions have played in the political mobilization of workers and in making government responsive to the preferences of the poor and middle class, the consequence of that decision would have been greater inequality not just of economic power but also of political power.<sup>61</sup> The two major constitutional rights cases from Texas, *Whole Woman's Health v. Hellerstedt*,<sup>62</sup> striking down parts of the state's restrictive abortion law, and *Fisher v. University of Texas at Austin*,<sup>63</sup> upholding its race-conscious college admissions program, can also be viewed as cases about political power. Judicial intervention on behalf of the socioeconomic opportunity and against the subordination of women and racial minorities can be understood, on the *Carolene Products* model, as compensating for a lack of political power while at the same time contributing to the empowerment of these groups.

These half-dozen cases would conventionally be viewed as raising very different kinds of constitutional concerns and assigned to separate categories of structure, democracy, and rights. The ambition of the pages that follow is to show how those categories and the apparently disparate array of legal and political controversies they contain might be integrated into a more cohesive and normatively compelling vision of power in public law.

## I. POWER IN GOVERNMENT

“That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish . . . .”<sup>64</sup> Justice Scalia's trenchant description of the stakes of the independent counsel case might be equally well applied to any issue of structural constitutional law. Thus, in separation of powers cases, as Justice Scalia suggests, the issue is typically how institutional rearrangements affect the relative power of the branches in controlling the decisions of the national government. Does the legislative veto or some limitation on the President's authority to remove agency officials impermissibly diminish the President's power over the direction of executive branch

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<sup>60</sup> *Id.*

<sup>61</sup> See *infra* notes 574–581 and accompanying text. Such a decision also would have shifted power in favor of Republicans over Democrats. See Garrett Epps, *The End of Public-Employee Unions?*, THE ATLANTIC (Feb. 20, 2015), <http://www.theatlantic.com/politics/archive/2015/02/the-end-of-public-employee-unions/385690> [https://perma.cc/83YZ-K2B5] (noting that the issue in *Friedrichs* “has an overwhelmingly partisan valence,” given that “public-employee unions are part of the base of the Democratic Party”).

<sup>62</sup> 136 S. Ct. 2292 (2016).

<sup>63</sup> 136 S. Ct. 2198 (2016).

<sup>64</sup> *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

decisionmaking, shifting some measure of control to Congress or unelected bureaucrats?<sup>65</sup> Other separation of powers cases assess claims of presidential power — for example to initiate armed conflicts or detain suspected terrorists<sup>66</sup> — and raise questions about what kinds of decisions the President can make unilaterally, when Congress or the judiciary must play a role in making those decisions, and what happens when the relevant institutional actors disagree. In federalism cases, similarly, the fighting issue is typically how much policymaking turf the national government will be permitted to control and how much will be left for state governments. For example, does the individual mandate of the Affordable Care Act go beyond the bounds of constitutional federalism by opening up a “vast domain” of federal policymaking power at the expense of the states?<sup>67</sup>

Needless to say, there is a great deal of disagreement about how these and similar constitutional questions should be decided and a great deal of complexity and variability in how they have, in fact, been decided by courts and other constitutional interpreters. As in most areas of constitutional law, courts and theorists disagree about the right approach to constitutional interpretation, the relevance and weight of different sources, and the meaning of the relevant words and phrases in the constitutional text. Even within a broadly shared framework of “balancing” power, “formalists” and “functionalists” in the separation of powers context disagree about whether the balance of power among the branches is best maintained through case-by-case analysis focused on practical consequences or by strict adherence to the rules laid down in the constitutional text.<sup>68</sup> Related disagreements arise over which normative standards should be used to measure whether power is “balanced” or has exceeded its constitutional bounds.<sup>69</sup> And all of

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<sup>65</sup> See, e.g., *id.* at 696–97 (majority opinion) (holding that the Independent Counsel Act is constitutional and does not increase judicial and legislative power at the expense of the executive branch); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (holding that dual for-cause removal limitations contravene the separation of powers); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding a statute’s legislative veto provision unconstitutional).

<sup>66</sup> See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that the President’s attempt to use a military commission to criminally try a detainee is illegal); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that an American citizen-detainee can challenge his designation as an enemy combatant under the Due Process Clause).

<sup>67</sup> See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) (“Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.”).

<sup>68</sup> See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1147–52 (2000) (describing the consensus view that “[t]he system of separation of powers is intended to prevent a single governmental institution from possessing and exercising too much power,” *id.* at 1148); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 230–31 (distinguishing the two camps as either taking a rule- or standard-based approach to the same project of balancing power among the branches).

<sup>69</sup> See Magill, *supra* note 68, at 1196.

these disagreements are colored and often exacerbated by competing visions of what the structural constitution is supposed to be accomplishing. Those who view the separation of powers as being about increasing government “efficiency” will find little in common with those who view it as about preserving “liberty”; the goal of enhancing “accountability” will often point in a different direction from that of encouraging “deliberation.”<sup>70</sup>

Abstracting from all of this disagreement, however, the least common denominator of most approaches to adjudicating or analyzing structural controversies is some assessment of where power in the structure of government is located and how it is distributed or redistributed by various legal and political arrangements.<sup>71</sup> Unfortunately, such assessments have been beset by persistent disagreement and confusion.<sup>72</sup> As this Part describes, structural constitutional analysis has foundered on a recurring set of ambiguities and discrepancies about the meaning and location of power in government.<sup>73</sup>

#### A. *Power of and over the State*

“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>74</sup> Presenting the challenge of constitutionalism in these terms, Madison highlighted the distinction between two kinds of power. One is the power *of* the state to control the governed. The other is power *over* the state, asserted through law and politics, that keeps the government in control. Distinguishing these two forms of power, and de-

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<sup>70</sup> For further discussion of these various functional goals, see *infra* notes 130–145 and accompanying text.

<sup>71</sup> For some approaches to constitutional interpretation, structural concerns about power, while perhaps relevant to constitutional design or external normative assessment, would not come directly into play in deciding cases and controversies. See, e.g., John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5 (2014) (arguing that constitutional law should not recognize freestanding principles of separation of powers or federalism but should simply enforce the textually specified rules and otherwise defer to congressionally determined arrangements).

<sup>72</sup> See *supra* notes 2–27 and accompanying text.

<sup>73</sup> For a pioneering discussion of the underdeveloped and conflicting conceptions of power and what it means to “balance” power in the context of separation of powers, see Magill, *supra* note 31. More recently, Professor Eric Posner has cataloged a similar set of confusions and provided an analytic framework for conducting balance-of-power analyses that is generally consistent with the approach taken in this Foreword. See Eric A. Posner, *Balance-of-Powers Arguments and the Structural Constitution* (Univ. of Chi. Inst. for Law & Econ., Working Paper No. 622, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2178725](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178725) [<https://perma.cc/SQ23-WWRH>]. The discussion that follows builds upon Professor Elizabeth Magill’s and Professor Posner’s foundational work.

<sup>74</sup> THE FEDERALIST NO. 51, *supra* note 1, at 319 (James Madison).

scribing their relation to one another, is an important first cut at disentangling power in the structural constitution.

1. *Capacity and Control.* — It is often said that constitutions both build and constrain state power.<sup>75</sup> Embedded in this statement are two different understandings of what “power” means. The kind of power that constitutions are supposed to build has been termed “infrastructural power,” meaning “the capacity of the state to actually penetrate civil society, and to implement logistically political decisions throughout the realm.”<sup>76</sup> State power in this sense means the ability to accomplish the kinds of things that states and governments are designed to be able to do: fighting wars, securing domestic order, raising revenues, promoting economic development, providing education and health care, and the like.<sup>77</sup> This is the kind of power that “state building” projects are supposed to build. We might refer to it as power in the sense of state capacity.<sup>78</sup>

The second ambition of constitutionalism — though it tends to be first and foremost in the minds of contemporary constitutional lawyers and theorists<sup>79</sup> — is to constrain, or control, state power.<sup>80</sup> To this end, constitutional law imposes rules about what the state can and cannot be used to accomplish and specifies rights that place some uses off limits. At the same time, the constitutional structure of government and the democratic political system aspire to put state power in the hands of those who are likely to make good decisions — controlling state power not by regulating its *uses* but by determining who its *users* will be. This is power in a different sense: the political power to determine what state capacity will and will not be used to accomplish. It is power *over* the power *of* the state.<sup>81</sup>

This is the kind of power — the political power of control over the state — that is most frequently front and center in constitutional law,

<sup>75</sup> See, e.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 6 (1995) (“Constitutions restrict the discretion of power-wielders because rulers, too, need to be ruled. But constitutions not only limit power and prevent tyranny, they also construct power . . .”).

<sup>76</sup> Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, 25 *EUR. J. SOC.* 185, 189 (1984) (emphasis omitted).

<sup>77</sup> See Daryl J. Levinson, *Incapacitating the State*, 56 *WM. & MARY L. REV.* 181, 195 (2014).

<sup>78</sup> See *id.* at 195–96; see also Posner, *supra* note 73, at 4 (distinguishing the “vertical” power of government to coerce citizens from the “horizontal” power of the different units of government).

<sup>79</sup> See WALDRON, *supra* note 31, at 29–30 (presenting the standard view of constitutionalism as the project of “controlling, limiting, and restraining the power of the state,” *id.* at 30).

<sup>80</sup> See generally Richard H. Fallon, Jr., *Constitutional Constraints*, 97 *CALIF. L. REV.* 975 (2009) (exploring how the Constitution constrains government decisionmakers).

<sup>81</sup> The distinction between these two senses of power is embedded in statements like the following: “Winners of political contests are positioned to use the control of the coercive power of the state to impose their preferences on losers through public policies.” Jacob S. Hacker & Paul Pierson, *After the “Master Theory”: Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 *PERSP. ON POL.* 643, 648 (2014).



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and it will be the focus of attention in the pages that follow. As these pages will elaborate, questions about who does or should exercise the power of controlling the state can be asked at the level of institutional and official actors, like the President, Congress, state governments, courts, and bureaucrats. These questions can also be asked at the level of voters and citizens: popular majorities, interest groups, and all manner of coalitions and factions that participate in political decisionmaking processes.

2. *Structural Linkages.* — While it is important to distinguish power in the sense of control from power in the sense of capacity, it is also important to appreciate how the two are intertwined. The more power the state possesses, the more it matters who controls that power. And the more that political actors doubt that the reins of state power will be held by well-motivated hands, the more they will seek to reduce or eliminate that power. Think of state capacity as a potentially useful but dangerous technology, like nuclear power. The first-best approach to such a technology is to tightly control how it is used, harnessing the benefits while avoiding the risks. But when perfect control is impossible and the downside risks are sufficiently great, we might consider a second-best, risk-averse strategy of preventing development of the technology altogether, or taking steps to outlaw or diminish it. In the case of state power, this nuclear (or no-nuclear) option might be described as state un-building, or “incapacitating” the state.<sup>82</sup>

This basic set of arguments about controlling, building, and incapacitating state power has provided a template for constitutional debates about government structure since the Founding. The design and ratification of the U.S. Constitution was itself an ambitious project of state-building. Federalists at the Founding sought to construct a stronger, centralized government comparable to those of developed European states.<sup>83</sup> Lacking the capacity to effectively borrow money, raise taxes, regulate commerce, promote trade, and fight wars, the national state under the Articles of Confederation was pathetically weak. The overarching ambition of the constitutional Framers was to create a centralized government powerful enough to fulfill the fiscal and military requirements of respectable statehood.<sup>84</sup>

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<sup>82</sup> Levinson, *supra* note 77, at 197 (“Incapacitating a state simply means eliminating or withholding some of the tools or resources that contribute to state capacity — reversing or stunting the process of state-building.”).

<sup>83</sup> See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT* 73–219 (2003).

<sup>84</sup> See *id.* In addition to their material ambitions, the Framers were also seeking recognition and acceptance for the United States as a full-fledged member of the Europe-centered society of states. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 952–61 (2010).

But the colonial experience and revolution had left Americans deeply suspicious of centralized state power. “Standing armies, centralized taxing authorities, the denial of local prerogatives, [and] burgeoning castes of administrators” did not bring back fond memories of the colonial period.<sup>85</sup> Debates over the Constitution thus pitted the state-building ambitions of the Convention against fears that a centralized state with expansive fiscal and military capacities would become a Frankenstein’s monster that would turn against its citizens. Antifederalists fanned these flames of doubt,<sup>86</sup> missing no opportunity to remind their fellow citizens of “the uniform testimony of history, and experience of society . . . that all governments that have ever been instituted among men, have degenerated and abused their power.”<sup>87</sup> If the Federalists got their way, Antifederalists warned, an expansive federal tax bureaucracy would appear in “every corner of the city, and country — It will wait upon the ladies at their toilet.”<sup>88</sup> A standing army would allow a dictatorial President or an oligarchical cabal of senators to rule “‘at the point of the bayonet . . .’ ‘like Turkish janizaries enforcing despotic laws.’”<sup>89</sup>

Federalist defenders of the Constitution advanced two kinds of arguments in response. One was that the fiscal and military powers of the national government that the Antifederalists found so threatening were also the powers necessary for national defense, domestic order, and effective governance — the “powers by which good rulers protect the people.”<sup>90</sup> To be sure, “in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused.”<sup>91</sup> But the Antifederalist prescription for a weak federal government would be tantamount to “cut[ting] a man in two in the middle to prevent his hurting himself.”<sup>92</sup> Publius asked incredu-

<sup>85</sup> STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* 20 (1982).

<sup>86</sup> See SAUL CORNELL, *THE OTHER FOUNDERS* 94–95 (1999).

<sup>87</sup> JACK N. RAKOVE, *ORIGINAL MEANINGS* 152 (1996) (quoting *A Farmer*, reprinted in 3 *THE COMPLETE ANTI-FEDERALIST* 191 (Herbert J. Storing ed., 1981)).

<sup>88</sup> CORNELL, *supra* note 86, at 95 (quoting *Essays of Brutus No. VI*, N.Y. J., Dec. 27, 1787, reprinted in 15 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 110, 113 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter 15 DHRC]).

<sup>89</sup> EDLING, *supra* note 83, at 110 (first quoting *Essays of Brutus No. I*, N.Y. J., Oct. 18, 1787, reprinted in 13 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 411, 420 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter 13 DHRC]; then quoting Patrick Dollard, Address to the South Carolina Convention (May 21, 1788), in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 336, 338 (Jonathan Elliot ed., 2d ed. 1888) [hereinafter 4 DEBATES]).

<sup>90</sup> EDLING, *supra* note 83, at 100 (quoting *A Landholder V*, CONN. COURANT, Dec. 3, 1787, reprinted in 14 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 334, 336 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 DHRC]).

<sup>91</sup> *THE FEDERALIST NO. 41*, *supra* note 1, at 252 (James Madison).

<sup>92</sup> EDLING, *supra* note 83, at 93 (quoting Oliver Ellsworth, Speeches in the Connecticut Convention (Jan. 7, 1788), in 15 DHRC, *supra* note 88, at 273, 278).

lously whether “[w]e must expose our property and liberty to the mercy of foreign invaders and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that [the government] . . . might endanger that liberty by an abuse of the means necessary to its preservation.”<sup>93</sup>

At the same time, Federalists argued that the best response to the risks of state power was not to reduce power but to control it. Democratic control over the national government would ensure that it served the interests of citizens and did not become a tool of oppression.<sup>94</sup> In place of the Antifederalist vision of “Congress as some foreign body . . . [that] will seek every opportunity to enslave us,” Federalists urged Americans to recognize that “[t]he federal representatives will represent the people; they will be the people;” their “interest is inseparably connected with our own.”<sup>95</sup> So long as the power of the national government remained securely under the control of the people, Federalists assured, it would only be used for good. That was, after all, the posture Antifederalists took toward state governments: states could be trusted with substantial power because they were under the close watch and secure control of their citizens. As the influential Antifederalist Federal Farmer put it, state governments ought to be both “strong and well guarded.”<sup>96</sup> It was only because they expected the national government to be much less well guarded — controlled by a group of distant and despotic aristocrats disconnected from “the body of the people”<sup>97</sup> — that the Antifederalists sought limitations on its power.

These lines of debate have been carried through constitutional development to the present. Thus, Professor Jerry Mashaw describes a

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<sup>93</sup> THE FEDERALIST NO. 25, *supra* note 1, at 161–62 (Alexander Hamilton).

<sup>94</sup> The meaning of “democratic” in the context of the founding debates is complicated. Federalists were “Republicans” in the sense that they believed the government should ultimately be tied to popular sovereignty. But they were at pains to prevent too much direct popular influence over government decisionmaking. See generally RAKOVE, *supra* note 87, at 203–43; see also MICHAEL J. KLARMAN, THE FRAMERS’ COUP 244 (2016) (emphasizing the Federalists’ anti-democratic ambitions).

<sup>95</sup> GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 545 (1969) (first quoting Samuel Stillman, Address to the Massachusetts Convention (Jan. 9, 1788), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 162, 167 (Jonathan Elliot ed., 2d ed. 1888) [hereinafter 2 DEBATES]; then quoting J.C. Jones, *id.* at 28, 29; and then quoting Samuel Stillman, *id.* at 162, 167).

<sup>96</sup> EDLING, *supra* note 83, at 182 (quoting Letter XVII from the Federal Farmer to the Republican (Jan. 23, 1788), reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 350, 356 (John P. Kaminski & Gaspare J. Saladino eds., 1995) [hereinafter 17 DHRC]).

<sup>97</sup> RAKOVE, *supra* note 87, at 230 (quoting Letter X from the Federal Farmer to the Republican (Jan. 7, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 285 (Herbert J. Storing ed., 1981)); see *id.* at 229–30.

“three-step process of building and binding administrative capacity”<sup>98</sup> that has characterized the development of the federal administrative state since the early Republic: “First, something happens in the world. Second, public policymakers identify that happening as a problem . . . and initiate new forms of governmental action . . . . Third, these new forms of action generate anxieties about the direction and control of public power. Means are thus sought to make the new initiative . . . accountable . . . .”<sup>99</sup> In other words, expansions in administrative state capacity go hand in hand with efforts to secure control over how that greater capacity will be deployed. The more powerful the administrative state becomes, the greater the stakes of who controls it.

These stakes have grown enormously over the course of American political and constitutional development. In the early Republic and antebellum America, the national government truly was “a midget institution in a giant land.”<sup>100</sup> At the start of the Jefferson Administration, the total federal workforce in Washington numbered 153.<sup>101</sup> As of 1840, the national government employed approximately 20,000 people, 14,000 of whom worked for the Post Office.<sup>102</sup> In place of the centralized bureaucratic capacity that defined European states, America operated with a decentralized administrative framework constructed loosely through the locally grounded institutions of courts and political parties.<sup>103</sup> Fast forward to today, when the federal government employs over two million civilians and 1.4 million active duty military personnel.<sup>104</sup> The government is not just visibly larger but — along countless dimensions in the military, economic, and social spheres — vastly more capable.

One reaction to the expansive modern regulatory state is to conclude, simply, that it has become too big and too dangerous, and that

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<sup>98</sup> Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1337 (2006).

<sup>99</sup> *Id.*

<sup>100</sup> EDLING, *supra* note 83, at 228 (quoting John M. Murrin, *The Great Inversion, or Court Versus Country: A Comparison of the Revolutionary Settlements in England (1688–1721) and America (1776–1816)*, in *THREE BRITISH REVOLUTIONS: 1641, 1688, 1776*, at 368, 425 (J.G.A. Pocock ed., 1980)).

<sup>101</sup> BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT* 112 (2009).

<sup>102</sup> Ira Katznelson, *Flexible Capacity: The Military and Early American Statebuilding*, in *SHAPED BY WAR AND TRADE* 82, 89 (Ira Katznelson & Martin Shefter eds., 2002).

<sup>103</sup> SKOWRONEK, *supra* note 85, at 19–35.

<sup>104</sup> See *Total Government Employment Since 1962*, U.S. OFFICE OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962> [https://perma.cc/KBL7-EUE6] (indicating that in 2014, the last year listed, the federal government employed 2.663 million civilians in the executive branch, 1.459 million uniformed personnel in the military, and 63 thousand people in the legislative and judicial branches).

the only solution is to shrink or dismantle it.<sup>105</sup> The Antifederalist reaction to state power has lived on as a pronounced libertarian strain in American political and constitutional thought, suspicious of the power of “big government” and ever vigilant about protecting the liberty of citizens against the ubiquitous threat of government tyranny. But Federalist responses have lived on as well. Proponents of a powerful presidency starting with Alexander Hamilton have emphasized the incapacity of government to regulate a modern industrial economy and the need for a state capable of matching and managing the “concentrations of [corporate] power on a scale that beggars the ambitions of the Stuarts.”<sup>106</sup> For those who accept the necessity and desirability of the formidable power of the administrative state, the crucial question is who will control it.<sup>107</sup> From this perspective, “[t]he history of the American administrative state is the history of competition among different entities for control of its policies” — the President, Congress, expert bureaucrats, interest groups, and democratic majorities.<sup>108</sup>

Or consider ongoing debates about the power of an increasingly “imperial” presidency. The “imperial” designation itself conflates two different claims about presidential power, one going to control and the other to capacity. The first is that Presidents have come to control more and more of the actions of the executive branch and the federal government as a whole, replacing Congress as the primary decisionmaker in government and “unifying” the executive branch so that agencies and bureaucrats increasingly march under White House orders.<sup>109</sup> The second claim is that the executive branch over which the President presides is increasingly formidable, featuring the vast bureaucracy, unlimited regulatory reach, and all the other resources of

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<sup>105</sup> See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004) (arguing that policies that cannot overcome a “Presumption of Liberty” are unlawful, *id.* at 259); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (arguing against the lawfulness of an administrative state that “increasingly imposes profound restrictions on [Americans’] liberty,” *id.* at 1); CHARLES MURRAY, *BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION* (2015) (describing how libertarian freedom has been eroded by the growth of government); *LIBERTY’S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE* (Dean Reuter & John Yoo eds., 2016) (cataloging recent exercises of administrative power that threaten individual liberty).

<sup>106</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938).

<sup>107</sup> Cf. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573 (1984) (conceptualizing separation of powers in the administrative state as shared control by Congress, the Supreme Court, and the President over administrative government).

<sup>108</sup> Kagan, *supra* note 11, at 2246.

<sup>109</sup> See HOWELL & MOE, *supra* note 7, at xvii (arguing that effective government depends upon shifting power to the presidency, which is “wired to be the nation’s problem-solver[] in chief”).

the administrative and national security state. The imperial President is the primary holder of power over a powerful state apparatus.<sup>110</sup>

As the language of “imperialism” suggests, that combination of powers poses great risk. Americans have long feared that the presidency would grow from a “foetus of [m]onarchy”<sup>111</sup> into a full-blown dictatorship, and the vast capabilities of the executive branch suggest that a presidential dictatorship would be more totalitarian than tinpot. On the other hand, as proponents of presidential power starting with Hamilton have emphasized, presidential power can also be a force for good. For those who look to the presidency for “energy”<sup>112</sup> and efficacy in government and on the world stage, imperial power is cause for celebration.<sup>113</sup> For example, Professors Eric Posner and Adrian Vermeule approvingly describe how modern Presidents have unshackled themselves from outdated constraints on executive capacity, such as constitutional rights and congressional limitations, and seized nearly complete control over the national state.<sup>114</sup> This perspective in part reflects what Posner and Vermeule portray as the indispensable benefits of presidential power: “[t]he complexity of policy problems . . . the need for secrecy in many matters of security and foreign affairs, and the sheer speed of policy response necessary in crises” play to the Executive’s distinctive institutional strengths.<sup>115</sup> If efficacious governance is going to come from anywhere, it will be the White House.

At the same time, for Posner and Vermeule, “tyrannophobi[c]” fears of unbounded presidential power are mitigated by the plebiscitary accountability of Presidents to the American public.<sup>116</sup> Other theorists take a similar view of “the presidency’s rise as not just the most dan-

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<sup>110</sup> See, e.g., William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008). Some of the variables to which Marshall attributes the expansion of presidential power, such as the growth of the federal bureaucracy and the military and intelligence capabilities of the U.S. government, speak to capacity. See *id.* at 514, 517. Others, such as greater presidential command over the administrative state and information disparities between the President and Congress, speak to control. See *id.* at 515–16.

<sup>111</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., 1911) (providing Edmund Randolph’s description of the presidency at the Philadelphia Convention).

<sup>112</sup> See THE FEDERALIST NO. 70, *supra* note 1, at 421 (Alexander Hamilton) (“Energy in the executive is a leading character in the definition of good government.”).

<sup>113</sup> See Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1383 (2012) (book review) (describing demands for a presidency that is “an instrument of effective power”).

<sup>114</sup> See POSNER & VERMEULE, *supra* note 4.

<sup>115</sup> *Id.* at 9.

<sup>116</sup> See *id.* at 176 (describing “the fear of unbridled executive power” in American political and constitutional culture as “tyrannophobia”). On the plebiscitary accountability of the modern presidency, see *supra* note 11 and accompanying text. To avoid confusion, note that “plebiscitary” is sometimes used in a different and nearly opposite sense to mean accountable only at election time but unaccountable to Congress, the press, or the public while actually governing. See, e.g., SCHLESINGER, *supra* note 6, at 255.

gerous branch, but the most accountable branch as well.”<sup>117</sup> Thus, Professor Jack Goldsmith describes how the menacing power of the post-9/11 presidency has given rise to a “synopticon” of “watcher[s]”<sup>118</sup> — Congress, journalists, human rights advocates, lawyers, and judges — who monitor, publicize, and check the President’s every move.<sup>119</sup> In Goldsmith’s view, expansive executive power begets intensive accountability, which in turn legitimates presidential power and even strengthens it.<sup>120</sup> Capacity and control — or in Goldsmith’s synonymous title, *Power and Constraint* — go hand in hand.<sup>121</sup>

Skeptics of the imperial presidency, like the Antifederalists at the Founding, are less sanguine about the possibility of democratic control. Professor Bruce Ackerman’s alarmist view of the modern presidency, for instance, is premised on democratic breakdown resulting in a “run-away presidency.”<sup>122</sup> Responsive to this concern, Ackerman proposes a set of reforms designed to bring the President back under democratic and legal control by “Enlightening Politics”<sup>123</sup> and “Restoring the Rule of Law.”<sup>124</sup> But Ackerman goes further, urging not just that the presidency be controlled but also that it be incapacitated — by limiting authority to engage in sustained military actions,<sup>125</sup> fragmenting the unitary and hierarchical structure of the executive branch,<sup>126</sup> or even eliminating the presidency altogether.<sup>127</sup> As Ackerman recognizes, draining the presidency of power would come at a high cost to proponents of “activist government — dedicated to the on-going pursuit of economic welfare, social justice, and environmental integrity.”<sup>128</sup>

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<sup>117</sup> Flaherty, *supra* note 3, at 1731.

<sup>118</sup> GOLDSMITH, *supra* note 12, at 206.

<sup>119</sup> *Id.* at xi–xiii.

<sup>120</sup> *Id.* at xv–xvi.

<sup>121</sup> Professor Stephen Skowronek sees a similar complementarity between capacity and control in the broad sweep of American political development with respect to the presidency, with each major historical expansion of presidential power accompanied by a corresponding effort to increase democratic accountability and control. See Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009).

<sup>122</sup> ACKERMAN, *supra* note 2, at 6. Ackerman argues that the democratic accountability of the President is being undermined by the diminishing influence of party elites and the professional press as gatekeepers, *see id.* at 18–29, and by a resulting “politics of unreason” that fogs democratic decisionmaking, *id.* at 9.

<sup>123</sup> *Id.* at 119–40.

<sup>124</sup> *Id.* at 141–79.

<sup>125</sup> *See id.* at 168.

<sup>126</sup> *See id.* at 152–59.

<sup>127</sup> *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 727–28 (2000) (proposing that the United States switch to a modified parliamentary system of government).

<sup>128</sup> ACKERMAN, *supra* note 2, at 124.

Nonetheless, in light of the grave downside risks, Ackerman is prepared to make this “tragic choice[.]”<sup>129</sup>

Longstanding debates about the separation of powers track the same dilemma of state power and dialectic between capacity and control. In one view, the primary point of separationism is to “preserve liberty by disabling government.”<sup>130</sup> Dividing the government into separate branches and chambers that must act in concert serves to multiply veto points, increase transaction costs, and make it generally more difficult for the national government to impose tyranny, threaten liberty, or do anything else.<sup>131</sup> For those who believe that the “the facility and excess of lawmaking seem to be the diseases to which our governments are most liable,” any “additional impediment” against legislation will be welcome.<sup>132</sup> As Hamilton summarized the argument, “[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.”<sup>133</sup> Contemporary libertarians make much the same calculation.<sup>134</sup> From the opposite direction, however, progressives and

<sup>129</sup> *Id.* The original critic of the imperial presidency, Arthur Schlesinger, struggled with the same dilemma but came out in a different place. Schlesinger argued that we should seek a “means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control.” SCHLESINGER, *supra* note 6, at xxviii; *see also* GOLDSMITH, *supra* note 12, at xvi (highlighting that a strong but better-controlled President was Schlesinger’s bottom line).

<sup>130</sup> CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 15–16 (1993); *see also* *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (“The Framers’ inherent distrust of governmental power was the driving force behind” the constitutional separation of powers, which serves to “secure individual liberty”); *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.”); John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 204 (2007) (arguing that the constitutional design “manifestly places value upon cumbersomeness, high transaction costs, and even (to some extent) gridlock”).

A competing strain of thought is that the separation of powers might actually foster government efficiency, in the manner of a Fordist assembly line. *See* AKHIL REED AMAR, *AMERICA’S CONSTITUTION* 64 (2005) (“Separation of powers also facilitate[s] a certain degree of specialization of labor, enabling each branch to . . . operate more efficiently.”); Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 115 (1971) (“[F]or the Framers, efficiency was a fundamental goal and a separate executive the necessary means.”); *see also* Magill, *supra* note 68, at 1184–85 (noting the tension between the efficiency and inefficiency justifications for separation of powers).

<sup>131</sup> It bears emphasis that impeding national government action does not simply mean that there will be less government and hence less risk of government tyranny. For one thing, the status quo, reflecting prior government action, may itself be tyrannical. For another, disabling the national government will create more space for state and local government policymaking, another potential source of tyranny.

<sup>132</sup> THE FEDERALIST NO. 62, *supra* note 1, at 376 (James Madison).

<sup>133</sup> THE FEDERALIST NO. 73, *supra* note 1, at 442 (Alexander Hamilton).

<sup>134</sup> *See, e.g.*, RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 5–6 (2014) (“[T]he classical view of American constitutionalism examined all legal interventions under a presumption of error. The structural protections of the separation of powers, checks and balances, federalism and the individual rights guarantees built into the basic constitutional structure were



other proponents of powerful government have long lamented a constitutional design that created a government “divided against itself” and thereby “deliberately and effectively weakened.”<sup>135</sup> Exacerbated by polarized political parties and divided government, separation of powers—induced gridlock is now more than ever a source of frustration for those who look to government in Washington for solutions to pressing social problems.

Here again, whether gridlocked and inefficient government is a bug or a feature of the constitutional design will depend on predictions of what an unfettered national state might use its power to accomplish. These predictions, in turn, will depend on who is likely to control the direction of the federal government. One dark possibility, salient at the Founding, was that control over one or more branches of government would fall into the hands of venal officials or dominant and dangerous factions.<sup>136</sup> In his *Federalist No. 51*, Madison famously defended the incapacitating potential of the separation of powers as an “auxiliary precaution[.]”<sup>137</sup> in case the right kind of democratic control over the government — whether stemming from its democratic “dependence on the people”<sup>138</sup> or the hope that “[e]nlightened statesmen will . . . be at the helm”<sup>139</sup> — failed.<sup>140</sup> From this perspective, the in-

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all part of combined efforts to slow down the political process that, left to its own devices, could easily overheat.”); see also Stephen Gardbaum, *Political Parties, Voting Systems, and the Separation of Powers*, 65 AM. J. COMP. L. (forthcoming 2017) (manuscript at 43) (on file with the Harvard Law School Library) (attributing “the Madisonian focus on divided government and political competition among institutions” in the U.S. political system to “[t]he risk-averse strain in American political culture that is deeply skeptical and fearful of government,” and has therefore prioritized “dispersing and slicing up political power”).

More generally, Adrian Vermeule identifies a prominent strain of “precautionary” thought in American constitutionalism, which he describes as follows:

[C]onstitutional rules should above all entrench precautions against the risks that official action will result in dictatorship or tyranny, corruption and official self-dealing, violations of the rights of minorities, or other political harms of equivalent severity. On this view, constitutional rulemakers and citizens design and manage political institutions with a view to warding off the worst case. The burden of uncertainty is to be set against official power, out of a suspicion that the capacity and tendency of official power to inflict cruelty, indignity, and other harms are greater than its capacity and tendency to promote human welfare, liberty, or justice.

ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 11 (2014).

<sup>135</sup> Pildes, *supra* note 113, at 1383 (quoting HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 40 (1915)).

<sup>136</sup> See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 42–44 (1985).

<sup>137</sup> THE FEDERALIST NO. 51, *supra* note 1, at 319 (James Madison).

<sup>138</sup> *Id.*

<sup>139</sup> THE FEDERALIST NO. 10, *supra* note 1, at 75 (James Madison).

<sup>140</sup> THE FEDERALIST NO. 51, *supra* note 1, at 319 (James Madison).

capacitating potential of separation of powers was supposed to be a substitute for reliably well-functioning democratic accountability.<sup>141</sup>

But separation of powers has also been viewed as a complement to democratic accountability.<sup>142</sup> From this perspective, legislative-executive separationism is supposed to facilitate broad-based interest representation and work together with elections to better reflect democratic will: “different branches chosen at different times through different voting rules might together produce a more accurate and more stable composite sketch of deliberate public opinion.”<sup>143</sup> Moreover, the branches are supposed to monitor and check one another on an ongoing basis, providing information to voters about the doings and misdoings of their representatives and thereby facilitating electoral control.<sup>144</sup> To the extent the system of separation of powers succeeds in fostering democratic accountability, it will no longer be needed as an incapacitation device.<sup>145</sup> The complementary relationship between power over the state and the power of the state might make the separation of powers self-defeating.

Separation of powers aside, the important general takeaway is the distinction and the relationship between these two kinds of power: capacity and control. Over more than two centuries, the constitutional state-building project has produced what is now a “global leviathan.”<sup>146</sup> This vast increase in the power of the American state has raised the stakes of the question this Foreword brings into focus: who controls it?

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<sup>141</sup> See Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 625 (2010).

<sup>142</sup> See Levinson & Pildes, *supra* note 30, at 2343–44.

<sup>143</sup> AMAR, *supra* note 130, at 64.

<sup>144</sup> See Nzelibe & Stephenson, *supra* note 141, at 626. Nzelibe and Stephenson advance the further argument that separation of powers can facilitate electoral control by informing the retrospective voting strategies of rational voters. *Id.* at 620–21.

<sup>145</sup> It is not at all clear that the separation of powers improves democratic accountability in comparison to plausible alternatives. A long line of thought compares the U.S. system of separation of powers unfavorably along this dimension to the British system of parliamentary government, unified by single party control of an omnipotent legislature. From this perspective, the American diffusion of power among the branches and chambers of Congress, especially when they are under divided party control, undermines the ability of voters to apportion responsibility. See Levinson & Pildes, *supra* note 30, at 2325–26, 2342–43. Other approaches to dividing power might do a better job of facilitating electoral accountability. See, e.g., Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010) (exploring the possibility of dividing government into branches not by function but by policy topic and suggesting that this approach might enhance electoral control).

<sup>146</sup> William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 758 (2008).

### B. *Doing Versus Deciding*

There is a tendency in public law to attribute power to any political actor or institution visibly exercising governmental authority.<sup>147</sup> Yet it is often the case that some other actor or institution is acting as a principal, making the relevant policy decisions and hence exercising the real power of control. Put differently, the proximate “doer” is not necessarily or even usually the “decider” of what should be done. Consequently, power in government cannot be reliably located by focusing myopically on the point of decision or action.

1. *Principals and Agents.* — Consider the familiar scenario of statutory delegations of broad policymaking authority by Congress to the executive branch. An intuitive and still commonly held view is that such delegations entail a “massive transfer of power” from Congress to the Executive, upsetting the constitutional balance between the branches.<sup>148</sup> A variant on this view is that broad delegations undermine democracy by shifting the locus of policymaking from elected representatives to administrative agencies, vesting authority in unaccountable bureaucrats to make policy in many domains.<sup>149</sup> Yet, as basic principal-agent theory would suggest, political delegation cannot be simply equated to giving away power. If Congress is delegating to agencies that share its preferences, or that can be influenced to adhere to those preferences, then Congress will lose no power over policymaking. To the contrary, the major effect on legislative power might be to increase capacity, enabling Congress to harness the expertise and other administrative capabilities of agencies to better effectuate its own policy goals. Far from an abdication of power, delegation can be an effective tool of congressional power.

In reality, of course, the consequences of delegation are more complicated than legislative abdication versus empowerment. As in any principal-agent scenario, delegation will inevitably come with some degree of slack that allows the Executive or agency to deviate from legislative preferences. Furthermore, there are actually multiple

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<sup>147</sup> See, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917 n.3 (2005) (viewing government institutions as exercising power whenever they “make[] policy by legislating, regulating, or adjudicating”).

<sup>148</sup> Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 710 (1994) (book review); see also Flaherty, *supra* note 3, at 1819–21; Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 177–80 (1994); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994).

<sup>149</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131–34 (1980) (“[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic.” *Id.* at 132.); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 3–21 (1993).

principal-agent relationships in play.<sup>150</sup> Most prominently, the President is also a political principal with the ability to influence agency decisionmaking and move policy in his preferred direction.<sup>151</sup> In addition, even after Congress and the President have had their say, whatever residual discretion is left in agencies will be parceled out among political appointees and professional civil servants, who can be further subdivided into policy specialists, scientists, lawyers, and other types, all potentially possessing different preferences over policy outcomes.<sup>152</sup> To further complicate matters, judicial review of agency decisionmaking empowers courts to influence policy outcomes in their own preferred directions, while also shifting the relative influence of all of these other actors.<sup>153</sup>

How delegation actually affects the distribution of power among all of these institutions and officials turns out to be complicated and context-specific; useful generalizations are hard to come by. Thus, political scientists continue to debate whether Congress or the President, as a general matter, exerts greater influence over agency decisionmaking.<sup>154</sup> With respect to agency officials, formal models and

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<sup>150</sup> See generally Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) (describing a variety of these nested principal-agent relationships in the administrative state in the context of arguing for a constitutional norm of greater supervision by principals and a reduction in agency slack).

<sup>151</sup> Whether the President has this power formally or merely functionally is open to debate. For an overview of the debate (as well as an argument for the latter position) see Peter L. Strauss, Foreword, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 697–98, 697 n.3 (2007). See also *infra* notes 238–280 and accompanying text (developing the distinction between the *de jure* and *de facto* powers of the presidency).

<sup>152</sup> See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–37 (2011); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 422, 430–35 (2015).

<sup>153</sup> See Kagan, *supra* note 11, at 2269–72.

<sup>154</sup> One camp asserts “congressional dominance,” Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766–70 (1983), emphasizing the ability of Congress to use “structure and process” to “hard-wire” agencies to do its bidding, Mathew D. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 185 (1999), kept in line by mechanisms of ongoing oversight and by threats of budget cuts, public hearings, and statutory overrides, *see id.* See also Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989) (extending the argument that Congress uses administrative procedures as a means of “guiding agencies to make decisions that are consistent with the preferences of the legislative coalition”). An opposing camp portrays the President as dominant, emphasizing veto power over initial delegations and subsequent statutory overrides, the President’s primary role in appointing and removing bureaucrats, and supervisory authority over agency decisionmaking — bolstered in recent decades by Office of Information and Regulatory Affairs (OIRA) review, the proliferation of policy czars, and other politicizing and centralizing measures. See Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1844–45 (2015); Kagan, *supra* note 11; B. Dan Wood, *Congress and the Executive Branch: Delegation and*

case studies of bureaucratic autonomy proliferate but generate few generalizable conclusions.<sup>155</sup> In the absence of focused empirical investigation in specific policymaking contexts, confident assessments of the consequences of delegation for the power of Congress, the President, bureaucrats, courts, and other political actors will remain elusive.

Constitutional federalism provides another illustration of the empirical difficulties of locating decisional power. Focused on the proximate doer, courts are quick to assume that legislation enacted by Congress should count as an exercise of national power and that state power is exercised in policy domains governed by state legislation. At the same time, however, courts and theorists recognize and indeed celebrate the possibility that states will have considerable control over the national lawmaking process through the various political safeguards of federalism.<sup>156</sup> To the extent that state governments or state-level constituencies can use their leverage over federal elections,<sup>157</sup> national political parties,<sup>158</sup> or the implementation of cooperative federalism schemes to influence national policy,<sup>159</sup> federal statutes may reflect their preferences as much as or more than the preferences of national officials and their constituents. In the other direction, national officials are understood to have many levers of influence over state policymaking, ranging from conditional subsidies to the threat of preemptive

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*Presidential Dominance*, in THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS 789 (George C. Edwards III et al. eds., 2011).

<sup>155</sup> See, e.g., DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY, 1862–1928 (2001) (analyzing bureaucratic autonomy in the Post Office, the Department of Agriculture, and the Department of the Interior); DANIEL CARPENTER, REPUTATION AND POWER (2010) (describing how the FDA gained power); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119 (1996) (using a formal model of institutional decisionmaking to argue that “control of the bureaucracy is a function of the interactions of the [P]resident and Congress,” *id.* at 163 (emphasis omitted)).

<sup>156</sup> See e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954). As Madison originally explained, the structure of constitutional federalism is supposed to enable “[t]he different governments . . . [to] control each other.” THE FEDERALIST NO. 51, *supra* note 1, at 320 (James Madison).

<sup>157</sup> See THE FEDERALIST NO. 45, *supra* note 1, at 287 (James Madison); Wechsler, *supra* note 156, at 544.

<sup>158</sup> See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 268–87 (2000).

<sup>159</sup> See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 472–75, 478–86 (2012) (describing and taxonomizing the kinds of power states wield under these regimes); Philip J. Weiser, *Toward a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 671 (2000) (“[T]he real authority under [cooperative federalism] regimes often rests with the states which ultimately exercise considerable discretion in making and implementing policy.”).

regulatory burdens.<sup>160</sup> The mutual influence of federal and state governments over one another's policies means that assessments of power based solely on the identity of the enacting legislature will never be reliable. Thus, direct control over corporate law by Delaware and other states does not rule out the possibility that "the risk of federal action heavily influences Delaware, [and] it follows that even when federal authorities do not take the issue away, federal power may make Delaware law."<sup>161</sup> The other way around, an oddity of the Court's anticommandeering rule, which is supposed to protect state autonomy and power against federal control, is that the rule was invented in the context of a state-requested federal statute that gave effect to a policy regime the states had constructed for themselves.<sup>162</sup>

Or consider the Supreme Court, an institution many see as "the final arbiter of critical political and social issues,"<sup>163</sup> asserting supremacy over constitutional interpretation,<sup>164</sup> and thus provoking endless hand wringing over the countermajoritarian nature of judicial review. From another perspective, however, the Court appears not supreme over the political branches and popular majorities but subservient to them. Generations of political scientists have followed Dahl in observing "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."<sup>165</sup> Owing to some combination of political selection of judicial appointments and ongoing mechanisms of control rang-

<sup>160</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 166–67 (1992) (emphasizing that the constitutional prohibition on commandeering does not rule out conditional spending or preemption as a tool of congressional influence over state governments); Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013) (reading *NFIB v. Sebelius* to leave Congress with considerable latitude to use conditional spending to influence states). But see Rick Hills, *Fair-Weather Friends of Federalism (and Nationalism) in King v. Burwell? The Dilemma or Supporting Principles that Hurt One's Cause*, PRAWFSBLAWG (Mar. 7, 2015, 9:40 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/03/fair-weather-friends-of-federalism-and-nationalism-in-king-v-burwell.html> [<https://perma.cc/NB73-E3B6>] (deriving from *NFIB* a broad anticoercion principle that would protect states against both conditional spending and conditional regulatory preemption).

<sup>161</sup> Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 591–92 (2003).

<sup>162</sup> See *New York*, 505 U.S. at 190–91 (White, J., concurring) (discussing how states requested that Congress oversee state-developed regional solutions to a 1970s waste disposal problem).

<sup>163</sup> Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1138 (2011).

<sup>164</sup> See H. Jefferson Powell, *Enslaved to Judicial Supremacy?*, 106 HARV. L. REV. 1197, 1197 (1993) ("For most of our history, most Americans have seen the Supreme Court as the ultimate interpreter of the Constitution, entitled . . . to impose its understanding of the Constitution on the states, the other branches of the federal government, and the people.").

<sup>165</sup> Dahl, *supra* note 25, at 285; see also FRIEDMAN, *supra* note 25, at 374–76 (documenting the Court's responsiveness to public opinion); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 25–27 (2007) (discussing the political constraints on judicial authority); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 265–67 (2010).

ing from threats of court-packing and jurisdiction-stripping to outright defiance, the empirical reality appears to be that the Court will rarely drift very far from the agenda of a dominant national political coalition.<sup>166</sup> Here again, how much power the Court actually possesses to make independent decisions, or how much power the political branches possess over judicial decisionmaking, are difficult empirical questions that cannot be answered by casual observation.

2. *Exercising Power by Doing Nothing.* — A major source of difficulty, intimately familiar to social scientists but often lost on lawyers, is that the exercise of power is often unobservable, or observationally equivalent to nonpower.<sup>167</sup> The fact that the political branches only rarely take action to discipline the Court — impeaching Supreme Court Justices, packing the Court, stripping its jurisdiction, or simply ignoring judicial decisions — might evince a lack of political control; but it might also evince perfectly effective political control, such that the Court never provokes the political branches to bring down the hammer.<sup>168</sup> Consequently, while we can see the Court deciding cases, we cannot easily discern the extent to which the Court’s decisions are dictated or influenced by the President or Congress. Put differently, while doing is observable, deciding is often not.<sup>169</sup>

<sup>166</sup> For surveys of the relevant political science literature, see LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 85–88 (2013); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 308–20 (2005).

<sup>167</sup> See Friedman, *supra* note 166, at 311–15.

<sup>168</sup> See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 995 (2002) (“If Congress and the executive have seldom exercised their power to impair the judiciary . . . this may be because the judiciary has acted in such a way that Congress and the executive have seldom felt the need to do . . .”).

<sup>169</sup> The examples discussed in the text could be multiplied nearly without end. The fact that the Senate has not rejected many judicial or executive appointments, for instance, should not count as evidence of the Senate’s limited influence over these “presidential” decisions. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 512 (2d ed. 2013) (making this point for agency officials and citing empirical research showing “that the Senate has a substantial influence on the policy preferences of presidential appointees, notwithstanding the fact that almost all appointees are confirmed”). *But see, e.g.*, Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 396 (citing the fact that “members of the opposition party vote to confirm 64 percent of the time” as evidence that “senators usually defer to the president in terms of judicial philosophy” when it comes to Supreme Court appointments). Likewise, the frequency of judicial invalidations of agency decisions is not a reliable indicator of the influence of judicial review on agency policymaking. See Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 285, 312 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010). *But see, e.g.*, Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1125–31 (discussing data on judicial review of agency rules and concluding that the low rate of reversals “appear[s] . . . to support [the] observation that ‘the courts generally let the agencies do what they want,’” *id.* at 1130 (quoting MARTIN SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 270–71 (1968))). And so on.

The same difficulty bedevils assessments of power in many other structural contexts. Returning to the question of who controls the bureaucracy, for example, it was once conventional wisdom that after enacting broad delegations Congress abandoned any effective control over agency policymaking. The seemingly indisputable evidence in support of this view was “the rarity of any visible use by Congress of its remaining levers of control — its ability to revise statutory mandates, reverse administrative decisions, cut agency budgets, block presidential nominees, or even conduct serious oversight hearings.”<sup>170</sup> As a subsequent generation of political scientists pointed out, however, congressional inaction is just as compatible with a reality in which Congress exercises perfectly effective control over agencies. Again, if Congress can create agencies that share its policy preferences or threaten agencies with sanctions if they deviate from congressional preferences, then agencies may behave just as Congress wants — obviating any need for resort to corrective measures.<sup>171</sup> Proponents of the congressional dominance view argue along these lines that, through some combination of clever *ex ante* design of the structure and decisionmaking processes of agencies and the threat of *ex post* sanctions, Congress does in fact maintain effective, albeit invisible, control over agency behavior.<sup>172</sup>

Along similar lines, a common assertion in separation of powers scholarship is that Congress has largely abdicated its constitutional war powers, leaving it to the Executive to decide when wars or lesser military adventures will be fought.<sup>173</sup> The result, in the view of many observers, is that “[o]n matters of war, we have what the framers thought they had put behind them: a monarchy.”<sup>174</sup> But congressional passivity should not be automatically equated with powerlessness. True, Congress does not often invoke the War Powers Resolution, cut off funding, or enact resolutions forbidding (or authorizing) military actions. As political scientists have emphasized, however, Congress

<sup>170</sup> Kagan, *supra* note 11, at 2256; *see also id.* at 2256 n.21.

<sup>171</sup> *See id.* at 2258 (describing the view that “perfect control of an institution is likely to be invisible: if the agencies always did what Congress wanted, Congress would have no need to hold oversight hearings, express disapproval, or impose sanctions”).

<sup>172</sup> *See* sources cited *supra* note 154.

<sup>173</sup> *See* JOHN HART ELY, *WAR AND RESPONSIBILITY*, at ix (1993); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 117–33 (1990); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 692 (2008) (“[D]iscussions of constitutional war powers have consistently depicted a Congress so fearful of taking responsibility for wartime judgments that it hardly acts at all.”).

<sup>174</sup> Louis Fisher, *A Dose of Law and Realism for Presidential Studies*, 32 PRESIDENTIAL STUD. Q. 672, 673 (2002); *see also* ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 45, 47–48 (2007) (assuming, in the context of the war on terrorism, that “government means the executive branch,” *id.* at 45 (emphasis omitted)).



can exercise considerable influence over the President's war-making decisions without taking these kinds of overt actions. Just the threat of criticism by members of Congress in the event a military adventure goes badly — made credible by partisan and electoral incentives — may be sufficient to prevent Presidents from entering into risky armed conflicts.<sup>175</sup> Here again, the simple and generalizable point is that inactivity is not necessarily tantamount to weakness.

As a final example, and one that connects back to power in the sense of state capacity, consider the common description of the U.S. national state as “weak,” as compared to the “strong” centralized states of Europe.<sup>176</sup> This perception is based on the relatively small state apparatus housed in Washington, as measured by metrics like civil servants per capita and federal government spending as a percentage of GDP. Yet, since the early Republic, the national government has managed to punch above its weight by leveraging the governance capacity of nonstate actors. One way of doing so is through cooperative federalism arrangements that allow the national government to harness the governance capacity of states and localities as a source of national power.<sup>177</sup> Another is by enlisting nominally private individuals and firms to do the work of governance by means of contracting, grant giving, and issuing regulatory mandates.<sup>178</sup> As Professor Sean Farhang has explained in the context of private enforcement regimes:

[S]tate capacity is not exhausted by the actions of state personnel or the expenditure of state resources. If the object of interest is the state's capacity to implement its policy choices by controlling the behavior of other entities, then one must attend not only to the direct actions of state officers, but also to more indirect pathways of regulatory control.<sup>179</sup>

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<sup>175</sup> See WILLIAM G. HOWELL & JON C. PEVEHOUSE, WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS 17 (2007) (“[I]f Congress was all powerful (which it plainly is not) and the president only pursued military options that a majority of members support (which he obviously does not do), then we would never witness any bills or appropriations that were intended to rebuke or restrain the exercise of presidential power since each side could anticipate the outcome.”).

<sup>176</sup> See Desmond King & Robert C. Lieberman, *Ironies of State Building: A Comparative Perspective on the American State*, 61 WORLD POL. 547, 547–48 (2009) (articulating this characterization and then arguing against it).

<sup>177</sup> See, e.g., Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 564–74 (2011) (characterizing the delegation of implementation authority to the states as “a specific strategy used by the federal government to strengthen its new federal laws and the federal norms they introduce,” *id.* at 565); see also *infra* notes 271–280 and accompanying text.

<sup>178</sup> See, e.g., Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 717 (2010) (describing how privatization “provide[s] outsourcing agencies with the means of accomplishing distinct policy goals” that would otherwise be out of reach and thus can be understood as “executive aggrandizing”).

<sup>179</sup> SEAN FARHANG, THE LITIGATION STATE 7 (2010).

If what we really care about is “how much of what happens in the society is publicly or politically controlled,”<sup>180</sup> then the effective size, or strength, of government should reflect the infrastructural resources it can conscript or otherwise direct, regardless of whether these are in the hands of subsidiary government units or private individuals and organizations exercising “delegated” government power.<sup>181</sup> The fact that “many features conventionally understood as hindrances to the development of strong and effective states — federalism and robust private associationalism, for instance — can, in fact, be shown to be state-building assets,”<sup>182</sup> is another manifestation of the distinction between doing and decisional power.

### C. *Gaining Power By Losing It (and Vice Versa)*

A well-known paradox of constitutionalism is that “[l]imited government is, or can be, more powerful than unlimited government.”<sup>183</sup> The same is true at the level of particular government institutions and officials: constitutional and other legal and political constraints that reduce power when viewed in isolation may actually serve to expand power when viewed in a broader temporal or topical frame. And conversely, local expansions of relative or absolute institutional power may create the opposite effect globally. The perceived effects of legal and political interventions on power will consequently depend on the size and shape of the transactional frame in which they are viewed.<sup>184</sup>

1. *Empowering Constraints.* — Just as binding contracts allow individuals and firms to enter into exchange relationships that would otherwise be impossible, constraints that commit political actors to a course of action can enable them to accomplish goals that would otherwise be out of reach. Constraints can enable political actors to stick to their preferred policies, resisting pressures to deviate. For example, a standard justification for the political independence of central banks is to institutionalize commitments to optimal monetary policy by insulating the relevant decisionmakers from predictable short-term political pressures to embrace inflationary measures.<sup>185</sup> Constraints on decisional power can also generate credible commitments that induce

<sup>180</sup> DANIEL N. SHAVIRO, TAXES, SPENDING, AND THE U.S. GOVERNMENT’S MARCH TOWARD BANKRUPTCY 27 (2007).

<sup>181</sup> See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370–71 (2003) (portraying privatization as the delegation of government power to private entities who serve as “stand-ins for the government,” *id.* at 1370).

<sup>182</sup> King & Lieberman, *supra* note 176, at 568.

<sup>183</sup> STEPHEN HOLMES, PASSIONS AND CONSTRAINT, at xi (1995).

<sup>184</sup> See generally Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002) (describing how constitutional transactions can be reframed in time or scope to change the apparent balance of harm or power).

<sup>185</sup> See ALLAN DRAZEN, POLITICAL ECONOMY IN MACROECONOMICS 144 (2000).

others to behave in desirable ways. States and governments that can credibly commit to protecting property rights or repaying debts will benefit from economic investment and the ability to borrow on favorable terms;<sup>186</sup> states that can commit themselves to complying with international law can reap the benefits of reciprocal compliance by other states;<sup>187</sup> and political parties that lose elections may accept disadvantageous democratic outcomes in exchange for assurances their rivals will do the same when electoral fortunes turn.<sup>188</sup>

Constitutional rules and rights are typically understood as constraints on power, but constitutional constraints can also serve as power-enhancing commitment devices. This is a familiar point at the level of constitutional theory. Invoking the analogy of Ulysses and the Sirens, theorists of constitutional “precommitment” emphasize that constraints on present majority rule might serve to enhance popular sovereignty and democratic capability by enabling the populace to resist short-term pressures or other decisionmaking pathologies.<sup>189</sup>

At the level of constitutional structure and government institutions, however, the possibility of empowering constraints surfaces only sporadically. A number of constitutional scholars have pointed out, for instance, that institutional and legal limitations on the President may have the effect — and even the purpose — of increasing presidential power.<sup>190</sup> For example, Posner and Vermeule emphasize that presidential credibility is a *sine qua non* of broad public support: “For [P]residents, credibility is power.”<sup>191</sup> Consequently, Presidents will be motivated to pursue “self-binding”<sup>192</sup> measures — such as appointing independent commissions or special prosecutors, or assembling a multilateral coalition to pursue some foreign policy goal — in order to

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<sup>186</sup> See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803 (1989).

<sup>187</sup> See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 29–38, 84–85 (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* 25–69, 119–81 (2008).

<sup>188</sup> See ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET* 26 (1991); James D. Fearon, *Self-Enforcing Democracy*, 126 Q.J. ECON. 1661, 1663 (2011).

<sup>189</sup> See JON ELSTER, *ULYSSES UNBOUND* 88–174 (2000); HOLMES, *supra* note 183, at 134–77. Painting with a broader brush, constitutional theorists have elaborated on how constraining constitutional rules and arrangements enable self-government by facilitating collective action and coordination within a stable legal and political system. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 707–15 (2011).

<sup>190</sup> Or the opposite: that vesting greater unilateral authority in the presidency has reduced the President’s influence over policy. See Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 835 (1996).

<sup>191</sup> POSNER & VERMEULE, *supra* note 4, at 153.

<sup>192</sup> *Id.* at 137.

build support for their initiatives.<sup>193</sup> Other commentators focus on legal constraints imposed on Presidents, emphasizing that “short-term constraints on the immediate preferences of actors like [P]residents might actually enable long-term marshaling of effective presidential power.”<sup>194</sup> Limitations on presidential discretion imposed by the Office of Legal Counsel, for example, might in a broader frame enable Presidents to accomplish more than they could without the credibility and legitimation of legal review.<sup>195</sup> In the same spirit, Goldsmith concludes that the concatenation of political, legal, and civil society checks that have been imposed upon the post-9/11 presidency “constrain[s] presidential discretion in numerous ways” but also helps build public consensus in favor of broad presidential powers and consequently “strengthen[s] the presidency and render[s] it more effective over the medium and long term.”<sup>196</sup>

Enabling constraints have also been invoked to explain the political viability of an independent judiciary. Why would political actors ever accede to court decisions that stand in the way of their interests, as opposed to asserting political control over the court or simply ignoring it? One answer is that an independent judiciary empowers these actors to a greater extent than it impedes their political agenda by enabling credible, and reciprocal, commitments. In this view, judicial constraints may provide a kind of insurance to political parties or coalitions that expect to alternate in control of government over time, guarding against the excesses of the temporarily dominant party.<sup>197</sup> Democrats who are temporarily ascendant in the national government may be willing to accept a judicial prohibition on suppressing Republican political speech if Republicans will be similarly constrained during their turn in power. During the New Deal, some progressive Democrats were willing to support the Court against President Roosevelt’s political attack because they believed an independent judiciary in the future would protect rights they valued — not economic liberty, but freedom of speech and religion — against the dangers of a future President.<sup>198</sup> An independent judiciary that functions in this way might

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<sup>193</sup> *Id.* at 137–50. A further reason why Presidents may welcome or impose constraints on their own authority is to fend off greater constraints that would otherwise be imposed by Congress or courts. See Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 896 (2011).

<sup>194</sup> Pildes, *supra* note 113, at 1408.

<sup>195</sup> See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1722 (2011) (book review).

<sup>196</sup> GOLDSMITH, *supra* note 12, at xv.

<sup>197</sup> See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 21–33 (2003); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994); Matthew C. Stephenson, “When the Devil Turns . . .”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 61 (2003).

<sup>198</sup> See FRIEDMAN, *supra* note 25, at 218–22.

provide governing coalitions with greater benefits in the long term than the short-term costs it imposes by blocking their preferred policies.<sup>199</sup>

Even less commonly does recognition of the potentially empowering effects of constitutional constraints trickle down to the level of judicial decisionmaking in specific cases. A recent exception that proves the rule popped up in the Court's *Free Enterprise Fund v. Public Co. Accounting Oversight Board*<sup>200</sup> decision. The majority in that case viewed the dual for-cause protections that Congress had created for Public Company Accounting Oversight Board (PCAOB) members as an unconstitutional "handicap" on the power of the President, impeding his ability to control executive branch officials.<sup>201</sup> Justice Breyer took a different view, arguing in dissent that insulating the PCAOB from presidential influence might actually enhance presidential power, by enabling the President to commit to politically impartial regulation by technocratic experts.<sup>202</sup> Invoking the Ulysses analogy, Justice Breyer explained that "the establishment of independent administrative institutions" might "empower precisely because of their ability to constrain."<sup>203</sup>

Justice Breyer might have gone further. Scholars have hypothesized that credible commitments to agency independence might empower Presidents in other ways, as well, for example by enabling them to elicit greater compliance from regulated industries or to convince Congress to delegate more resources or policymaking authority to the executive branch.<sup>204</sup> On the other hand, scholars have also suggested that delegating to a bureaucracy insulated from political interference might augment the power of Congress, by allowing it to entrench its preferred policies against downstream political change.<sup>205</sup>

The difficulty — in this case, and more generally — lies in determining which of these many theoretical possibilities has real-world purchase. Viewing constitutional rules and arrangements that limit the choices of officials and institutional actors myopically or in isolation risks seeing only the disempowering constraint and missing the power

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<sup>199</sup> See Keith E. Whittington, "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 584–86 (2005).

<sup>200</sup> 561 U.S. 477 (2010).

<sup>201</sup> *Id.* at 500.

<sup>202</sup> See *id.* at 522 (Breyer, J., dissenting).

<sup>203</sup> *Id.*

<sup>204</sup> See Nolan McCarty, *The Appointments Dilemma*, 48 AM. J. POL. SCI. 413 (2004); Stephenson, *supra* note 169, at 300–02.

<sup>205</sup> See McCubbins et al., *The Political Origins of the Administrative Procedure Act*, *supra* note 154, at 180; Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111, 113 (1992).

that constraint might simultaneously create. At the same time, while it is almost always possible to concoct a story about how an apparent legal or political constraint could be empowering on net, sometimes a constraint is just a constraint. Distinguishing empowering from disempowering constraints is yet another challenge for constitutional assessments of structural power.

2. *Compensating Adjustments.* — Applying a balance-of-powers analysis, courts and theorists assessing structural controversies sometimes suggest that an institutional arrangement that, when viewed in isolation, would impermissibly shift power to one institution should nevertheless be viewed as constitutionally permissible on the ground that it compensates for an imbalance of power in the other direction. In *INS v. Chadha*,<sup>206</sup> for example, the Supreme Court invalidated a legislative veto because it violated Article I, Section 7's formal requirements of bicameralism and presentment for legislative action.<sup>207</sup> To the Justices in the majority, Congress's evasion of these procedural constraints on lawmaking represented a power grab at the expense of the Executive — strengthening Congress's hand relative to the Article I, Section 7 baseline and correspondingly weakening the Executive's.<sup>208</sup> Justice White's dissent offered a contrasting perspective. Widening the lens, Justice White portrayed the legislative veto as merely a partial clawback of the much greater quantity of power that Congress has handed over to the executive branch by way of delegation.<sup>209</sup> Quite the opposite of Congress upsetting the constitutional balance of power, it was a step in the direction of restoring the constitutionally mandated balance.<sup>210</sup>

A number of commentators have expanded upon Justice White's approach, proposing additional "compensating adjustments" to decrease presidential power in order to restore a balance that they perceive to have tilted in favor of the Executive.<sup>211</sup> The idea of compensating adjustments has also been carried over to the federalism context, where scholars have argued for new constitutional limitations on national power to compensate for what they perceive to be an in-

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<sup>206</sup> 462 U.S. 919 (1983).

<sup>207</sup> See *id.* at 956–57, 959.

<sup>208</sup> *Id.* at 951.

<sup>209</sup> See *id.* at 984–87 (White, J., dissenting).

<sup>210</sup> See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540–43 (1992).

<sup>211</sup> See Flaherty, *supra* note 3, at 1832–39; Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994); see also Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 400–02 (1997) (describing these and similar proposals as "compensating adjustments").

creasing imbalance in the direction of centralization and state disempowerment.<sup>212</sup>

These arguments go to the appropriate normative baseline for evaluating whether institutional power has become unbalanced. But the analytic frame placed around assessments of structural power also matters for descriptive purposes of perceiving dynamic changes caused by institutional interactions. To illustrate, Goldsmith argues against the common view that the post-9/11 period has seen the rise of limitless, unchecked executive power by pointing to compensating adjustments by other political actors, resulting in a systemic “self-correct[ion].”<sup>213</sup> As Goldsmith sees it, the Bush Administration’s assertions of extravagant executive power catalyzed a counterreaction by Congress and courts, as well as by journalists, human rights advocates, and other democratic actors, who pushed back and imposed new constraints on the presidency.<sup>214</sup> By the same token, assaults on executive power might provoke Presidents to take countermeasures of their own. Professor David Pozen suggests that unilateral policy initiatives by the Obama Administration might be understood as calculated countermeasures calibrated to offset congressional attempts to obstruct and undermine ordinary processes of interbranch cooperation.<sup>215</sup> What might be viewed in isolation as constitutionally dubious presidential self-aggrandizement, says Pozen, might be better understood in broader perspective as presidential “self-help” that restores a balanced equilibrium of power.<sup>216</sup>

The possibility of compensating adjustments complicates assessments not just of the relational balance of power between institutional actors but also of any single actor’s power. The complication is that constraints on power along one margin might be offset by causally connected expansions along a substitute margin. For example, if Congress is not permitted to use legislative vetoes, it might nonetheless exercise roughly the same power over agency policymaking by delegating less discretionary authority, making greater use of appropriations and oversight mechanisms, or creating structures and processes that prevent agencies from generating the kind of outcomes that would have provoked a legislative veto.<sup>217</sup> Institutional adaptations to constraints

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<sup>212</sup> See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1736 (2005).

<sup>213</sup> See GOLDSMITH, *supra* note 12, at xv.

<sup>214</sup> See *id.* at xiv–xv; see also POSNER & VERMEULE, *supra* note 4, at 184–85 (describing a historical pattern in which powerful Presidents provoked political backlash, resulting in constitutional and legislative constraints).

<sup>215</sup> See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4–7 (2014).

<sup>216</sup> See *id.*

<sup>217</sup> Likewise, Presidents who cannot remove agency heads may be able to control their behavior using any number of other mechanisms. See *infra* notes 268–269 and accompanying text.

on power might even have the perverse effect of increasing the overall power of the political actors who were supposed to be constrained.<sup>218</sup> Separation of powers arrangements that require cooperation between the executive and legislative branches with respect to enacting statutes, fighting wars, entering into treaties, and the like may turn out to be self-defeating if legislative-executive gridlock ultimately drives Presidents to stretch their constitutional authority to act unilaterally.<sup>219</sup> As President Obama's unilateral actions on immigration and climate change arguably illustrate, constitutional constraints on unilateral presidential power may have produced more of it.

Potential examples of perversely overcompensating adjustments along these lines abound. Eliminating the legislative veto might lead Congress to delegate less and decide more on its own, or to substitute even more effective tools of agency control, with the net result of increasing Congress's overall policymaking influence relative to the President's.<sup>220</sup> Preventing Congress from commandeering state governments to implement federal regulatory regimes might leave Congress no choice but to act on its own, preempting the states altogether.<sup>221</sup> Had Congress not been permitted to mandate that individuals purchase health insurance under the Affordable Care Act, Congress might have been left to pursue a far more ambitious program of nationalized health insurance.<sup>222</sup> Limiting the President's constitutional authority to bypass the Senate and make recess appointments, or the Senate's refusal to confirm a President's nominee to the Supreme Court during an election year, might lead Presidents to take the position that they do

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<sup>218</sup> See Adrian Vermeule, *Publius as an Exportable Good*, NEW RAMBLER (Dec. 3, 2015), <http://newramblerreview.com/book-reviews/law/publius-as-an-exportable-good> [<https://perma.cc/JD7N-9UKD>] (reviewing SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL (2015)) (identifying a generalizable mechanism through which "excessive governmental power is itself the product of excessive constraint").

<sup>219</sup> See Kagan, *supra* note 11, at 2312; see also Vermeule, *supra* note 218 ("Supposing an antecedent public demand for economic and social reform, the problem with strong separation of powers is that the number and height of the veto-gates may cause the demand to remain pent-up for too long, producing in turn a demand for a Bonapartist executive who will sweep the veto-gates away with a strong right arm.")

<sup>220</sup> See Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, 99 CORNELL L. REV. 1133, 1158–59 (2014); Edward H. Stiglitz, *Folk Theories, Dynamic Pluralism, and Democratic Values* 24–25 (Cornell Law Sch., Working Paper No. 16-10, 2016).

<sup>221</sup> See Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1646–47 (2006).

<sup>222</sup> See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2612 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Aware that a national solution was required, Congress could have taken over the health insurance market by establishing a tax-and-spend federal program like Social Security. Such a program . . . would have left little, if any, room for private enterprise or the States.")



not need Senate authorization at all.<sup>223</sup> In these and countless other contexts, limitations on power might prove self-defeating, making static assessments of power entirely misleading.

3. *Blame Avoidance.* — Government officials seek power of two different kinds. The first is the now-familiar form of power directed toward advancing a preferred policy agenda. But officials might also care, and care even more, about power in the sense of advancing their careers, by winning elections and positioning themselves for higher office. These two varieties of power are not unrelated. One of the reasons officials might care about reelection and elevation is to maximize their policymaking power in the longer term. In the shorter term, however, pursuing policy outcomes is not always the best strategy for winning reelection or maximizing political support.

Indeed, for government officials who prioritize keeping their jobs or advancing to higher office, policymaking power can be a poisoned chalice. For one thing, responsibility for policymaking may take time away from electorally more profitable activities like fundraising and constituent service. But more importantly, taking charge of substantive decisionmaking creates the potential for criticism, blame, and loss of support from those who disapprove of the outcomes.<sup>224</sup> As Machiavelli advised, power-maximizing politicians might do better to “have anything blameable administered by others, favors by themselves.”<sup>225</sup>

Machiavellian blame-avoidance strategies appear to be common practice among reelection-maximizing members of Congress.<sup>226</sup> A standard explanation for why Congress so often chooses to delegate broad policymaking discretion to an executive branch that does not necessarily share its policy preferences is that members of Congress can claim credit for addressing critical policy problems by enacting vague statutes without actually making the difficult, controversial, and

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<sup>223</sup> See VERMEULE, *supra* note 134, at 67 (discussing this possibility in reference to recess appointments); Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 946, 973–74 (2013) (arguing that the answer to the titular question is yes, though not for judicial appointees); Gregory L. Diskant, *Obama Can Appoint Merrick Garland to the Supreme Court if the Senate Does Nothing*, WASH. POST (Apr. 8, 2016), [https://www.washingtonpost.com/opinions/obama-can-appoint-merrick-garland-to-the-supreme-court-if-the-senate-does-nothing/2016/04/08/4a696700-fcf1-11e5-886f-a037dba38301\\_story.html](https://www.washingtonpost.com/opinions/obama-can-appoint-merrick-garland-to-the-supreme-court-if-the-senate-does-nothing/2016/04/08/4a696700-fcf1-11e5-886f-a037dba38301_story.html) [<https://perma.cc/E65J-RP6R>] (arguing that President Obama could plausibly claim constitutional authority to appoint Chief Judge Garland to the Supreme Court if the Senate fails to act).

<sup>224</sup> See generally CHRISTOPHER HOOD, *THE BLAME GAME: SPIN, BUREAUCRACY, AND SELF-PRESERVATION IN GOVERNMENT* (2011) (exploring blame avoidance as a motivating force in government).

<sup>225</sup> NICCOLÒ MACHIAVELLI, *THE PRINCE* 75 (Harvey C. Mansfield trans., Univ. of Chi. Press 2d ed. 1998) (1532) (footnote omitted).

<sup>226</sup> Political scientists portray members of Congress as especially focused on reelection. See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13 (1974) (assuming for purposes of analysis that members of Congress are interested in nothing other than reelection).

possibly unsuccessful policy choices that threaten to antagonize some set of voters and interest groups. Those choices are instead thrust into the hands of executive branch agencies, which can be blamed for regulatory failures and costs even while legislators take credit for regulatory successes and benefits.<sup>227</sup> A similar story has become part of the conventional wisdom in explaining Congress's eagerness to defer to the President in the realm of foreign affairs and war powers. As Professor John Hart Ely argues, the "legislative surrender" to the President in this domain has been a "self-interested one" for members of Congress, who have figured out that the winning political strategy is to avoid the risk of taking a position on high-stakes foreign policy questions, forcing the President to lead, and then jumping on the bandwagon or criticizing depending on how things work out.<sup>228</sup> As with delegation, the legislature's loss of power in this arena is the legislators' political gain.

These accounts assume, plausibly, that Presidents have a different set of incentives that tend to link their political success with accepting if not aggressively seeking power.<sup>229</sup> Still, there are circumstances in which Presidents, too, can benefit from passing the buck or sharing blame. For example, Presidents who could claim unilateral authority to initiate military actions abroad might instead choose to ask Congress for authorization for the purpose of spreading the blame in case a military conflict goes badly.<sup>230</sup> Enlisting Congress to provide this kind of "political insurance" may decrease the power of the presidency as an institution by undermining constitutional claims to unilateral decisionmaking authority. But individual Presidents may be willing to pay that institutional price for personal political success.

Another blame-avoidance strategy, useful to Presidents, members of Congress, and state officials alike, is to shift decisionmaking authority to the judiciary. As Professor Keith Whittington describes, "[e]lected officials have an incentive to bolster the authority of the courts precisely in order to distance themselves from responsibility for [judicial deci-

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<sup>227</sup> See Stephenson, *supra* note 169, at 289–90 (presenting and critically assessing this theory of delegation).

<sup>228</sup> ELY, *supra* note 173, at ix. Here is a journalist's description of Congress's reluctance to vote to authorize the use of military force against the Islamic State: "[L]awmakers would rather avoid taking a war vote — always a wrenching proposition and one that can look quite different in retrospect — and instead let the White House take responsibility. That approach lets Congress off the hook, but in the long term it erodes its power." Carl Hulse, *Executive Branch Overreach? Lawmakers Blame Themselves*, N.Y. TIMES (Feb. 8, 2016), <http://www.nytimes.com/2016/02/09/us/politics/executive-branch-overreach-lawmakers-blame-themselves.html> [<https://perma.cc/E3Y7-79K9>].

<sup>229</sup> See Kagan, *supra* note 11, at 2309–12; Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 138 (1999).

<sup>230</sup> See Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 910 (2007); Nzelibe & Stephenson, *supra* note 141, at 622.

sions].”<sup>231</sup> Stipulating to judicial supremacy in constitutional interpretation allows legislators to take insincere but politically advantageous positions on controversial issues like abortion, flag burning, and government funding for religious schools, secure in the knowledge that courts will prevent these measures from taking effect.<sup>232</sup> Deferring to judicial authority also allows officials to escape blame for policy agendas that displease some of their constituents. For example, the willingness of the Court to take the lead in dismantling Jim Crow segregation allowed Democrats to address the demands of one segment of their legislative and electoral coalition without incurring the full wrath of their white Southern supporters.<sup>233</sup>

Judges and Justices may resort to power-abnegating blame-avoidance strategies of their own. A notable tendency of the post-New Deal Supreme Court has been to steer clear of the military, foreign relations, and economic issues — guns and butter — that are at the top of the nation’s policy agenda.<sup>234</sup> A plausible explanation is that the Justices do not want to place the Court’s public esteem and political independence at risk by taking unpopular positions on issues that the public and the political branches care most about.<sup>235</sup>

In all of these contexts, power-maximizing officials playing the long game might strategically choose to take one step back in order to move two steps forward. Even officials single-mindedly intent on maximizing policy influence over the course of their careers will not invariably want control over policy in every situation. Taking hold of power may not be the best way of advancing a successful career or even a powerful one.

#### D. *De Jure Versus De Facto Power*

One way of understanding the efficacy and influence of political actors is to focus on their legal authority, or *de jure* power: what the Constitution or subconstitutional law authorizes them to do or when it makes them supreme or sovereign over other actors or institutions.<sup>236</sup>

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<sup>231</sup> WHITTINGTON, *supra* note 165, at 143.

<sup>232</sup> *See id.* at 137–43.

<sup>233</sup> *See id.* at 144–45. President Eisenhower similarly benefited from a strategy of shifting responsibility for ending segregation to the courts, *see id.* at 145–49, as did Southern state legislators, who could “play to their individual constituencies by either directing blame at the Court or lining up with it,” *id.* at 149.

<sup>234</sup> *See* Schauer, *supra* note 22, at 44.

<sup>235</sup> *See id.* at 58.

<sup>236</sup> *Cf.* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2 (describing the public law perspective of “institutional formalism,” which means “treating the governmental institution involved as more or less a formal black box to which the Constitution (or other source of law) allocates specific legal powers and functions”).

But the efficacy and influence of political actors in the real world also depends on a number of de facto forms of power and influence.

1. *Paper Powers and Real Powers.* — How powerful is the presidency? From a strictly de jure perspective, the answer might be, not very powerful at all: “The President’s formal powers under the Constitution are far too narrow to justify the hoopla that surrounds presidential elections. Under the Constitution, . . . Presidents have very limited power over domestic policy.”<sup>237</sup> And while the President may lead in foreign affairs, “there is almost nothing vital that the President can do even in this realm” without congressional cooperation.<sup>238</sup> From this vantage, the power of the presidency is far from imperial. Quite the contrary: it is a “weak office.”<sup>239</sup>

Since the Founding, however, there has been a pronounced gap between the limited de jure powers of the presidency and what Presidents have been capable of and responsible for accomplishing in practice. Hamilton among others recognized that the presidency’s distinctive capability for “[d]ecision, activity, secrecy, and dispatch” would likely serve as a significant source of de facto power.<sup>240</sup> More recently, Justice Jackson’s *Youngstown*<sup>241</sup> opinion highlighted the “gap that exists between the President’s paper powers and his real powers.”<sup>242</sup>

As Justice Jackson explained, the President’s real powers stem from features of the presidency and the American system of government that “do not show on the face of the Constitution.”<sup>243</sup> These features include the “[v]ast accretions of federal power, eroded from that reserved by the States, [which] have magnified the scope of presidential activity.”<sup>244</sup> In other words, more of government now happens at the national level and in an executive branch over which the President has come to exercise increasing control, creating a disjunction between the “paper” picture of congressional control over agency policymaking, and the “real world of modern administrative practice” in which the White House plays a commanding role.<sup>245</sup> Moreover, as Justice Jackson put it, the President has the singular ability, enhanced by “modern meth-

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<sup>237</sup> Calabresi & Lindgren, *supra* note 10, at 2613.

<sup>238</sup> *Id.* at 2614.

<sup>239</sup> *Id.* at 2613.

<sup>240</sup> THE FEDERALIST NO. 70, *supra* note 1, at 423 (Alexander Hamilton).

<sup>241</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>242</sup> *Id.* at 653 (Jackson, J., concurring); see also RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 37 (1990) (“The probabilities of [the presidency’s] power do not derive from the literary theory of the Constitution.” (emphasis omitted)).

<sup>243</sup> *Youngstown*, 343 U.S. at 653 (Jackson, J., concurring).

<sup>244</sup> *Id.*

<sup>245</sup> See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1188 (2014); see also sources cited *supra* note 148 (regarding presidential dominance).

ods of communications,”<sup>246</sup> to influence and mobilize popular opinion, through which “he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”<sup>247</sup> Finally, Justice Jackson observed, the “rise of the party system has made a significant extraconstitutional supplement to real executive power,” as “[p]arty loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own.”<sup>248</sup> This enables the President to “win, as a political leader, what he cannot command under the Constitution.”<sup>249</sup>

As Justice Jackson also recognized in *Youngstown*, a further reason for the increase in de facto presidential power is the decrease in de facto congressional power: “[O]nly Congress itself can prevent power from slipping through its fingers” by being “wise and timely in meeting its problems.”<sup>250</sup> Otherwise, Justice Jackson warned, “[t]he tools belong to the man who can use them.”<sup>251</sup> And in fact, an increasingly feckless Congress has, in recent decades, lost power to a more capable presidency.<sup>252</sup> The formal, constitutional powers of Congress have not changed, but the de facto ability of Congress to enact legislation has been greatly diminished by increasingly polarized political parties combined with divided government.<sup>253</sup> At the same time, because the President is held accountable for pressing social problems, the President’s political success depends on initiating government action. (As Justice Jackson put it, the President is the “focus of public hopes and expectations.”<sup>254</sup>) Finding legislative channels for policy change effectively blocked, Presidents are all the more likely to resort to unilateral action, moving policy in their preferred directions and cutting Congress out of the picture.<sup>255</sup> President Obama’s unilateral efforts to regulate carbon emissions, reform immigration, and accomplish nu-

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<sup>246</sup> *Youngstown*, 343 U.S. at 653 (Jackson, J., concurring).

<sup>247</sup> *Id.* at 653–54.

<sup>248</sup> *Id.* at 654.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> See, e.g., Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15, 50 (Nathaniel Persily ed., 2015) (observing that “one of the most important long-term consequences of the decline in legislative capacity caused by polarization is that Congress’s power is declining relative to the other branches of government”).

<sup>253</sup> See *id.* at 40–45.

<sup>254</sup> *Youngstown*, 343 U.S. at 653 (Jackson, J., concurring).

<sup>255</sup> See Kagan, *supra* note 11, at 2309–12; Moe & Howell, *supra* note 229, at 138.

merous other policy goals are just the most recent testaments to Justice Jackson's foresight.<sup>256</sup>

For all of these reasons, the de facto power of the presidency has become a familiar and indispensable feature of the American political and constitutional systems. Especially (though by no means exclusively) in the domain of foreign affairs, presidential leadership — if not unilateralism — is now the norm; so much so, in fact, that the line between de jure and de facto powers has begun to blur. Courts have come to view the institutional advantages of the presidency — including its “unity of design,”<sup>257</sup> “secrecy and dispatch,”<sup>258</sup> and “better opportunity of knowing the conditions which prevail in foreign countries”<sup>259</sup> — not just as sources of de facto power but as reasons for blessing this power as constitutionally legitimate.<sup>260</sup> For instance, in *Zivotofsky ex rel. Zivotofsky v. Kerry*,<sup>261</sup> upholding for the first time “a President’s direct defiance of an Act of Congress in the field of foreign affairs,”<sup>262</sup> the Court relied heavily on what it called “functional considerations,” meaning the de facto advantages of the presidency with respect to “[d]ecision, activity, secrecy, and dispatch.”<sup>263</sup> At the same time, viewing historical practice as a “gloss on ‘executive Power,’”<sup>264</sup> courts and executive branch lawyers have looked to legally dubious presidential military and other actions in the international domain as validating precedents for subsequent actions of the same kind.<sup>265</sup> In this way, as well, the expansive de facto powers of the presidency have become de jure constitutionalized.

<sup>256</sup> See Binyamin Applebaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), <http://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html> [<https://perma.cc/C9VT-XWNR>].

<sup>257</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting COMPILATION OF REPORTS OF COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE, 1789–1901, S. DOC. NO. 56-231, pt. 8, at 24 (2d Sess. 1901)).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 319–20.

<sup>260</sup> *Id.*

<sup>261</sup> 135 S. Ct. 2076 (2015).

<sup>262</sup> *Id.* at 2113 (Roberts, C.J., dissenting).

<sup>263</sup> *Id.* at 2086 (majority opinion) (quoting THE FEDERALIST NO. 70, *supra* note 1, at 423 (Alexander Hamilton)). See also *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006) (Thomas, J., dissenting) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting)) (pointing to the “structural advantages attendant to the Executive Branch — namely the decisiveness, ‘activity, secrecy, and dispatch’ that flow from the Executive’s ‘unity’” — as reasons to recognize “broad constitutional authority” for the President to take charge of national security).

<sup>264</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring).

<sup>265</sup> See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013).

The distinction between de jure and de facto power illuminates other areas of constitutional structure, as well. Consider “independent” administrative agencies, identified, as a formal matter, as those headed by officials who cannot be removed by the President without cause.<sup>266</sup> The constitutional legitimacy of independent agencies — and how they can or cannot be reconciled with the separation of powers, the unitary executive, and representative democracy — has been debated in a long series of Supreme Court cases and a voluminous academic literature.<sup>267</sup> As commentators have come to notice, however, formal protection against presidential removal is neither necessary nor sufficient to create the functional independence from presidential or other sources of political influence that independent agencies are supposed to possess.<sup>268</sup> Some formally independent agencies appear to be heavily influenced by the White House, interest groups, or other political actors.<sup>269</sup> Other agencies lacking formal for-cause removal protection, like the Federal Reserve, are generally treated as politically inviolable.<sup>270</sup> As a functional matter, the political independence of agencies appears to turn on a complex set of variables that has little to do with for-cause protection or other formal markers of de jure independence.

The distinction between de jure and de facto power also has become increasingly salient in discussions of constitutional federalism. As Professor Heather Gerken describes, a longstanding view of state power is premised on “sovereignty,” “which formally guarantees a state’s power to rule without interference over a policymaking domain of its own.”<sup>271</sup> This kind of power has been in steep decline since the New Deal, as the domain of autonomous state policymaking authority, impervious to federal intervention or preemption, has all but disappeared.<sup>272</sup> Yet de jure sovereignty does not fully capture the de facto extent of state power. As Gerken describes, “process federalists,” in the political safeguards tradition, have long “argue[d] that federalism depends on preserving the de facto autonomy of the states, not the de jure autonomy afforded by sovereignty.”<sup>273</sup> In addition, Gerken herself

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<sup>266</sup> Other formal features associated with independent agencies include a multimember board structure and exemption from the requirement of submitting proposed rules to OIRA for cost-benefit analysis review. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772–73 (2013).

<sup>267</sup> For a survey of both, see generally MANNING & STEPHENSON, *supra* note 169, at 425–539.

<sup>268</sup> See Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 169, at 333, 347.

<sup>269</sup> See Strauss, *supra* note 107, at 583; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165–66 (2013).

<sup>270</sup> See Vermeule, *supra* note 269, at 1196.

<sup>271</sup> Gerken, *supra* note 21, at 12.

<sup>272</sup> See *id.* at 12–13.

<sup>273</sup> Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1554 (2012).

emphasizes a set of pathways of de facto state influence over national policymaking under cooperative federalism arrangements that she collectively terms “the power of the servant” — meaning, the kinds of power that states and localities can effectively exercise even while formally subordinate to the national government by the measure of sovereignty.<sup>274</sup> In fact, these opportunities for influence exist precisely because states lack both de jure sovereignty and de facto autonomy; they stem from the states’ pervasive entanglement in national policy-making processes.<sup>275</sup>

There is a further sense in which the kinds of cooperative federalism arrangements Gerken emphasizes implicate de facto power — one that harkens back to power in the sense of capacity.<sup>276</sup> Cooperative federalism is a pervasive and structurally necessary feature of American government because the national government, notwithstanding its nearly unlimited de jure power, simply lacks the de facto capacity to implement policy and consequently has no choice but to rely upon the governance resources of states and localities.<sup>277</sup> This structural situation is in part the legacy of Founding-era fears of a distant national government and a precautionary strategy of preserving governance capacity in the states and keeping it out of the hands of untrustworthy federal officials. Rather than build a powerful national state, the argument went, it would be better to substitute state militias for a national standing army and state officials for an expansive federal tax bureaucracy.<sup>278</sup> What the Supreme Court now calls “commandeering” and sees as an impermissible power grab by Congress and a violation of states’ rights was originally conceived as a crucial safeguard against an expansive national government that threatened to swallow up state power.<sup>279</sup>

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<sup>274</sup> See Gerken, *supra* note 21, at 35–37.

<sup>275</sup> See *id.* at 37–40.

<sup>276</sup> See *supra* pp. 46–47.

<sup>277</sup> See Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 608 (2014) (“Even if Congress wanted to, the federal government could not tomorrow (or . . . in five years) displace the states from their roles in governance under this system, in part because it could not simply summon into existence the personnel and institutional capacity that would be necessary for doing so.”). In this respect, American federalism reflects a common pattern of political development in federal states in which the central government lacks the ability or motivation to subsume nominally subsidiary governments because these governments possess governance capacity that the central state lacks. See DANIEL ZIBLATT, *STRUCTURING THE STATE* 2–3 (2006).

<sup>278</sup> See EDLING, *supra* note 83, at 195–97, 204–05; see also THE FEDERALIST NO. 27, *supra* note 1, at 173 (Alexander Hamilton) (“[T]he legislatures, courts, and magistrates, of the respective [states], will be incorporated into the operations of the national government . . . and will be rendered auxiliary to the enforcement of its laws.”).

<sup>279</sup> See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1106–07 (2013).



In any event, it is not at all clear whether cooperative federalism increases or decreases the net power of the national government. To the extent the national government can harness decentralized governance capacity in the service of its own policy objectives, cooperative federalism can serve as a “tool of national power.”<sup>280</sup> On the other hand, as the Antifederalists understood, and as Gerken emphasizes in the present day, a national government that lacks the in-house capacity to accomplish its regulatory goals is ultimately at the mercy of the states and localities on which it relies. Thus, while the *de jure* balance of power has shifted decisively in favor of the national government, the *de facto* balance remains far from clear.

2. *Parchment Barriers.* — The gap between the *de jure* and *de facto* powers of government is mirrored by the gap between the formal constitutional constraints that are supposed to apply to these powers and the actual efficacy of these constraints. As the Framers of the Constitution phrased the worry, constitutional limitations on political power, “however strongly marked on paper,”<sup>281</sup> might serve merely as “parchment barriers.”<sup>282</sup> In particular, Madison and other Framers feared that rights meant to protect individuals and minorities against majoritarian oppression would be futile because “the political and physical power” in society were both lodged “in a majority of the people.”<sup>283</sup>

The questionable force of *de jure* limitations on *de facto* power casts doubt on what constitutional rules and rights actually accomplish in terms of constraining power. These doubts seem to be suppressed in American constitutional culture owing to a peculiar faith that judicial review will somehow convert parchment barriers into genuinely binding legal constraints. But courts can serve as reliable constitutional enforcers only if powerful political actors are willing to pay attention to what judges have to say, raising the question: why do “people with money and guns ever submit to people armed only with gavels?”<sup>284</sup> Sometimes they do not. President Lincoln’s defense of his arguably illegal actions during the Civil War on the grounds of “all the laws but

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<sup>280</sup> Gluck, *supra* note 177, at 564.

<sup>281</sup> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* JACK N. RAKOVE, *DECLARING RIGHTS* 160, 163 (1998).

<sup>282</sup> THE FEDERALIST NO. 48, *supra* note 1, at 305 (James Madison).

<sup>283</sup> Letter from James Madison to Thomas Jefferson, *supra* note 281, at 162.

<sup>284</sup> Stephenson, *supra* note 197, at 60; *see also* WHITTINGTON, *supra* note 165, at 26 (“[T]he Court’s judgments will have no force unless other powerful political actors accept . . . the priority of the judicial voice.”).

one”<sup>285</sup> reminds us that Presidents backed by popular majorities might not be much constrained by parchment or gavel barriers.<sup>286</sup>

More recent reminders also exist. Consider the ongoing debates about how much, if at all, legal constraints have limited the President’s flexibility in prosecuting the post-9/11 war on terrorism. One answer is, not much at all. The limited role of courts in this area combined with congressional passivity has led some to suppose that the President is left to make his own decisions, free of any externally imposed legal constraints. Moreover, many doubt that Presidents have been inclined to subject themselves to serious internal checks, pointing to the willingness of executive branch lawyers to “[t]ime and time again . . . fudge, stretch, or retrofit the law to accommodate the imperatives of national security”<sup>287</sup> — approving torture, unilateral deployment of military force abroad, and drone killings of American citizens — as evidence that legal review is merely “a rubber stamp for the president.”<sup>288</sup> Some prominent scholars consequently conclude that the “law does little to constrain the modern executive,”<sup>289</sup> and that the President operates in “[a] culture of lawlessness”<sup>290</sup> in which “short-term presidential imperatives . . . overwhelm sober legal judgments.”<sup>291</sup> And not just scholars: as President Obama’s chief counterterrorism advisor put it in a public address, “I have never found a case that our legal authorities . . . prevented us from doing something that we thought was in the best interest of the United States to do.”<sup>292</sup>

At the same time, however, other observers are convinced that presidential power is subject to serious legal constraints — or at least that the evidence to the contrary is lacking.<sup>293</sup> For every arguable example of government lawyers rationalizing illegality (for example, the Justice Department’s Office of Legal Counsel (OLC) “torture memos”), there are competing examples of government lawyers — as well as Congress and courts — saying no to something the President apparently wants to do (such as, for President Obama, closing

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<sup>285</sup> DANIEL FARBER, *LINCOLN’S CONSTITUTION* 158 (2003) (emphasis omitted).

<sup>286</sup> See LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 63–91 (2012) (collecting examples of Presidents and other government officials violating the Constitution).

<sup>287</sup> Jack Goldsmith, *Law Wars*, *NEW RAMBLER* (Nov. 10, 2015) (reviewing CHARLIE SAVAGE, *POWER WARS* (2015)), <http://newramblerreview.com/book-reviews/law/law-wars> [<https://perma.cc/7KVM-Y98H>].

<sup>288</sup> Eric Posner, *Has Obama Upheld the Rule of Law? A New Book Claims to Get Inside His Presidency, but It Misses the Point*, *SLATE* (Nov. 9, 2015, 1:06 PM) (reviewing SAVAGE, *supra* note 287), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/11/power\\_wars\\_book\\_review\\_of\\_obama\\_s\\_post\\_9\\_11\\_presidency.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/11/power_wars_book_review_of_obama_s_post_9_11_presidency.html) [<https://perma.cc/ZD9D-LUQJ>].

<sup>289</sup> POSNER & VERMEULE, *supra* note 4, at 15.

<sup>290</sup> ACKERMAN, *supra* note 2, at 152.

<sup>291</sup> *Id.* at 88.

<sup>292</sup> Posner, *supra* note 288 (omission in original).

<sup>293</sup> See Pildes, *supra* note 113, at 1392–403.

Guantanamo<sup>294</sup>).<sup>295</sup> Statements by government officials professing to be free of burdensome legal constraints must be weighed against Vice President Cheney’s repeated expressions of frustration at the piling on of legal impediments resulting in “an erosion of the powers and the ability of the [P]resident of the United States to do his job.”<sup>296</sup> And, here again, the problem of observational equivalence looms large: law-abiding Presidents may not even consider obviously illegal courses of action, giving courts and government lawyers few opportunities to say no.<sup>297</sup>

The same perplexing uncertainty about the extent to which constitutional rules and rights effectively constrain majorities and other powerful political actors exists throughout constitutional law. Officials are regularly accused of disregarding all manner of constitutional prohibitions or interpreting them in bad faith.<sup>298</sup> More broadly, the evolution of constitutional rights and structural arrangements to conform with shifting public demands and political preferences in any number of areas — ranging from the emergence of antidiscrimination protection for racial minorities and gays and lesbians to the rise of the administrative state — suggests that many constitutional barriers may be fragile and malleable.<sup>299</sup> Unfortunately, we have very little understanding of when, how, or which formal constitutional limitations on power are effective in constraining political actors as opposed to merely creating parchment barriers.<sup>300</sup>

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<sup>294</sup> See Connie Bruck, *Why Obama Has Failed to Close Guantánamo*, NEW YORKER (Aug. 1, 2016), <http://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo> [<https://perma.cc/YW8W-J5C3>].

<sup>295</sup> See Morrison, *supra* note 195, at 1715–21 (marshaling evidence that the OLC has acted as an effective legal check on the President).

<sup>296</sup> GOLDSMITH, *supra* note 12, at 36 (quoting *The Vice President Appears on ABC’s This Week*, WHITE HOUSE (Jan. 27, 2002), <http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20020127.html> [<https://perma.cc/9QBL-78TQ>]).

<sup>297</sup> See Bradley & Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, *supra* note 265, at 1150 (“[F]ocusing on the law’s impact on actions actually taken by the President or other executive actors threatens to obscure the potentially much broader universe of actions not taken.”). As Goldsmith puts the point:

[W]hat the public never sees are the scores of times that lawyers preempt operations and policies . . . that are clearly out of bounds. Nor can we ever see the stream of dreamed-up and potentially useful operations and policies that never make it to a conversation because the policymaker knows that the answer will be “no” and thus never asks.

Goldsmith, *supra* note 287 (internal punctuation omitted).

<sup>298</sup> See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 918–34 (2016) (illustrating the pervasiveness of “bad faith talk,” *id.* at 887, in American constitutional discourse and creating a taxonomy).

<sup>299</sup> See Levinson, *supra* note 189, at 699–700, 718–20, 745.

<sup>300</sup> See generally *id.*

It is no wonder courts and theorists have had so much trouble agreeing on where power is located in government. To start, “power” has multiple meanings. It is important to distinguish power in the sense of capacity and control, doing and deciding, reelection and policy success, *de jure* and *de facto*, and so on. The suggestion here is that for most (though not all) purposes, the kind of power that should matter for constitutional analysis is the ability of political actors to influence government decisionmaking and policy outcomes. As the foregoing discussion has described, locating power in that sense raises a set of difficult empirical challenges that are seldom recognized, much less resolved, by courts or scholars.

Highlighting these challenges is not meant to be a counsel of despair but a spur to more focused empirical investigation. Conceptually, decisional power can be located by ascertaining the policy preferences of the relevant institutional actors and, in cases where these preferences conflict, observing actual policy outcomes. The more outcomes align with an actor’s preferences, the more power can be attributed to that actor. To be sure, operationalizing that investigation in qualitative or quantitative empirical studies is no easy task, but it is hardly beyond the reach of social scientists or legal analysts.

That said, this kind of empirical investigation is probably beyond the reach of judges and Justices. And because so little of it has been conducted by anyone, constitutional adjudication and analysis remain largely in the dark about the location of power in government. Is the presidency imperial or imperiled? Has the national government consolidated away nearly all the power of states, or have states reclaimed much of their power as servants in schemes of cooperative federalism? How much independent policymaking power is possessed by Supreme Court Justices or agency bureaucrats? Does Congress or the President exercise more control over the administrative state? Is the power of the President constrained by law? The answer to all of these questions, unfortunately, is that we have very little idea. That answer may be dispiriting, but the hope is that constitutional law will make better progress by recognizing what it cannot easily see rather than by continuing to look for power under the light.

## II. FROM INSTITUTIONS TO INTERESTS

Structural constitutional law is focused on how power is distributed among government institutions — Congress, the President, agencies, and the like. The previous Part described a number of challenges in this regard. But the difficulty of locating power goes deeper. The ultimate holders of power in American democracy are not government institutions but democratic interests: the coalitions of policy-seeking political actors — voters, parties, officials, interest groups — that compete for control of these institutions and direct their

decisionmaking. Locating policymaking power therefore requires not only identifying the relevant institutional decisionmakers but also “passing through” the power of each institution to the underlying interests that control its decisionmaking.<sup>301</sup> Because the law and theory of the structural constitution seldom take this second step, standard analyses of power are not only dubiously accurate as far as they go but also crucially incomplete.

The gap between the power of institutions and the power of interests provides a parsimonious explanation for some familiar features of political behavior and constitutional disputation. Because power-seeking political actors are intrinsically indifferent to the distribution of power at the institutional level, government institutions will have no hardwired or consistent tendency to aggrandize their own power or compete with one another for power. And policy-minded actors will tend to derive their views about how power should be distributed at the institutional level based on politically contingent observations or predictions about how that power will be passed through to interests — causing their institutional-level judgments to shift with the political winds (or “flip-flop”).<sup>302</sup>

The disconnect between institutions and interests also raises rather fundamental questions about the stakes of structural controversies and about why constitutional law should be concerned with balancing institutional power or worrying about its concentration in a single branch or unit of government. Separation of powers and federalism were once conceived as mechanisms for balancing power among interests and social groups, and both structural design strategies are still used for that purpose in constitutional systems elsewhere in the world. In the U.S. system as it currently operates, however, the distribution of power at the structural level bears no systematic relation to the distribution of power at the democratic level. Diffusing and balancing power among government institutions is no guarantee that power will be similarly diffused or balanced among political interests or social groups.

#### A. *Institutional Indifference*

There is a striking discrepancy between constitutional law’s intense concern with how power is distributed among government institutions and the indifference to institutional power that is on daily display among power-seeking political actors — including the officials who

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<sup>301</sup> Cf. Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 789 n.157 (1999) (emphasizing that shifts in power among the branches of government affect the relative power of “constituencies” or “political voices”).

<sup>302</sup> See Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 493 (2016).

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populate these institutions. That indifference is telling of where meaningful power is located: not at the level of institutions but at the level of interests.

1. *Passing Through Power.* — Let us return to the distinction between “doing” and “deciding.”<sup>303</sup> Government acts through institutions — at the national level, most prominently, Congress (subdivided into the House and Senate, committees, and so forth), the executive branch (similarly subdivided into the White House, various agencies, and so forth), and courts. But these institutions do not decide what government does. The actual deciders, and hence holders of power, are the political actors who control the relevant institutions. These actors include, most proximately, the government officials who populate the branches and units of government and direct their decisionmaking — the President, members of Congress, heads of agencies, and other high-level public employees.<sup>304</sup> Government officials, in turn, represent and are influenced in varying degrees by electoral majorities, political parties, interest groups, and other “democratic” constituencies. Officials and their democratic constituencies form coalitions based on shared policy goals and compete for control over government institutions in order to advance those goals. These policy-based coalitions, or *interests*, are the ultimate deciders in government.

Of course, there are many complications embedded in this caricature of how democracy works. Among these is the relationship between government officials and the democratic-level constituencies that influence their decisionmaking. How decisional power is, and should be, divided between democratic principals and their representative agents are among the most well-worn topics in political science and theory.<sup>305</sup> This is another level at which it is important to distinguish between the visible “doers” — government officials — and the democratic actors — voters, interest groups, political parties, and the like — who are, to a considerable extent, the actual “deciders.”

For present purposes, however, the important point is that government decisionmaking is driven by the policy preferences of the officials and democratic-level constituents — in whatever combination — that compose interest-based political coalitions. As a result, parsing political decisionmaking power requires a two-level analysis. The first step

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<sup>303</sup> See *supra* note 169 and accompanying text.

<sup>304</sup> *But cf.* HOWELL & MOE, *supra* note 7, at 47–62 (arguing that the parochial outlook of individual members of Congress results in cobbled-together collections of special interest provisions rather than coherent and effective policy programs).

<sup>305</sup> At the level of normative theory, see, for example, HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967). At the level of descriptive political science, see, for example, *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* (Adam Przeworski et al. eds., 1999).

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is to identify the relevant institutional decisionmakers — Congress, the President, agencies, and the like — and weigh their relative influence. The second, and crucial, step is to “pass through” the power of each institution, allocating it among the controlling interests.

Because structural constitutional analysis typically begins and ends at the first level, the distribution-of-power consequences of structural controversies are left obscure. We might wonder, for instance, how decisional power is redistributed when Congress creates independent agencies, insulated from presidential control by for-cause limitations on removal. Confronted with the dual for-cause buffer between the President and the PCAOB created by the Sarbanes-Oxley Act, the Supreme Court concluded that this arrangement impermissibly diminished presidential power over agency decisionmaking, leaving PCAOB decisionmaking to unelected “functionaries”<sup>306</sup> while also “provid[ing] a blueprint for extensive expansion of the legislative power.”<sup>307</sup> Even if this assessment of institution-level power is correct, however, it tells us nothing about resulting power of interests or policy consequences. For all we know, the same interest-based constituencies will exercise the same relative influence over PCAOB policymaking regardless of whether that influence is channeled through the President, Congress, or the SEC and the PCAOB more directly.<sup>308</sup>

Sometimes, shifting power at the level of government institutions really will have no consequences at all for interest-level power. If a dominant interest group or single-minded majority can equally well control decisionmaking in Congress, the White House, administrative agencies, or anywhere else, then moving institutional-level power around will make no difference. If it is true, as some contend, that “organized wealth” has captured both political parties and come to dominate decisionmaking across all the branches and levels of government on issues like financial reform and tax policy,<sup>309</sup> then shifting institutional decisionmaking authority on these issues will do nothing to change policy outcomes. Many constitutional debates about the post-9/11 war on terrorism take for granted that a strictly enforced requirement of congressional authorization for presidential actions — military strikes, detentions, surveillance programs, and the like — will be consequential in protecting rights and liberties and guarding against

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<sup>306</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

<sup>307</sup> *Id.* at 500 (quoting *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991)).

<sup>308</sup> *Cf. Aziz Z. Huq, Removal As a Political Question*, 65 STAN. L. REV. 1, 52–70 (2013) (questioning the linkage between presidential control and democratic accountability).

<sup>309</sup> *See Andrias, supra* note 34, at 422.

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abuses of power.<sup>310</sup> But if Congress and the President answer to the same constituencies — if, for example, “a large national majority dominates both Congress and the presidency and enacts panicky policies [or] oppresses minorities”<sup>311</sup> — then shifting their relative decisionmaking authority will have no bearing on outcomes.

But, of course, shifting power at the level of government institutions often will have real consequences for interest-level power and hence policy outcomes. This will be the case whenever different institutions are controlled by different interests and consequently display divergent policy preferences. When the Democrats control the White House and Republicans control the House and Senate, for example, policy outcomes on many issues will turn on the relative power of the President and Congress. Proponents of more stringent environmental regulation or permissive immigration policies will prefer that the relevant policy decisions be placed in the hands of the President. But this is entirely contingent on shifting patterns of partisan control. As soon as a Republican President occupies the White House, proponents of progressive environmental and immigration policies will prefer that power be reallocated to a more sympathetic decisionmaker.

The point is a general one: for power-seeking political actors, institutional power matters only on account of expected policy outcomes; when expected outcomes change, so do judgments about institutional power. This contingency is what accounts for the familiar observation that in political and constitutional debates about the best allocation of decisionmaking authority among government institutions, advocates often “flip-flop,” switching positions depending on which political party or coalition controls the relevant institutions.<sup>312</sup> Positions on presidential signing statements, recess appointments, unilateral actions, and other assertions of executive power predictably depend on which party controls the White House. Senators take different positions on the filibuster and on the need to consider or confirm Supreme Court nominations during an election year depending on whether they are in the majority or minority, or whether they are copartisans with the President. Those who disagree with Supreme Court decisions on the substantive merits (including dissenting Justices) brand these decisions as activist and antidemocratic, while applauding (or authoring) no less activist or antidemocratic — but substantively more agreeable — opinions.

For those who take a longer view, the interest-level consequences of institutional power very quickly become unpredictable. This is one of

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<sup>310</sup> See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004).

<sup>311</sup> POSNER & VERMEULE, *supra* note 174, at 46.

<sup>312</sup> See Posner & Sunstein, *supra* note 302, at 486.



the important points of Professor Elizabeth Magill’s pioneering work on separation of powers.<sup>313</sup> Magill asks: Suppose we simply got rid of the Senate’s advice and consent on treaties and the nominations of judges and executive officials, making the President sole decider and thus (let us assume) increasing the power of the President relative to the Senate.<sup>314</sup> Would there be any predictable effects on the power of democratic-level actors that would shift substantive policy in any particular direction? In the short run, surely; but in the longer run, perhaps not. As Magill explains, the groups:

[T]hat influence the Senate and the executive on policy questions are often not systematically differentiated. . . . There may be periods in time where there are systematic differences in interest groups’ ability to influence decisions in the executive and the Senate . . . . But . . . . such differences will not be stable across time and cannot be used as a basis for predicting the effect of an arrangement.<sup>315</sup>

Something similar might be said about any structural reallocation of power that is meant to endure beyond the next election cycle. When decisions about institutional power have no effect, or no predictable effect, on the relative power of competing interests, policy-minded political actors will view structural controversies as matters of indifference. Behind a veil of ignorance as to the constellation of interests that will control the relevant institutions and consequently the policy consequences of institutional choice, there may be little reason to do more than shrug.<sup>316</sup>

Veils of ignorance with respect to the power of interests over institutions come in varying degrees of opacity. Over long time horizons, it really is hard to come up with reliable generalizations about differences at the highest levels of constitutional structure. In the domain of

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<sup>313</sup> See Magill, *supra* note 31, at 640–41.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 641. Professor Aziz Huq draws a similar conclusion about the effect of expanding or contracting presidential power on individual liberty. Given the lack of “strong correlations between branch power and the preservation of individual liberties,” Huq argues, the most we can say is that “[e]xpansions of presidential power . . . can either enlarge or contract regard for individual liberties depending upon whether the executive is displacing a Congress with either more authoritarian or more libertarian preferences.” Aziz Z. Huq, *Libertarian Separation of Powers*, 8 N.Y.U. J.L. & LIBERTY 1006, 1037 (2014).

<sup>316</sup> See Posner & Sunstein, *supra* note 302, at 495–96, 527–28. On the use and operation of “veil of ignorance” mechanisms generally in public law, see ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 31–71 (2007). Again, however, political actors can cast off the veil by deciding institutional questions one case at a time, on the basis of predictable policy outcomes — flip-flopping. Alternatively, political actors can try to gerrymander the dimensions of institutional power. For example, conservatives will tend to support constraints on the President’s treaty-making authority that apply predominantly in the context of human rights and do not interfere with negotiating free trade agreements. See Jide Nzelibe, *Our Partisan Foreign Affairs Constitution*, 97 MINN. L. REV. 838, 842 (2013); Jide Nzelibe, *Partisan Conflicts over Presidential Authority*, 53 WM. & MARY L. REV. 389, 392–93 (2011).

separation of powers, conventional wisdom once held that the President, elected by a national majority, tends to be more responsive to the median voter, whereas members of Congress are more accountable to the geographically localized constituencies and interest groups they depend upon for reelection.<sup>317</sup> Upon closer inspection, however, that institutional caricature turned out to be theoretically and empirically dubious.<sup>318</sup> Comparable hypotheses about the states and the national government advanced in the context of federalism have proven similarly suspect.<sup>319</sup> For example, it was once widely believed that national environmental regulation would be predictably more stringent than state regulation because state regulators would be hindered by disproportionate industry influence and because interstate competition would create a “race to the bottom.” Neither turns out to be reliably true.<sup>320</sup>

On the other hand, even over the long term, some lower-level government institutions might well be systematically more susceptible to influence by certain kinds of interests, resulting in predictable policy slants. Agencies, for example, can be structured to “stack the deck” in favor of certain interests.<sup>321</sup> The Supreme Court, for its own part, seems to display a reliable, modestly countermajoritarian tendency to give effect to elite preferences on social issues like free speech, gay rights, and school prayer.<sup>322</sup> Moreover, there have been periods of

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<sup>317</sup> See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994); Nourse, *supra* note 301, at 765–67.

<sup>318</sup> See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006); see also Stephenson, *supra* note 169, at 303–04 (collecting and discussing the theoretical and empirical literature on this point).

<sup>319</sup> Federalism may implicate a predictable policy slant for reasons other than differences in interest-level power. Decentralization of governance reliably impedes some forms of regulation and economic redistribution by making it more difficult to deal with externalities and by creating a race to the bottom with respect to wealth transfers. Not surprisingly, then, while views on the allocation of decisionmaking authority between the national government and the states are often driven by case-specific policy consequences and flip politically depending on the issue, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 948 (1994) (“[C]laims of federalism are often nothing more than strategies to advance substantive positions . . .”), overall support for decentralization skews noticeably to the political right, see Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 505 (1998).

<sup>320</sup> See Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 555 (2001) (debunking the claim that preregulatory political coalitions will compete more successfully with industry interest groups at the federal level as compared to the state level); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (refuting the claim that interstate competition would cause states to minimize the stringency of environmental regulation).

<sup>321</sup> See *infra* notes 437–440 and accompanying text.

<sup>322</sup> See Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189–91 (1998).

decades in American history when, owing to the vagaries of politics, certain interests have had sufficiently stable control over institutions such that they could be reliably empowered or disempowered through shifts in the separation of powers or federalism. For participants in antebellum contests over slavery or the race-related controversies of the civil rights era, the interest-level stakes of federalism were crystal clear. So, too, were the consequences of activist judicial review, whether by the Taney or Warren Courts. During the forty-year period when Democrats controlled the House of Representatives or the twenty-year period when Presidents Roosevelt and Truman sat in the White House, the partisan stakes of separation of powers were similarly transparent. The same has been true of the Supreme Court for periods as long as a generation when the ideological leanings of the Justices have been predictably to one side or the other of the political branches'.<sup>323</sup>

And then, of course, there is the short term and the present, when it has become transparent which interests influence which institutions. At that point, the policy consequences of structural power will be visible to all, and political actors will form institutional preferences accordingly — even if this requires them to flip-flop. But let us not lose sight of the general point, from which the flip-flopping and all the rest follows. The policy consequences of how power is distributed at the level of government institutions depend on how that power is passed

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<sup>323</sup> See Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS., Summer 2004, at 149 (2004) (describing how theoretical defenses and criticisms of judicial review have coincided with the political slant of the Supreme Court as compared to the political branches). Friedman writes:

[F]rom 1890 until 1937 it was possible to know what side one was on. The courts were conservative. The political branches were (more) progressive. . . . All of that changed in the period between 1937 and 1968. Things flipped. The Court became the progressive force for change, and the “political” branches . . . were decidedly more conservative.

*Id.* at 157.

Indeed, such extended patterns of partisan or coalitional control seem to shape perceptions of institutional policy slants even after the patterns of control have changed. More than half a century after *Brown v. Board of Education*, many remain attached to a view of the Supreme Court as a heroic protector of minorities and a leader of progressive social change. See James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120, 1134 (1992) (describing how an increasingly conservative Court has maintained the support of a cohort of African Americans who continue to see Warren Court decisions like *Brown* as salient); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–2, 6–7, 18–23 (1996) (attributing the popular “myth of the heroically countermajoritarian Court,” *id.* at 6, largely to *Brown*); see also Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 90 (1997) (“Because of the nation’s experience with the Warren Court, legal liberalism has been linked to political liberalism since mid-century.”). Federalism, conversely, remains tarnished by its historical association with slavery, Jim Crow, and the empowerment of Southern racists. See Gerken, *supra* note 21, at 48 (observing that many continue to understand federalism as a “code-word for letting racists be racist”).

through to interests. A myopic focus on power at the level of constitutional structure misses most of the action.

2. *Power-Hungry Institutions?* — The failure to pass through power from institutions to interests also accounts for an entrenched set of misunderstandings about the dynamics of power in the structural constitution. Broad swathes of the law and theory of the structural constitution are based on a “Madisonian” model that features perpetually power-seeking government institutions seeking to expand their policymaking turf at the expense of rivals.<sup>324</sup> In the domain of separation of powers, the perpetual risk is that the self-aggrandizing branches of the national government will encroach on the power of their rivals, while the optimistic hope is that the interbranch competition for power will result in a balanced equilibrium of “[a]mbition . . . counteract[ing] ambition.”<sup>325</sup> Much of the law and theory of constitutional federalism similarly supposes that an imperialistic national government intent on consolidating all government power will make every effort to usurp the power of the states, while states will fight back to protect and enlarge the scope of their policymaking domain.

The political logic underlying these predictions of incessant government “empire-building” has never been clear.<sup>326</sup> Madison suggested that each of the departments of government would somehow come to possess a “will of its own,”<sup>327</sup> and in particular a self-interested will to power. But government institutions do not really have wills or interests of their own; their behavior is determined by the interests — officials and democratic-level constituencies — that control them. These interests do tend to seek power, but they do so in the service of their preferred policies, without regard to the power of any particular institution. Policy-focused political actors will care about institutional power only contingently and instrumentally, seeking to increase the power of institutions that they control or that share their policy goals and to decrease the power of institutions controlled by different interests or possessing different policy goals. All of this follows directly from passing through power from institutions to interests.

The institutional indifference of policy-seeking political interests helps explain a familiar set of real-world political dynamics that seem entirely mysterious on the Madisonian model of power-seeking institutions. Prominent among these is the “separation of parties” observa-

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<sup>324</sup> Although this model is based on some sentences of Madison’s *Federalist No. 51*, it is in other ways inconsistent with what Madison himself seems to have thought and in other places said. See Levinson, *supra* note 147, at 943–44, 959–60.

<sup>325</sup> THE FEDERALIST NO. 51, *supra* note 1, at 319 (James Madison).

<sup>326</sup> See generally Levinson, *supra* note 147.

<sup>327</sup> THE FEDERALIST NO. 51, *supra* note 1, at 318 (James Madison).

tion that competition and conflict between the branches of government are driven primarily by patterns of partisan control.<sup>328</sup> When Republicans control Congress and a Democratic President sits in the White House, no one is surprised to see Democrats in the House and Senate encouraging the President to take unilateral action with respect to environmental regulation, immigration reform, or humanitarian interventions abroad. Nor is anyone surprised when Congress delegates extensively to an executive branch controlled by the same party in order to better advance a shared policy agenda. Indeed, during periods like the present, when the two major parties are ideologically coherent and highly polarized, it is only slightly an exaggeration to say that the American system of government has not one separation of powers system but two. When control over the branches of the national government is divided by political party and party lines therefore track branch lines, partisan competition is channeled through the branches, generating a simulacrum of Madisonian rivalry, competitive ambition, and checks and balances. When government is unified by political party, however, intraparty cooperation tends to trump interbranch competition. This is simply because party affiliation will often — though certainly not always<sup>329</sup> — serve as a strong predictor of interest-based policy agreement and disagreement at the institutional level.

Something similar is true in the domain of federalism. As Professor Jessica Bulman-Pozen has elaborated, in the American system of federalism, states serve as sites of partisan mobilization and political contestation that cut across and bear no consistent relationship to the division of power between the states and the national government.<sup>330</sup> Thus, “[p]ut in only slightly caricatured terms, Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans.”<sup>331</sup> Not surprisingly, therefore, the constitutional challenge to the power of Congress to enact the Patient Protection and Affordable Care Act — enacted by a Democratic President and a Democratic-controlled Congress without a single Republican vote — was brought by Republican officials in twenty-seven states without a single Democratic state official signing on.<sup>332</sup> Likewise, of the twenty-four states that have joined the pending legal challenge to

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<sup>328</sup> See Levinson & Pildes, *supra* note 30, at 2315.

<sup>329</sup> On some issues, cleavages based on geography, economic interests, or other variables will cut across party lines. See *id.* at 2324.

<sup>330</sup> See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 1078–79.

the EPA's Clean Power Plan, all but a handful are red.<sup>333</sup> For federal officials, as well, partisan policy goals typically take precedence over the power of the national government. While the EPA during the George W. Bush Administration was taking no action on climate change, Democratic members of Congress threw their support behind the regulatory efforts of California, attempting to protect the state's policies against federal preemption.<sup>334</sup>

Partisan-driven dynamics like this undermine the Madisonian premises of process federalism. The "political safeguards" perspective on state-federal relations presumes that states will have some intrinsic motive to protect and expand their own power by pushing back against national regulatory incursions — "preserv[ing] the regulatory authority of state and local institutions to legislate policy choices."<sup>335</sup> But the ability of state officials to influence national decisionmaking will not lead to less federal regulation if state officials and their constituents do not want less federal regulation and may in fact prefer more of it.<sup>336</sup> By the same token, in the absence of any consistent imperial motivation on the part of federal officials, the problem of federal aggrandizement that the political safeguards were supposed to solve also disappears.<sup>337</sup>

What the Madisonian vision of the structural constitution has missed is that the political actors who decide how power will be allocated among government institutions have no intrinsic interest in the power of government institutions. Officials and democratic-level constituencies are invested in substantive policy outcomes, not institutional authority; their allegiance is to whatever institution can deliver the goods. Here again, the power of institutions matters only insofar as it bears on the power of interests.

### *B. The Interest-Level Stakes of Constitutional Structure*

The central organizing principle of the structural constitution is that power should be divided, diffused, or balanced to prevent the "accumulation of all powers . . . in the same hands" and hence "tyranny."<sup>338</sup> By dividing power between the states and the national government, among the branches of the national government, and maybe also within the executive branch and inside administrative agencies,

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<sup>333</sup> See Megan Herzog, *Clean Power Plan Litigation Kick-Off*, LEGAL PLANET (Nov. 17, 2015), <http://legal-planet.org/2015/10/28/clean-power-plan-litigation-kick-off> [<https://perma.cc/KT2J-WW46>].

<sup>334</sup> See Bulman-Pozen, *supra* note 330, at 1101–02.

<sup>335</sup> Kramer, *supra* note 158, at 222.

<sup>336</sup> See Levinson, *supra* note 147, at 941.

<sup>337</sup> See *id.* at 942–43.

<sup>338</sup> THE FEDERALIST NO. 47, *supra* note 1, at 298 (James Madison).

the constitutional structure of government is supposed to create the very opposite of tyranny: a political system in which power is spread broadly among many different hands.

But *whose* hands? It is one thing to ensure that power is divided between the President and Congress, but quite another to ensure that power is divided between political interests: Democrats and Republicans, the rich and the poor, majorities and racial or ethnic minorities, or the like. Diffusing or balancing power at the level of government structures and institutions predicts nothing about the consequences for the distribution of power at the level of these groups.

There is a long history, and in some parts of the world a present reality, of designing the structure of government for the purpose of distributing power among identified political interests. The designers of the U.S. Constitution had their own ideas about how the structure of government would work to empower some groups at the expense of others. But the constitutional design did not prove enduring in this respect: since the Founding, the constitutional structure has served the purpose of distributing or balancing power among identifiable interests in American politics and society only contingently and haphazardly, not by design.

1. *Separation of Powers Minus Mixed Government.* — A time-honored strategy of constitutional design is to balance the power of competing social and political interests in the structure of government. This is the theory of mixed government, based on the idea that “the major interests in society must be allowed to take part jointly in the functions of government, so preventing any one interest from being able to impose its will upon the others.”<sup>339</sup> Historically, the major social interests have been most commonly identified in terms of economic status or class: whether occupational guilds in the Florentine Republic or nobles and commons in the British tradition. But the essential feature of mixed, or “balanced,” government is that the major social and political interests, however defined, are represented in the institutional structure of government. The idea is to give each of these interests sufficient influence over government decisionmaking so that no one can consistently prevail over the others.<sup>340</sup>

The mixed government tradition has been carried through to the modern world in the form of “consociational” democratic design.<sup>341</sup> Conceived as a strategy for bringing peace and stability to societies

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<sup>339</sup> M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 37 (2d ed. 1998).

<sup>340</sup> On the intellectual and political history and theory of mixed government, see generally SCOTT GORDON, *CONTROLLING THE STATE* (1999).

<sup>341</sup> See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* 25 (1977) [hereinafter *PLURAL SOCIETIES*]; Arend Lijphart, *Consociational Democracy*, 21 *WORLD POL.* 207 (1969).

deeply divided along ethnic or religious lines, the consociational approach institutionalizes power sharing among the major groups in society through a set of structural arrangements that includes grand coalition cabinets, proportional representation in the legislature, and mutual veto power over important government decisions.<sup>342</sup> Like mixed government, consociationalism is supposed to prevent political domination by a single group, guaranteeing all groups a voice in, and typically an effective veto over, government actions that affect their vital interests. As the leading theorist of consociationalism puts it, the overarching goal “is to *share, diffuse, separate, divide, decentralise, and limit* power.”<sup>343</sup>

The intellectual tradition of mixed government was deeply influential in shaping the system of separation of powers that became part of the U.S. constitutional design, but was also a source of great ambivalence for the Framers. Many admired the British system of representation, which had been conceived on the mixed government principle to empower and balance the three major social orders, or estates of the realm: the monarchy, the nobility, and the people, who were represented in government, respectively, by the King, the House of Lords, and the House of Commons.<sup>344</sup> Yet by the time of the Founding, most Americans had rejected the division of society into stable classes or interests. The hope was that the American republic would level over hereditary class distinctions and replace them with cross-cutting distinctions that were “‘various and unavoidable,’ so much so that they could not be embodied in the government.”<sup>345</sup> This would make mixed government both impossible and unnecessary.

At the same time, Founding-era political thought had fixated on a very different, and more recent, set of ideas relating to separation of powers growing out of conflicts between the Crown and Parliament in seventeenth-century England and theorized by the great “oracle” Montesquieu.<sup>346</sup> Here, the notion was that three qualitatively different types of government power — legislative, executive, and judicial — should be assigned to separate government departments, and administered by different personnel. The idea of separating qualitatively different powers is entirely different from the mixed government idea of creating concurrent or shared powers among competing groups as a

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<sup>342</sup> See Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES 3, 18–20 (Sujit Choudhry ed., 2008).

<sup>343</sup> Arend Lijphart, *Consociation: The Model and Its Applications in Divided Societies*, in POLITICAL CO-OPERATION IN DIVIDED SOCIETIES 166, 168 (Desmond Rea ed., 1982).

<sup>344</sup> WOOD, *supra* note 95, at 199.

<sup>345</sup> *Id.* at 606–07.

<sup>346</sup> See THE FEDERALIST NO. 47, *supra* note 1, at 298–301 (James Madison).



barrier to unilateral decisionmaking or domination. As the British system exemplified, mixed government could be accomplished by representing the major interests in a single, omnipotent branch, with no need for separating governmental powers into multiple branches.<sup>347</sup> And presumably, from a mixed government perspective, if important governmental powers were institutionally divided, the relevant interests would need to be represented in each branch.

The U.S. constitutional scheme of separation of powers combines these two design strategies in a distinctive way.<sup>348</sup> Following Montesquieu's suggestion, the Constitution assigns each of the three types of government power to a different branch of government, differentiated by function and personnel. At the same time, the Constitution sacrifices the supposed benefits of functional separation and differentiation by giving the branches a set of "checks and balances" over one another, preventing unilateral action and requiring mutual cooperation to accomplish the tasks of governance. This is the legacy of mixed government, except now substituting functionally differentiated branches for social and political interests — and thereby sacrificing the entire point.

Not surprisingly, many at the Founding were confused about the system of government the Constitution was designed to put in place, and in particular about how the functional purposes of mixed government could be served once branches had been substituted for interests. Hamilton worried at the Convention:

If government [is] in the hands of the *few*, they will tyrannize over the many. If (in) the hands of the many, they will tyrannize over the few. It ought to be in the hands of both; and they should be separated. . . . Gentlemen say we need to be rescued from the democracy. But what the means proposed? A democratic assembly is to be checked by a democratic senate, and both these by a democratic chief magistrate. The end will not be answered — the means will not be equal to the object.<sup>349</sup>

Antifederalist critics of the Constitution concurred. As Patrick Henry put it, "To me it appears that there is no check in that government. The President, senators, and representatives, all, immediately or mediately, are the choice of the people."<sup>350</sup> And the Federal Farmer dismissed "the partitions" between House and Senate as "merely those

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<sup>347</sup> See RAKOVE, *supra* note 87, at 245.

<sup>348</sup> On the fusion of mixed government and separation of functions in the U.S. constitutional design, see W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965); RAKOVE, *supra* note 87, at 245–56; VILE, *supra* note 339, at 36–40; Magill, *supra* note 68, at 1161–67.

<sup>349</sup> 4 *THE PAPERS OF ALEXANDER HAMILTON* 185–86 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

<sup>350</sup> 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, at 164 (Jonathan Elliot ed., 2d ed. 1891).

of the building in which they sit: there will not be found in them any of those genuine balances and checks, among the real different interests, and efforts of the several classes of men in the community we aim at.”<sup>351</sup>

Unable to comprehend what the Framers had actually accomplished, John Adams charitably concluded that the constitutional design must have meant to create mixed government in accordance with the traditional model — institutionalizing a class divide between the aristocracy and the masses by providing separate legislative chambers for each, higher and lower, mediated by an independent executive power.<sup>352</sup> Adams was not completely delusional. Some Federalists, believing that the country should be run by “the rich and well born,”<sup>353</sup> and appalled by the prospect of populist democracy controlling the entirety of government,<sup>354</sup> had, in fact, advocated for a bicameral legislature with an upper house that represented property owners or the wealthy.<sup>355</sup> And many of the Convention delegates left Philadelphia with the hope that the Senate would play this role in a de facto way, owing to the indirect election and lengthy terms of senators, who were also likely to be chosen from among the elite.<sup>356</sup> At least officially, however, the constitutional structure of government was created on the premise that all of the branches of government would be equally democratic, representing “the people.”<sup>357</sup> As Professor Gordon Wood describes, “Americans had retained the forms of the Aristotelian schemes of [mixed] government but had eliminated the substance, thus divesting the various parts of the government of their social constituents. Political power was thus disembodied and became essentially homogeneous.”<sup>358</sup>

<sup>351</sup> Letter XI from the Federal Farmer to the Republican (Jan. 10, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 287–88 (Herbert J. Storing ed., 1981).

<sup>352</sup> See WOOD, *supra* note 95, at 567–87.

<sup>353</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 299 (Max Farrand ed., 1911) (speech of Alexander Hamilton).

<sup>354</sup> See KLARMAN, *supra* note 94; see also WOOD, *supra* note 95, at 506–15.

<sup>355</sup> There were some in the Convention who would have preferred to preserve this role for the Senate. See John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 284 (1999); see also AMAR, *supra* note 130, at 66 (describing Gouverneur Morris’s arguments for a Senate comprised only of men with “great personal property” and possessing “the aristocratic spirit”).

<sup>356</sup> See KLARMAN, *supra* note 94, at 394. Antifederalists, for their own part, suspected that the Senate, as well as the presidency, had been designed to ensure that the government would be controlled by the aristocracy. See *id.* at 363, 367; see also WOOD, *supra* note 95, at 516–18.

<sup>357</sup> See WOOD, *supra* note 95, at 584 (“[T]he parts of the government had lost their social roots. All had become more or less equal agents of the people.”). The Anti-Nobility Clause is a textual marker of this view. See U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States.”).

<sup>358</sup> See WOOD, *supra* note 95, at 604.

Madison's protracted attempt to rationalize the constitutional design just highlights how the political logic of mixed government is lost when branches are substituted for social interests. In Madison's account, the threat of political dominance and oppression by an unchecked aristocracy or an uncontrolled mob is converted into the threat of a "legislative department . . . everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."<sup>359</sup> Rivalrous social groups whose power might be balanced in a well-designed system of mixed government are replaced by "the interior structure" of the national government, which might be "so contriv[ed] . . . as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>360</sup> In the manner of class politics, these branches are to be pitted against one another in a competition for power, creating a stable equilibrium in which "[a]mbition . . . counteract[s] ambition."<sup>361</sup> The hybrid origins of our constitutional system of separation of powers echo loudly and incoherently in Madison's much-cited maxim: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>362</sup>

But Madison clearly understood what the constitutional separation of powers left out. When it came to "guard[ing] one part of the society against the injustice of the other part,"<sup>363</sup> dividing and balancing power among the branches of government would not do the job. The primary constitutional safeguard against factional dominance and oppression, Madison explains, is the "multiplicity of interests" in the extended sphere of a large republic, which will prevent a permanent majority from seizing control of the national government.<sup>364</sup> "[T]he society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."<sup>365</sup> The diffusion and balancing of power, in other words, will take place in society and politics rather than "by introducing into the government . . . a will independent of the society itself."<sup>366</sup> That latter strategy is the mixed gov-

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<sup>359</sup> THE FEDERALIST NO. 48, *supra* note 1, at 306 (James Madison).

<sup>360</sup> THE FEDERALIST NO. 51, *supra* note 1, at 317–18 (James Madison).

<sup>361</sup> *Id.* at 319.

<sup>362</sup> THE FEDERALIST NO. 47, *supra* note 1, at 298 (James Madison).

<sup>363</sup> THE FEDERALIST NO. 51, *supra* note 1, at 320 (James Madison).

<sup>364</sup> *Id.* at 321; *see also* THE FEDERALIST NO. 10, *supra* note 1, at 78 (James Madison).

<sup>365</sup> THE FEDERALIST NO. 51, *supra* note 1, at 321 (James Madison).

<sup>366</sup> *Id.* at 322.

ernment one of institutionalizing the power of competing interests to counterbalance the dominance of any single group.<sup>367</sup>

Yet the idea of interest balancing did not disappear altogether from the structural constitution. A residual attempt at interest representation at the Founding was motivated by the sectional divide over slavery. As Madison reminded his fellow delegates in Philadelphia, “the great division of interests in the United States. . . did not lie between the large and small states. It lay between the northern and southern” states and this division came “principally from the effects of their having, or not having, slaves.”<sup>368</sup> Invoking the basic principle that “every peculiar interest whether in any class of citizens, or any description of states, ought to be secured as far as possible,” Madison proposed at the Convention that the structure of government be designed to provide Northern and Southern states with a mutual “defensive power” to protect their distinctive sectional interests.<sup>369</sup> Specifically, Madison suggested that one branch of the national legislature be apportioned according to states’ free populations while the other be apportioned according to total population, with slaves and free persons counting equally.<sup>370</sup>

The structure of Congress that ultimately prevailed in Philadelphia, in tandem with the presidential election system, was expected to secure a balance of sectional power in the national government by different means. Proportional representation in the lower house of Congress and the Electoral College, bolstered by the Three-Fifths Clause, was supposed to guarantee that the South would soon have secure control over the House of Representatives and the presidency, while the greater number of Northern states would dominate the Senate. If everything went as planned, each section would have a mutual veto over the other, and the South would be empowered to prevent any assault on slavery.<sup>371</sup>

Things did not go as planned. The Founding bargain reflected the shared belief that population growth would be faster in the South than

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<sup>367</sup> See RAKOVE, *supra* note 87, at 282–83.

<sup>368</sup> 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 264 (Jonathan Elliot ed., 2d ed. 1891). Hamilton, among other prominent delegates, agreed: “[T]he only considerable distinction of interests lay between the carrying and non-carrying states.” KLARMAN, *supra* note 94, at 257; see also MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 93 (2006) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 10 (Max Farrand ed., 1911) (statement of James Madison) (Madison’s statement at the constitutional convention that “the real difference of interests lay, not between the large & small but between the N. & Southn. States,” a “line of discrimination” that existed on account of slavery)).

<sup>369</sup> KLARMAN, *supra* note 94, at 257 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., 1911) (statement of James Madison)).

<sup>370</sup> *Id.* at 258.

<sup>371</sup> See GRABER, *supra* note 368, at 103.

the North. In fact, however, the population and political power of the North quickly outpaced that of the South, giving the North a decisive advantage in the House and eventually the Electoral College.<sup>372</sup> Politically vulnerable to Northern dominance over the national government, Southerners sought other structural safeguards. One possibility was the Senate. With the enactment of the Missouri Compromise, a political understanding developed that equal representation of Northern and Southern states in the Senate that currently prevailed would be preserved. This “sectional balance” rule became a quasi-constitutional substitute for the original constitutional bargain over slavery.<sup>373</sup>

Much of Southern political thought in the antebellum period was directed toward concocting further options for institutionalizing the power of white Southerners to defend slavery. This was the project of John C. Calhoun, who laid the groundwork for contemporary consociationalism with his proposals for “concurrent voice” or “concurrent majority” arrangements.<sup>374</sup> As Calhoun explained:

[T]he adoption of some restriction or limitation which shall so effectually prevent any one interest or combination of interests from obtaining the exclusive control of the government . . . can be accomplished only in one way, . . . by dividing and distributing the powers of government [to] give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws or a veto on their execution.<sup>375</sup>

Calhoun and other Southern politicians proposed a number of institutional arrangements along these lines, including a dual Executive, with one President elected by the North and a second by the South, and a similar sectional balance requirement for Supreme Court Justices.<sup>376</sup>

Without these consociational innovations, Calhoun stressed, the constitutional separation of powers — the “division of government into separate, and, as it regards each other, independent departments” — was of no use to vulnerable minorities like Southern slaveholders, because it did nothing to prevent a majority from seizing control of all

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<sup>372</sup> See *id.* at 126–27.

<sup>373</sup> See *id.* at 140–44; Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy*, in *ANALYTIC NARRATIVES* 148, 153–55 (Robert H. Bates et al. eds., 1998).

<sup>374</sup> See JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY, 1789–1861*, at 77–82 (Univ. of S.C. Press 1990) (1930). On the connections between Calhoun’s concurrent majority and contemporary consociationalism, see JAMES H. READ, *MAJORITY RULE VERSUS CONSENSUS: THE POLITICAL THOUGHT OF JOHN C. CALHOUN* 199–204 (2009).

<sup>375</sup> JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND SELECTIONS FROM THE DISCOURSE* 20 (C. Gordon Post ed., 1953) (1853).

<sup>376</sup> See CARPENTER, *supra* note 374, at 94–95, 98–99.

the branches of government and exercising absolute power.<sup>377</sup> Nor, in Calhoun's view, was Madison's *Federalist No. 10* solution of fragmented pluralism likely to prevent the formation of a unified, stable majority faction. Even "[i]f no one interest be strong enough, of itself, to obtain [a majority]," Calhoun explained, "a combination will be formed between those whose interests are most alike — each conceding something to the others, until a sufficient number is obtained to make a majority."<sup>378</sup> In particular, Calhoun believed that political parties would facilitate the organization of majority coalitions and ensure their ability to control the whole of government.<sup>379</sup> The only way to create a structural safeguard against the tyranny of an inevitable majority party or coalition would be to "make the several departments the organs of the distinct interests or portions of the community; and to clothe each with a negative on the others."<sup>380</sup>

Calhoun had a point. The constitutional system of separation of powers provides for checks and balances among the branches and requires "concurrent majorities," such as the dual House and Senate majorities needed to enact legislation. But there is no linkage between the branches and any of the underlying social and political interests that might be in need of representation and protection. Nothing prevents the same factional interest from controlling all of the branches and using them in concert to work its will. The mixed government tradition, the original constitutional bargain over slavery, and Calhoun's arguments for converting separation of powers into consociational democracy all map a road not taken in U.S. constitutional design.

Other constitutional democracies in recent decades have chosen to follow that route, implementing a variety of consociational arrangements that provide "formal power-sharing along the major axes of social division."<sup>381</sup> An illuminating, if fleeting, example of consociationalism in practice comes from South Africa. Seeking to protect the interests of white elites against domination by a black majority in the transition from apartheid to democracy, the ruling National Party in South Africa proposed a consociational power-sharing arrangement that included rotation between white and nonwhite Presidents and a requirement of consensus among the major political par-

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<sup>377</sup> READ, *supra* note 374, at 14 (quoting CALHOUN, *supra* note 375, at 27).

<sup>378</sup> CALHOUN, *supra* note 375, at 14.

<sup>379</sup> See READ, *supra* note 374, at 49–50.

<sup>380</sup> CALHOUN, *supra* note 375, at 27.

<sup>381</sup> Samuel Issacharoff, *Managing Conflict Through Democracy, in* RIGHTS IN DIVIDED SOCIETIES 33, 34 (Colin Harvey & Alex Schwartz eds., 2012); see SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 1273–79 (5th ed. 2016) (providing an overview of consociational arrangements).

ties for important government decisions. While the 1993 Interim Constitution did, in fact, provide for consociational power sharing between the national party and Nelson Mandela's African National Congress in a "government of national unity,"<sup>382</sup> an essentially majoritarian democratic system ultimately won out, giving the African National Congress effective political control over the country and leaving white elites a potentially vulnerable minority.<sup>383</sup>

In the United States, more limited versions of consociationalism have been proposed to bolster the political power of minorities and protect them against domination by cohesive majorities that fail to take their interests into account. Drawing on consociational theory, Professor Lani Guinier has advocated a system of cumulative voting that would empower minority groups to vote strategically to elect some of their candidates of choice, who would then enact or block legislation of critical importance to their constituency.<sup>384</sup> Guinier has further considered the alternative of vesting minorities with a veto over legislation bearing upon "critical minority issues."<sup>385</sup> Concerns about the disproportionate influence of concentrated wealth have motivated scholars to return to the mixed government tradition to explore how the separation of powers might be used to prevent a contemporary oligarchy from dominating the rest of society.<sup>386</sup> As these scholars recognize, the modern assumption "that there is no connection between intrabranched interaction . . . and the dominance of a particular group in society" makes it difficult to conceive of how the separation of powers could be used to ensure that power is diffused, checked, and balanced among different groups.<sup>387</sup> The problem as these theorists conceive it is that economic elites have managed to capture *all* of the branches of government, as well as parties and other major political institutions, leaving no locus of countervailing power that could be used to represent majoritarian or other interests.<sup>388</sup> A possible solution might be to return to the original model of mixed government, redesigning one of the chambers of Congress to represent the interests of the nonwealthy.<sup>389</sup>

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<sup>382</sup> Christina Murray & Richard Simeon, *Recognition Without Empowerment: Minorities in a Democratic South Africa*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES, *supra* note 342, at 409, 425.

<sup>383</sup> See READ, *supra* note 374, at 216.

<sup>384</sup> See LANI GUINIER, THE TYRANNY OF THE MAJORITY 107–08 (1994).

<sup>385</sup> *Id.* at 108.

<sup>386</sup> See Andrias, *supra* note 34, at 429–35; Sitaraman, *supra* note 34, at 61–67.

<sup>387</sup> Andrias, *supra* note 34, at 429.

<sup>388</sup> See *id.* at 422 ("Wealth influences not only Congress and the President, but also the mechanisms scholars argue have replaced Madisonian checks and balances — i.e., political parties and internal executive branch checks.").

<sup>389</sup> See Sitaraman, *supra* note 34, at 62–63 (suggesting the possibility of capping the wealth of candidates for the House of Representatives).

If a proposal like that seems fanciful, it is because the U.S. system of separation of powers is no longer conceived as a mechanism for representing specific social and political interests or balancing power among them. To the limited extent the separation of powers has played that role over the course of constitutional history, it has done so accidentally or opportunistically, when the political stars happened for some period to align.

2. *Federalism Minus Communities of Interest.* — Together with the separation of powers, constitutional federalism is conceived as a mechanism for diffusing and balancing power: “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”<sup>390</sup> Exactly how dividing power between the levels of government is supposed to prevent tyranny is more often left to the imagination than spelled out in any concrete way. But two theories seem to dominate scholarly intuitions.

First, and most straightforwardly, federalism allows groups to *exit* the policymaking domain of the national state and govern themselves independently.<sup>391</sup> Groups that are minorities at the national level and that are vulnerable to oppression by majorities can escape to their own jurisdiction, taking control over the policies that will prevail.<sup>392</sup> In societies divided along ethnic or religious lines, federalism can take the place of (or operate alongside) consociational structures.<sup>393</sup> The same is true in societies divided along other lines. In the antebellum United States, white Southerners sought to protect their interest in preserving slavery not only through representation in the Senate but also through a commitment to federalism — and eventually, taking the exit approach a step further, through secession.

But federalism-as-exit can work to protect only those minorities that can be grouped into subsidiary territorial governance units. In

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<sup>390</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); see also Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 460 (2012) (“[F]ederalism and the separation of powers diffuse government authority to prevent the accumulation of excessive power in any one actor . . .”).

<sup>391</sup> See Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1355 (2012).

<sup>392</sup> The Bill of Rights was originally understood, in large part, to preserve state and local institutions of self-government in order to protect majorities at the state and local level against the risk of tyranny by untrustworthy federal officials. See AKHIL REED AMAR, *THE BILL OF RIGHTS*, at xii-xiii, 3-133 (1998); Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977 (1999) (reviewing AMAR, *supra*).

<sup>393</sup> Lijphart sees federalism and power sharing in the national government as complementary features of the consociational design package. See LIJPHART, *PLURAL SOCIETIES*, *supra* note 341, at 25-47.



the U.S. system of federalism, where states are the relevant governance unit, federalism can serve as an effective group-empowerment mechanism only for interests that correlate with existing state boundaries. At the Founding, states, or regional coalitions of states, in at least some respects plausibly constituted communities with distinctive political interests worthy of protection and empowerment. Several states established different religions (which the Establishment Clause, as it was originally understood, protected against federal interference).<sup>394</sup> Northern and Southern states had different economies.<sup>395</sup> Most importantly, the sectional divide over slavery aligned political interest with constitutional geography through the antebellum period, making federalism another crucial mechanism for protecting the interests of Southern slaveholders. Through the civil rights era, the interest of Southern states in preserving Jim Crow sustained the sectional divide and the significance of federalism.<sup>396</sup>

Beyond shielding Southern slaveholders and segregationists, however, constitutional federalism has not continued to play a major role in empowering political interests. The simple reason is that politically salient interests have ceased to align with state boundaries. No doubt, the fifty states are different in many ways: demography, geography, weather, and even “political culture.”<sup>397</sup> But what matters for federalism-as-exit is whether the lines of division on important policy issues drawn by political interests correspond to the geographical lines of states. On most contested issues, this correlation is weak or nonexistent; proponents and opponents are spread throughout the country rather than concentrated in any one or several states.<sup>398</sup> The most politically salient state-based differences are based on partisan affiliation, dividing Republican and Democratic states. Yet the red state-blue state divide reflects relatively modest differences in political composition at the state level, on the order of less than 60–40 in either direction.<sup>399</sup> These statistics pale in comparison to the much more dramatic and consistent differences in partisan and policy preferences between

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<sup>394</sup> See AMAR, *supra* note 392, at 32–33; Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 163–66.

<sup>395</sup> See KLARMAN, *supra* note 94, at 186–90.

<sup>396</sup> See WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 152–53 (1964) (“The main beneficiar[ies] [of federalism] throughout American history ha[ve] been the Southern Whites, who have been given the freedom to oppress Negroes . . .” *Id.* at 152.).

<sup>397</sup> See Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* 46–66 (Feb. 24, 2015) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>398</sup> See MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 117 (2008); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 16–24 (2009).

<sup>399</sup> See Stephen Ansolabehere et al., *Purple America*, 20 J. ECON. PERSP. 97, 99 (2006).

urban and rural voters;<sup>400</sup> some of the bluest cities are in the reddest states.<sup>401</sup>

One consequence of the weak correlation between state boundaries and political interests is that most Americans now care very little about how power is distributed among the states. Consider the constitutional anachronism of equal state representation in the Senate. The fact that people living in Wyoming have more than sixty times the voting power of people in California in the Senate is a source of outrage for constitutional and political theorists, who rightly characterize this aspect of the constitutional design as democratically indefensible.<sup>402</sup> And the unequal distribution of federal spending that results from the disproportionate representation of small states really is an arbitrary and unfair consequence of the constitutional design. For most purposes, however, the relative political power of small and large states has been fairly inconsequential — simply because voters from small and large states have not had systematically different policy interests. Only to the extent those interests diverge will political actors have much reason to care how political power is allocated among the states. Thus, at the constitutional convention, the primary argument against equal representation for small states was the lack of any obvious correlation between the size of states and their economic, religious, or other policy-relevant interests.<sup>403</sup> At the same time, however, some large-state delegates were ultimately willing to go along with the Connecticut compromise for the same essential reason: the interest-based cleavage that mattered most, the sectional divide over slavery, cut across the small state-large state divide.<sup>404</sup> Today, the unequal power of small states in the Senate has begun to matter more on account of demographic shifts that have made large states on average more urban and liberal and small states more rural and conservative. If this trend continues and the disproportionate representation of small states allows Republicans to get the upper hand over Democrats in national politics, the distribution of state power will become a more significant political issue. But what Benjamin Franklin remarked at the constitutional convention remains true: “The Interest of a State is

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<sup>400</sup> See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 241 (2013).

<sup>401</sup> See FEELEY & RUBIN, *supra* note 398, at 117; Josh Kron, *Red State, Blue City: How the Urban-Rural Divide is Splitting America*, THE ATLANTIC (Nov. 30, 2012), <http://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splittingamerica/265686> [<https://perma.cc/MPT4-C38M>].

<sup>402</sup> See, e.g., ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 46–54 (2001); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 49–62 (2006).

<sup>403</sup> See RAKOVE, *supra* note 87, at 66–67.

<sup>404</sup> See *id.* at 69–78; *supra* note 368 and accompanying text.

made up of the interests of its individual members . . . . If they are not injured, the State is not injured.”<sup>405</sup>

Put differently, the political consequences of state power depend entirely on how that power is distributed among the underlying interests. And how power at the level of states is passed through to interests will in most cases be a contingent matter of political geography. Federalism allows for the empowerment of interests that lose consistently at the national level but, owing to the good fortune of geographical clumping, can command majority support in one or more states. For these interests, shifting from national to state decisionmaking can make the difference between no power and some. Political parties are one consistent example: when one party controls Congress and the White House, the opposition party will always control some number of states. Beyond parties, some groups and interests can benefit from federalism but not others. Federalism could be used to empower Mormons — a national-level minority that happens to be a majority in the state of Utah — but not other religious minorities that are smaller and geographically dispersed. For the same reasons, federalism during the civil rights era was useful to Southern segregationists but not to Southern blacks.<sup>406</sup>

For the subset of interests that might benefit from devolving power to the states, federalism creates the possibility of strategic empowerment. When the Supreme Court in *United States v. Windsor*<sup>407</sup> restricted the authority of the national government to withhold benefits from same-sex couples married in states where such marriages had been legal,<sup>408</sup> it effectively leveraged federalism to redistribute political power to gays and lesbians and their supporters in progressive states.<sup>409</sup> It works the other way around, too: interests that can command a national-level majority will do better to shift decisionmaking power away from the states in which they find themselves as oppressed minorities. The Court’s decision in *Obergefell v. Hodges*<sup>410</sup> brought victory to proponents of same-sex marriage in the thirteen

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<sup>405</sup> RAKOVE, *supra* note 87, at 67 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 199 (Max Farrand ed., 1911) (statement of Benjamin Franklin)).

<sup>406</sup> More localized forms of decentralized governance might be more useful from this perspective. Gerken has argued for “pushing federalism all the way down,” not just to cities but also to sublocal governance institutions such as juries, school committees, zoning boards, and the like. See Gerken, *supra* note 21, at 21–33.

<sup>407</sup> 133 S. Ct. 2675 (2013).

<sup>408</sup> See *id.* at 2682.

<sup>409</sup> The Court’s earlier decision in *Romer v. Evans*, 517 U.S. 620 (1996), restricting the authority of the voters of Colorado to preempt local antidiscrimination ordinances enacted in cities with progressive majorities, see *id.* at 623–24, 635–36, served a similar purpose at a substate level of decentralization. See Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 168 (2005) (presenting a “localist reading of *Romer*”).

<sup>410</sup> 135 S. Ct. 2584 (2015).

states where it remained illegal.<sup>411</sup> The success of the civil rights movement, marked by federal statutes like the Civil Rights Act and the Voting Rights Act, was a defeat for federalism.<sup>412</sup>

As with separation of powers, then, federalism can be used strategically or can work fortuitously as a tool of interest empowerment. But, again, it can do so only under a restrictive set of political conditions. Only certain kinds of groups — national minorities that can form state majorities — can conceivably benefit from decentralization. Moreover, within the pool of potential beneficiary groups, notwithstanding the strategic possibilities, which groups will in fact benefit will often be an unpredictable matter of political contingency.

The same limitations apply to the other mechanism through which federalism might function to redistribute or diffuse power. Switching metaphors from “exit” to “voice,”<sup>413</sup> federalism can empower groups not to flee the national government but to influence its decisionmaking by mobilizing through state governments. This is the view of federalism long emphasized by process and political-safeguards theorists.<sup>414</sup> It is also the focus of a new generation of scholars who portray “federalism [as] the new nationalism,”<sup>415</sup> emphasizing how decentralized governance can empower minorities to exercise “a muscular form of voice”<sup>416</sup> in administering or resisting national policy.<sup>417</sup>

But which minorities, exactly, are empowered by federalism-as-voice? Here again, there does not seem to be any particular answer. The political voices that states will amplify are the voices of those interests that happen to be powerful within the state. But because federalism is generally agnostic as to what those interests will be, it is hard to make any reliable predictions about how state-amplified voice will bear on the balance or distribution of interest-level power.<sup>418</sup>

<sup>411</sup> Julia Zorthian, *These are the States Where SCOTUS Just Legalized Same-Sex Marriage*, TIME (June 26, 2015), <http://time.com/3937662/gay-marriage-supreme-court-states-legal> [https://perma.cc/9SZD-88KP].

<sup>412</sup> See BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 102 (2014) (“[T]he Voting Rights Act represented . . . a sweeping assault on federalism . . .”); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 502 (2000) (“The Civil Rights Act of 1964 provoked sustained public deliberation about the role of the federal government that fundamentally transformed American traditions of federalism.”).

<sup>413</sup> See Gerken, *supra* note 21, at 7; see also SCHAPIRO, *supra* note 398, at 7, 92–120 (developing a model of federalism that “emphasizes the value of multiple independent voices of governance,” *id.* at 7).

<sup>414</sup> See *supra* notes 156–159 and accompanying text.

<sup>415</sup> See, e.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1889 (2014).

<sup>416</sup> Gerken, *supra* note 21, at 7.

<sup>417</sup> See *id.* at 7–8.

<sup>418</sup> See Bulman-Pozen, *supra* note 330, at 1095–96 (“Federalism divides power and offers a structure for substantive views to compete. It does not specify what the recipients of divided

Gerken highlights the possibility of a “progressive federalism” that would empower groups like racial minorities, proponents of gay rights, and environmentalists.<sup>419</sup> As Gerken recognizes, however, decentralized governance might also amplify the voices of opponents of transgender bathroom choice in North Carolina, anti-immigration forces in Arizona, and anti-abortion activists in Texas — or for that matter *any* group that happens to constitute a local majority.<sup>420</sup> Federalism-as-voice does serve to “diffuse” power by making it possible for groups that are minorities at the national level to take control of decentralized political decisionmaking institutions and use them as soapboxes to amplify their voices in national democratic contestation.<sup>421</sup> But it is important to recognize that the recipients of this redistribution of power will be selected more or less at random.

In sum, just as the lack of any reliable connection between the power of branches and the power of interests has undermined the mixed government justification for the separation of powers, the lack of any strong correlation between the power of states and the power of politically salient groups has made constitutional federalism — of either the voice or exit variety — at best a blunt instrument for redistributing interest-level power.

### C. *What Remains?*

Courts and constitutional theorists since Madison have agreed that there is something deeply problematic — even tyrannical — about the concentration of structural power. But what, exactly, would be so bad about a system in which one political institution possessed all of the power? Perhaps it would help to imagine what would happen to the American constitutional system if the presidency and judicial review were eliminated altogether.<sup>422</sup> For good measure, let us also imagine doing away with any constitutional limitations on congressional power or other guarantees of state sovereignty, effectively eliminating constitutional federalism and concentrating all the power of the American state in Congress. Would this be “the very definition of tyranny”?

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power should use it for, nor does it equate particular views with one level of government or the other.”).

<sup>419</sup> See Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY 37, 37–38 (2012).

<sup>420</sup> See *id.* at 46 (“Local power doesn’t just empower racial minorities and dissenters, a progressive might argue. It also empowers those who will oppress them.”).

<sup>421</sup> See Gerken, *supra* note 21, at 43–44 (observing that, just as separation of powers “diffuse[s] power horizontally,” federalism “diffuse[s] power vertically”).

<sup>422</sup> Alternatively, and to much the same effect, we could imagine what eliminating Congress would look like. See Adrian Vermeule, Opinion, *Imagine There’s No Congress*, WASH. POST (Jan. 11, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/01/11/imagine-theres-no-congress> [https://perma.cc/2DUY-BDZ7].

Actually, it would be England. This is roughly how the British Westminster model of government works, vesting nearly unconstrained power in Parliament, and therefore in the party that controls Parliament at any given time.<sup>423</sup> Political scientists and comparative constitutionalists have long debated the advantages and disadvantages of the Westminster system as compared to the U.S. presidential system.<sup>424</sup> With respect to tyranny, ironically, a leading critique of presidentialism is that interbranch gridlock can lead Presidents to seize unilateral control of government, dismissing the legislature and setting themselves up as dictators — as has happened in every one of the Latin American presidential systems at some point in time.<sup>425</sup> More generally, suffice to say that the superiority of the American system of separated powers is far from the consensus view.<sup>426</sup>

The comparison between the U.S. and British systems does help bring to light the functional stakes of dividing versus concentrating institutional power in terms of the representation and empowerment of underlying interests. At the most basic level, increasing the number of institutions over which interests compete for control decreases the odds that a single interest will control the entire power of the state. And if a single interest does not manage to control every institution at once, then multiple interests will have to cooperate in order for government to get anything done. The U.S. system thus decreases the likelihood of the kind of political and programmatic unification that is more frequently on display in unconstrained parliamentary systems but has been approximated on occasion in Washington during periods of highly unified government, such as the New Deal and Reconstruction. Simply put, accomplishing any comprehensive policy agenda will be more difficult when multiple interests have to be brought into agreement.<sup>427</sup>

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<sup>423</sup> See *Parliamentary Sovereignty*, U.K. PARLIAMENT, <https://www.parliament.uk/about/how/role/sovereignty> [<https://perma.cc/7TAP-FYXE>].

<sup>424</sup> For an overview of the debates, see generally GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 83–119 (2d ed. 1997); *THE FAILURE OF PRESIDENTIAL DEMOCRACY* (Juan J. Linz & Arturo Valenzuela eds., 1994).

<sup>425</sup> See Ackerman, *supra* note 127, at 645–46. See generally Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY*, *supra* note 424, at 3 (elaborating on structural problems of presidentialism, including among others the potentially conflicting legitimacy of President and Congress).

<sup>426</sup> See Ackerman, *supra* note 127, at 643–64 (drawing on the political science literature to build a case against presidentialism).

<sup>427</sup> Whether multiple interests do, in fact, have to be brought into agreement, and if so how many, will depend not just on the structure of government but also on electoral and party systems. See MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES* 259–72 (1992). See generally Gardbaum, *supra* note 134 (manuscript at 2) (arguing that a state's party system affects the distribution of power “regardless of [the state’s] form of government”).

Here again, for better and for worse.<sup>428</sup> Following in the footsteps of Woodrow Wilson, who denounced the American system of separation of powers as a “grievous mistake,”<sup>429</sup> generations of critics have bemoaned the system’s tendency toward gridlock and inefficacious governance.<sup>430</sup> On the other hand, defenders of the U.S. constitutional design describe the same functional tendencies in terms of moderation, deliberation, building consensus — and, of course, preventing tyranny.<sup>431</sup>

Whatever the normative spin, the important point for present purposes is that dividing power at the institutional level does, in fact, create a systemic tendency toward diffusing and balancing power among a range of interests. The more government decisionmaking institutions, the greater the probability that multiple interests will participate in governance and that complete control over policy outcomes will not be in the hands of a single interest.

What this means in practice is a bit more complicated. With respect to the legislative-executive separation of powers, only interests on a scale large enough to compete for control of the presidency, the House, or the Senate are distinctively empowered by the U.S. constitutional design. At least in recent decades, this has typically meant the two major political parties. During periods when party control over the government is divided — but not when party control is unified — the Washington system of government “balances” partisan power, giving each of the parties an effective veto over legislation and much else the government might do.<sup>432</sup> Moreover, federalism all but ensures the vertical division of government along partisan lines — even when the national government is unified, the opposition party will control a number of states. Control over state governments does not give the opposition party a veto over national policymaking, but it does create opportunities to exercise influence in other ways — by resisting federal regulatory incursions, enacting policies in tension with the national

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<sup>428</sup> See *supra* notes 130–131 and accompanying text (section I.A’s discussion of the costs and benefits of separated powers in terms of incapacitating government).

<sup>429</sup> WOODROW WILSON, CONGRESSIONAL GOVERNMENT 187 (Johns Hopkins Univ. Press 1981) (1885).

<sup>430</sup> Levinson & Pildes, *supra* note 30, at 2325–26 (describing the development of this critique).

<sup>431</sup> See *id.* at 2328 & nn.61–62 (collecting sources taking this view).

<sup>432</sup> The fact of fluctuation between periods of unified and divided government complicates the simple equation of divided with less, or less extreme, governance, and unified with more. Anticipating gridlock during periods of divided government, a party with temporarily unified control will be more likely to implement extreme policies in their preferred direction. See Ackerman, *supra* note 127, at 650–53; Matthew C. Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 J. LEGAL STUD. 331, 335 (2013). Indeed, for this reason, divided government may actually pose the greater risk of “tyranny.”

government's agenda, and creating frictions in the "cooperative" administration of federal regulatory programs.<sup>433</sup>

A further, and rather fundamental, complication is that the number and variety of interests participating in government decisionmaking is not just a function of the formal, constitutional divisions among the branches of the national government or between the national government and the states. As Magill has emphasized in the separation of powers context, the branches of government "are complex institutions that are made up of many subparts . . . [with] varying interests that do not always coincide with one another."<sup>434</sup> Depending on the issue and relevant interests, and also on the internal institutional design of the legislative and executive branches, each might encompass any number of interests with varying degrees of influence. For example, even during periods of unified government, supermajority rules and practices like the Senate filibuster can empower the minority party on important issues.<sup>435</sup> Congressional committees respond to different interest-based constituencies, not infrequently forming alliances with executive branch agencies.<sup>436</sup> The executive branch can be more or less "unitary" depending on a host of institutional variables but is seldom if ever truly univocal.<sup>437</sup> As proponents and observers of an "internal separation of powers" within the executive branch emphasize, divisions between and among the White House, the various line agencies with different and sometimes competing agendas, and the political appointees and career civil servants of different stripes within agencies can create at least as many competing interests as the constitutional divide between the legislative and executive branches.<sup>438</sup>

<sup>433</sup> See Bulman-Pozen, *supra* note 330, at 1079–80.

<sup>434</sup> Magill, *supra* note 31, at 645.

<sup>435</sup> See Levinson & Pildes, *supra* note 30, at 2372–74. Indeed, for all the functional purposes under discussion, supermajority voting rules can generally serve as a substitute for separation of powers among the branches of government. See Gersen, *supra* note 145, at 334–36. As Professor Jacob Gersen rightly recognizes, interbranch separation of powers would be importantly different from intrabranched supermajority voting rules only if the branches of government represented "different groups of societal interests," *id.* at 337, whose representation in government would be desirable. *Id.* at 336–38.

<sup>436</sup> See Magill, *supra* note 31, at 646.

<sup>437</sup> See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. (forthcoming 2017) (manuscript at 31–32) (on file with the Harvard Law School Library).

<sup>438</sup> See Neal Kumar Katyal, *Toward Internal Separation of Powers*, 116 YALE L.J.F. 106 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 427–34 (2009); Michaels, *supra* note 30, at 543–47; Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 243–60 (2016). See generally Magill & Vermeule, *supra* note 152 (examining how administrative law functions to allocate power within agencies).



The de jure institutional boundaries and sovereignties of separation of powers (and, for similar reasons, federalism)<sup>439</sup> thus tell us very little about the de facto diffusion or concentration of interest-level power. As the “separation of parties” observation highlights, formal institutional divisions need not reflect divergent interests. And, the other way around, even when power is institutionally concentrated in the national government or the executive branch, considerable functional fragmentation can still prevail. The question of how many branches of government we have turns out to be a surprisingly difficult one when asked from a functional, de facto perspective rather than a constitutional, de jure one; depending on the context, the answer could be more or less than three. And the same would be true even if the presidency or Congress disappeared entirely.<sup>440</sup>

In sum, it is worth recognizing that dividing power at the structural level does have some positive correlation with the diffusion of power among interests. But it is also important to recognize that the relationship is both attenuated and agnostic. The U.S. system of separation of powers and federalism does make it difficult for a single interest to take plenary control over government, but the distribution of power at the structural level tells us very little about the number, identity, or relative influence of the interests that will participate in government decisionmaking. Balancing power on the institutional level is certainly no guarantee that power will be balanced between Democrats and Republicans, rich and poor, proponents of gay rights and religious objectors, or other competing interests. To the extent constitutional law is concerned about the balance of power at the democratic level or aspires to prevent political interests and social groups from accumulating enough power to tyrannize their rivals, it will need to look beyond the structural constitution.

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To be clear, the conclusion here is not that the separation of powers or federalism lack any good justification, or that there is no reason for constitutional law to care about how power is distributed among the branches of government or between the national government and the states. The focus of skeptical attention has been the Madisonian aversion to concentrated institutional power in its own right, and the orien-

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<sup>439</sup> In addition to fostering the pluralist empowerment of interests that can exercise majority control at the state level, to the (considerable) extent states internally decentralize to the local and sublocal levels, the number of interests participating in governance multiplies by orders of magnitude. See Gerken, *supra* note 21, at 21–33.

<sup>440</sup> Cf. Magill, *supra* note 31, at 653 (“[O]nce we recognize that government power can be, and is, diffused *within* a branch, and that fragmentation of state power need not . . . be among branches, the concern [about power at the level of branches] becomes anachronistic.”).

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tation of structural constitutional law toward “balancing” power at the institutional level. But there are any number of other reasons why constitutional law might take an interest in the distribution of structural power.

Some of these possible reasons have been mentioned already in passing. Separation of powers might be based not on the imperative to disperse undifferentiated power but on the functional advantages of matching different kinds of governance tasks — legislating, executing, adjudicating — to the most competent institutions. Dividing powers among the branches might also foster deliberation, facilitate democratic accountability, or protect liberty by making it more difficult for government to act. Federalism comes with its own set of justifications for dividing power vertically between the national government and the states: creating opportunities for political participation, promoting experimentation, improving welfare by means of preference-matching and sorting, and so on.

The argument in this Part does not speak to any of these other kinds of reasons for distributing structural power. (Whereas the argument in Part I speaks to many of them, inasmuch as accurately locating power in government has some bearing on the appropriate lines of division and distribution.) Here, the limited ambition has been to examine how the structural constitution does, and does not, relate to the distribution of power among political interests and social groups. Why else constitutional law might be concerned about the distribution of power among government institutions can be left an open question.

### III. BEYOND CONSTITUTIONAL STRUCTURE

If constitutional structure is at best a blunt or blind instrument for distributing power among political interests, a number of other areas of public law are more centrally concerned with that project. “Anticapture” judicial review and institutional design in administrative and constitutional law bridge the divide between the institutional structure of government and the power of democratic-level interests by attempting to police the undue power of well-organized interest groups that are viewed as unfairly advantaged in political competition. Moving all the way down to the democratic level, election law seeks to equalize political power among voters and political parties and to ensure that racial minorities and other disadvantaged groups receive a fair measure of representation. Constitutional rights — conceived in the political process tradition as substitutes for political power — might also be viewed as a mechanism for redistributing power and protecting powerless groups. Finally, a wider range of regulatory and redistributive regimes governing the economic and social spheres might be understood as redistributing political resources — money and mobilization — for the purpose of selectively empowering certain

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groups. These areas of public law are seldom viewed in a common frame with constitutional structure or with one another. But all might be usefully understood as different and more or less effective tools for accomplishing the same basic task of redistributing and balancing power among political interests and social groups.

As will become clear, this level of abstraction masks many differences, complexities, and unanswered questions. There is little agreement — even within any one of these areas, let alone among them — about the normative goals that redistributing power should serve or how power optimally should be distributed across different groups and interests in society. Most fundamentally, public law lacks any consensus vision of ideally well-functioning democracy. Commitments to majority rule compete with concerns for protecting and empowering minorities. Courts and theorists have very different views about the circumstances under which pluralist competition among groups and interests is fair or democratically attractive. The discussion that follows does not attempt to sort through all of these debates in any systematic way, much less take a position on any of the contested issues. The hope is just to show how a number of areas of constitutional and public law that are typically viewed as freestanding might be united — with one another and with the structural constitution — by a shared concern with diffusing, balancing, or otherwise distributing power.

#### A. *Administrative Process and “Captured” Power*

Concerns about unequal political power have driven public law’s efforts to come to grips with interest group “capture” of the administrative (and legislative) process. The perceived problem is that certain groups exercise disproportionate power in pluralist political competition owing to structural advantages that competing groups lack. Specifically, smaller “special interest” groups that are more concentrated and have higher per capita stakes will have an easier time overcoming collective action problems than will larger, more diffuse groups with lower per capita stakes.<sup>441</sup> As a result, these special interests will amass and leverage greater political resources, which can be used to mobilize and persuade voters, contribute money to campaigns, offer future employment to government officials, and provide information and expertise to legislators and regulators. Through these and other channels, special interests will wield disproportionate influence in legislative and administrative decisionmaking processes and shift policy in their preferred directions, at the expense of competing interests and

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<sup>441</sup> See MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION* 34, 143–44 (1965).

the broader public welfare.<sup>442</sup> Conventional political wisdom holds that the regulatory state is pervasively “captured” in this way by special interests.<sup>443</sup>

This diagnosis of disproportionate power has motivated public law prescriptions designed to level the political playing field between special interests and relatively disadvantaged groups. Starting in the 1960s, concerns about the capture of administrative agencies by the firms or industries they were charged with regulating led to more aggressive judicial review of administrative decisionmaking.<sup>444</sup> These concerns also led courts to impose new procedural requirements that were meant to facilitate the participation and influence of unrepresented or underrepresented interests — such as consumer protection, environmental regulation, and civil rights — in administrative decisionmaking processes.<sup>445</sup> This combination of “leveling down” and “leveling up” strategies was meant to equalize the power of the various stakeholders in regulation through a system of fairly weighted pluralist competition.<sup>446</sup> Judicial pursuit of that goal seemed eminently justifiable on the *Carolene Products* principle that courts should intervene to correct democratic failures and protect politically disadvantaged groups.<sup>447</sup>

Nonetheless, judicial efforts to counteract agency capture of administrative decisionmaking quickly attracted criticism. The cumbersome procedural requirements that were supposed to ensure representation of all affected interests arguably “ossified” agencies, delaying action and discouraging rulemaking.<sup>448</sup> Worse, these requirements might have perversely aggravated the problem of capture, as special interests were better equipped to navigate the increasingly complicated procedural pathways and also to subvert them by weighing in privately

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<sup>442</sup> See, e.g., Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE 1, 2 (Daniel Carpenter & David A. Moss eds., 2014) (providing an overview of regulatory capture theory).

<sup>443</sup> But see STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 4 (2008) (contesting the conventional wisdom by building a case that the regulatory state at least *sometimes* serves the public good). Concern about regulatory capture is far from a modern phenomenon. See William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE, *supra* note 442, at 25, 38–41 (tracing capture theory from the present back to the American constitutional Founding, the classical republican tradition, and Plato).

<sup>444</sup> See Kagan, *supra* note 11, at 2264–65.

<sup>445</sup> See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1711–60 (1975). Congress also responded by enacting statutes with more detail that constrained the discretion of agencies to depart from legislative policy and by creating more participatory opportunities for excluded interests. See Kagan, *supra* note 11, at 2265; Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1052 (1997).

<sup>446</sup> See Kagan, *supra* note 11, at 2265–66.

<sup>447</sup> See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 395 (2015).

<sup>448</sup> See Kagan, *supra* note 11, at 2266–67.

with agencies prior to rulemaking.<sup>449</sup> More fundamentally, the very goal of equalizing influence was spurned by democratic idealists who preferred a more public-regarding approach to democratic decisionmaking than even the most fairly balanced pluralist competition among self-serving interest groups.<sup>450</sup> At the same time, public-choice pessimists sowed skepticism that shifting decisionmaking power from agencies to any other political institution, including courts, would reduce or level interest group influence or make policy any more public regarding.<sup>451</sup> In the midst of this critical onslaught, the Supreme Court significantly reined in the judicial project of “[re]allocat[ing] . . . policymaking power” through anticapture procedural innovations.<sup>452</sup>

Notwithstanding this pullback, many continue to view judicial review of administrative decisionmaking as a “[b]rake on [c]apture.”<sup>453</sup> And some commentators have perceived a recent reinvigoration of anticapture review in the D.C. Circuit in the form of “libertarian administrative law,”<sup>454</sup> the aim of which is to “diminish[] the authority of powerful private groups (or factions) — which . . . account for the growing, liberty-invading power of government.”<sup>455</sup>

On another front, as the anticapture agenda began to wane in administrative law, constitutional scholars began to take up the cause of combating the excessive influence of special interests in government more broadly. Libertarian-leaning scholars argued that courts should invalidate broad swaths of regulation and redistributive taxation as unconstitutional takings in order to prevent interest group rent-seeking from reducing social welfare.<sup>456</sup> From the political left, progressive scholars focusing on a different set of laws and policies have argued that courts should invalidate or narrowly construe “private-regarding” legislation,<sup>457</sup> or laws that “distribut[e] . . . resources or opportunities to one group rather than another solely because those benefited have ex-

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<sup>449</sup> See *id.* at 2267–68.

<sup>450</sup> See *id.* at 2266.

<sup>451</sup> See Merrill, *supra* note 445, at 1044.

<sup>452</sup> Sunstein & Vermeule, *supra* note 447, at 396 (describing the “broader meaning” of *Vermont Yankee* in terms of “the allocation of policymaking power” and the limited role of courts in shifting policy in the direction that judges prefer, *id.* at 396–97); see also *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

<sup>453</sup> M. Elizabeth Magill, *Courts and Regulatory Capture*, in PREVENTING REGULATORY CAPTURE, *supra* note 442, at 397, 405; see also *id.* at 405–10; Sunstein, *supra* note 136, at 61–63 (discussing “hard-look” review in these terms).

<sup>454</sup> Sunstein & Vermeule, *supra* note 447, at 393.

<sup>455</sup> *Id.* at 402–03.

<sup>456</sup> See, e.g., RICHARD A. EPSTEIN, TAKINGS 30–31 (1985).

<sup>457</sup> See Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 875 (1980).

ercised the raw power to obtain governmental assistance.”<sup>458</sup> After a period of decline, these arguments have been revived in recent years. Scholars on the libertarian right have called for the rehabilitation of the Supreme Court’s *Lochner*-era condemnation of economic legislation that “favored entrenched special interests at the expense of competitors with less political power,”<sup>459</sup> and have applauded and called for the expansion of lower court decisions invalidating occupational licensing laws that reflect interest group rent-seeking and successful capture.<sup>460</sup> Scholars on the progressive left have become fixated on capture by business groups and wealthy individuals, proposing “more intense judicial review of legislative or executive action in circumstances where wealth has dominated without countervailing checks.”<sup>461</sup> How, if at all, courts will respond to these calls for heightened anticapture review remains to be seen.

In any event, judicial review is not the only mechanism for policing and preventing capture. Returning to the administrative process, the anticapture agenda has also been directed toward agency design. For example, Professor Rachel Barkow has explored how agencies might be designed with the goal of “protecting the interests of politically powerless groups, including the dispersed general public, where the political pressure to rule for more powerful, organized interests will be intense and one-sided.”<sup>462</sup> Barkow identifies a number of design features that can serve as “equalizing factors,” leveling down the power of interest groups.<sup>463</sup>

Alternatively, regulatory decisionmaking processes can be designed to level up the power of politically disadvantaged groups. This was the goal of the procedural reforms imposed by courts in the 1970s, meant to ensure that all affected interests were represented in agency

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<sup>458</sup> Sunstein, *supra* note 136, at 50–51; *see also* Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46–47 (1989); Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 51–54 (1984); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 228–29 (1986); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 476–89 (1989).

<sup>459</sup> DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* 3 (2011).

<sup>460</sup> *See* Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1086–90 (2014).

<sup>461</sup> Andrias, *supra* note 34, at 487; *see also* Sitaraman, *supra* note 34 (manuscript at 58–61).

<sup>462</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010).

<sup>463</sup> *Id.* at 52; *see also id.* at 42–64. Another approach to preventing capture is bureaucratic redundancy or overlapping delegations. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1185–87 (2012); Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1677 (2006).

rulemaking processes.<sup>464</sup> Congress and the President, too, can design agency structures and processes to enfranchise, or “stack the deck” in favor of, groups that would otherwise lack the organization or resources to influence agency decisionmaking.<sup>465</sup> The influential theory of congressional structure and process—control over agencies developed by Professors Matthew McCubbins, Roger Noll, and Barry Weingast (McNollgast) features cases in which the congressional goal was to enfranchise previously excluded interests and subsidize their representation.<sup>466</sup> A different version of the same basic approach is the “tripartism” advocated by Professors Ian Ayres and John Braithwaite, in which public interest groups are given full access to the information available to regulators, a role in negotiating regulatory outcomes, and some measure of enforcement authority.<sup>467</sup> Many “new governance” regimes similarly seek to involve public interest groups and other stakeholders in decisionmaking,<sup>468</sup> with the Madisonian goal of checking and balancing by means of “countervailing power”<sup>469</sup> — here applied at the level of interests rather than institutions.

With the same goal in mind, institutional designers have also made use of “proxy advocates,” government officials who are charged with representing disempowered interests in administrative decisionmaking processes.<sup>470</sup> Originally developed to protect the interests of consumers in federal and state rate-regulation proceedings,<sup>471</sup> the proxy-advocate model has received more attention in recent years in the form of “offices of goodness” charged with monitoring national security agencies with the goal of protecting the rights and liberties of vulnera-

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<sup>464</sup> See *supra* notes 444–447 and accompanying text.

<sup>465</sup> See McNollgast, *The Political Economy of Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1710 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (“By structuring who gets to make what decisions when, as well as by establishing the process by which those decisions are made, the details of enabling legislation can stack the deck in an agency’s decision-making.”).

<sup>466</sup> See Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 264–66 (1987).

<sup>467</sup> See IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 54–100 (1992).

<sup>468</sup> For an overview of “new governance” or “experimentalist” approaches to regulation, see, for example, Orly Lobel, *New Governance as Regulatory Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE 65 (David Levi-Faur ed., 2012); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55–56, 78–93 (2011).

<sup>469</sup> See Archon Fung & Erik Olin Wright, *Countervailing Power in Empowered Participatory Governance*, in DEEPENING DEMOCRACY 259, 260 (Archon Fung & Erik Olin Wright eds., 2003).

<sup>470</sup> See Daniel Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, in PREVENTING REGULATORY CAPTURE, *supra* note 442, at 365, 368.

<sup>471</sup> See Darryl G. Stein, *Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings*, 67 N.Y.U. ANN. SURV. AM. L. 513, 520, 524–25 (2012).

ble groups.<sup>472</sup> These offices can be embedded in individual agencies, on the model of the Department of Homeland Security Office for Civil Rights and Civil Liberties,<sup>473</sup> or they can be set up as independent agencies, like the Privacy and Civil Liberties Oversight Board.<sup>474</sup> In other regulatory contexts as well, freestanding agencies have been designed to represent the interests of disempowered groups. A prominent recent example is the creation of the Consumer Financial Protection Bureau in response to the lack of attention to consumer interests by existing banking regulators.<sup>475</sup> Short of creating a brand new agency, Congress might also respond to the problem of disproportionate influence by mobilizing other, preexisting agencies as “lobbyists” on behalf of disempowered interests.<sup>476</sup> All of these ways of hardwiring interest representation into the institutional structure of the executive branch might be viewed as an administrative state version of mixed government or consociationalism.<sup>477</sup>

Of course, whether Congress will do any of these things depends on who controls its decisionmaking. If powerful interest groups hold the same sway over Congress as they do over captured agencies, then agency design is not likely to emerge as a solution. To the contrary, we might expect the political branches to structure agencies and their decisionmaking processes so that “the politics of the bureaucracy will mirror the politics surrounding Congress and the president.”<sup>478</sup> Legislative capture may beget agency capture by design. An industry with legislative clout, for example, might convince Congress to create an agency with regulatory authority over that industry alone, facilitating its dominance over administrative decisionmaking.<sup>479</sup>

An anticapture agenda run through the judiciary faces challenges of its own. Here again, courts will only offer a promising solution to the extent that special interests are less dominant in the litigation pro-

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<sup>472</sup> Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 55 (2014); see also Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 291 (2015).

<sup>473</sup> See Sinnar, *supra* note 472, at 295–96.

<sup>474</sup> See *id.* at 297.

<sup>475</sup> See Barkow, *supra* note 462, at 72–73; see also Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 331 (2013) (recognizing the possibility that banking regulators had been captured by the financial services industry).

<sup>476</sup> J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2217 (2005); see *id.* at 2231.

<sup>477</sup> See *supra* notes 339–343 and accompanying text.

<sup>478</sup> McCubbins et al., *supra* note 466, at 274.

<sup>479</sup> See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 100 (1992).



cess than in the regulatory or administrative processes.<sup>480</sup> But even if courts were fully motivated to work against capture, judicial review of agency or legislative action can only accomplish so much.<sup>481</sup> Interest groups exercise the bulk of their power not by inducing government to enact beneficial regulations but by blocking or watering down detrimental ones.<sup>482</sup> Given the limitless set of agency inactions and the inevitably limited scope of their regulatory capacity and resources, formulating a manageable approach to judicial review is a notoriously daunting challenge.<sup>483</sup>

The most fundamental challenge for the anticapture agenda — and for the project of policing the distribution of interest-level power more broadly — lies in the motivating determination that some group has “too much” power. The very concept of “capture” depends upon a normative account of how much political power various groups should rightly possess, setting a baseline from which to measure disproportionate influence.<sup>484</sup> Absent any consensus vision of how power should be distributed among political interests and social groups, one person’s capture is another’s democratically fair competition. Thus, the concern that “regulation tends to favor narrow, well-organized groups at the expense of the general public” might be redirected from industry groups to labor unions, environmental organizations, and consumer advocates.<sup>485</sup> For some, the threat of a dominant interest group exploiting a diffuse majority comes not from big business but from racial minorities who benefit from affirmative action measures or from gays and lesbians who secure antidiscrimination protections.<sup>486</sup> Without

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<sup>480</sup> Compare CROLEY, *supra* note 443, at 140–42, and Magill, *supra* note 453, at 408–10, with Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48–66 (1991).

<sup>481</sup> See Magill, *supra* 453, at 410–19 (discussing the difficulties courts would face in attempting to police capture).

<sup>482</sup> See Carpenter & Moss, *supra* note 442, at 16–18.

<sup>483</sup> See Magill, *supra* note 453, at 412–13. For some ideas on how courts might manage the task of policing agency inaction generally, see, for example, Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1686–1702 (2004); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 672–75 (1985); Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 176–88 (2014). Alternative anticapture reviewers would face similar difficulties. See Michael A. Livermore & Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, in PREVENTING REGULATORY CAPTURE, *supra* note 442, at 420, 447–50 (discussing the difficulty of OIRA review of agency inaction as a mechanism for preventing capture).

<sup>484</sup> See Elhauge, *supra* note 480, at 48–59.

<sup>485</sup> Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1286 (2006) (quoting Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080 (1986)) (criticizing the views of conservatives who support anticapture review of “overzealous” agency regulators).

<sup>486</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting) (referring to gays and lesbians as “a geographically concentrated and politically powerful minority” working to undermine “the effort by the majority of [Colorado] citizens to preserve its view of sexual morality”);

some normative framework for resolving these deeply divergent views of how power should be distributed, a coherent anticapture agenda for public law will never get off the ground.

### B. Electoral Power

Democracy comes with many justifications, sounding in political legitimacy, epistemic quality, and expressive equality of citizenship. But perhaps the most compelling is that democracy is a mechanism for distributing power more broadly and equally among groups in society. Under nondemocratic systems of monarchy, oligarchy, and dictatorship, government can more easily ignore the political preferences of large segments of society. Not surprisingly, then, the rise of mass democracy in many parts of the world has been spurred by disenfranchised groups whose interests were being ignored by the elites in control of state power.<sup>487</sup>

Once democracy is up and running, the ideal of equalizing political power continues to serve as a normative touchstone in debates about how electoral rules and institutional structures should be designed. Precisely what equality of political power should be understood to mean and how it should be operationalized are notoriously difficult and contested questions.<sup>488</sup> But many democratic theorists and ordinary citizens would sign on to the intuitive ideal “that democratic institutions should provide citizens with equal procedural opportunities to influence political decisions (or, more briefly, with equal power over outcomes).”<sup>489</sup>

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City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989) (plurality opinion) (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n.58 (1974)) (finding constitutionally suspect the city’s minority set-aside program because “blacks constitute approximately 50% of the population,” *id.* at 495, and “[f]ive of the nine seats on the city council are held by blacks,” *id.* at 496).

<sup>487</sup> See DARON ACEMOGLU & JAMES A. ROBINSON, *ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY* 24–25 (2006).

<sup>488</sup> See generally CHARLES R. BEITZ, *POLITICAL EQUALITY* (1989); RONALD DWORKIN, *SOVEREIGN VIRTUE* ch. 4 (2000); ANNE PHILLIPS, *THE POLITICS OF PRESENCE* 27–38 (1995).

<sup>489</sup> BEITZ, *supra* note 488, at 4 (emphasis omitted) (describing this view of political equality as “the most widely held,” though proceeding to criticize it as too simple, *id.* at 4–5); see also Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 159 (2013) (“Political equality is a core feature of democratic governance. While the definition and appropriate scope of such equality is contested, there is general agreement that citizens in a democracy ought to have an approximately equal opportunity to influence the political process.”). Not all political theorists endorse equality of political power. A competing, antidemocratic tradition — running from Plato to Schumpeter to contemporary proponents of bureaucratic expertise and judicial wisdom — calls for allocating political power to those with the most ability to make good decisions. As has been noted, many of the Framers of the U.S. Constitution were similarly committed to elite rule. See KLARMAN, *supra* note 94, at 363, 367.

At a minimum, democratic institutions might be designed to prevent one group in society from unfairly dominating another.<sup>490</sup> Thus, Madison described the regulation of suffrage as a “task of peculiar delicacy”: “Allow the right exclusively to property, and the rights of persons may be oppressed. . . . Extend it equally to all, and the rights of property, or the claims of justice, may be overruled by a majority without property . . . .”<sup>491</sup> Madison and other Federalists hoped that the constitutional structure of government would avoid both horns of this dilemma. Although the national government in all of its branches would be formally responsive to democratic majorities, Madison hoped that large federal election districts for the House and the indirect election of Senators and the President would select the kind of representatives who would “possess most wisdom to discern, and most virtue to pursue, the common good of the society”<sup>492</sup> and allow these representatives to “refine and enlarge the public views” to filter out “partial considerations” and “discern the true interest of their country.”<sup>493</sup> In other words, representatives would tend to be elites with sufficient insulation from majority will to protect the wealthy against expropriation and redistribution. Such a system of representative democracy might replicate the interest-balancing benefits of mixed or consociational government.

More broadly, electoral empowerment and consociational democracy can both be viewed as “institutional-design mechanism[s] for building in commitments to fair representation and political equality” for competing interests.<sup>494</sup> From this perspective, the structure of government decisionmaking institutions and the design of electoral institutions are substitute tools for distributing or balancing political power among groups in society.<sup>495</sup>

Of course, for many political actors, the paramount concern is not balancing or equalizing power but grabbing as much of it as possible. Throughout the history of U.S. democracy, politicians, parties, and po-

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<sup>490</sup> See generally IAN SHAPIRO, *POLITICS AGAINST DOMINATION* (2016) (arguing that the overarching purpose of politics is to prevent domination).

<sup>491</sup> JAMES MADISON, 5 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787 WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATION* 580 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co. 2d ed. 1907).

<sup>492</sup> THE FEDERALIST NO. 57, *supra* note 1, at 348 (James Madison).

<sup>493</sup> THE FEDERALIST NO. 10, *supra* note 1, at 76 (James Madison); see also Sunstein, *supra* note 136, at 41–42.

<sup>494</sup> Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 86 (2004).

<sup>495</sup> See Levinson, *supra* note 391 (treating the two processes as interchangeable); see also Levinson & Pildes, *supra* note 30, at 2385 (emphasizing that the effects of political parties on the workings of the structural constitution create an important linkage between the law of democracy and the separation of powers).

litical coalitions have always sought to design or manipulate democratic institutions and electoral rules in such a way as to augment or entrench their hold on power. One straightforward strategy for doing so is to shift the composition of the electorate by enfranchising one's own supporters or disenfranchising one's opponents. Thus, after the Civil War, congressional Republicans sought to enfranchise black voters in the South, in part for the purpose of ensuring the electoral dominance of the Republican Party.<sup>496</sup> The end of Reconstruction allowed Southern Democrats to redeem the political supremacy of their party by using poll taxes, literacy tests, force, and fraud to disenfranchise nearly all black voters (and many poor whites).<sup>497</sup> In recent elections, voter identification laws and other procedural restrictions on voting have been supported or opposed on the basis of their predictable racial and partisan consequences.<sup>498</sup>

Electoral districting is another useful device for manipulating the effective voting power of different constituencies. At-large and multi-member districting schemes, as well as gerrymandered single-member districts, were additional tools used by Southern Democrats to suppress black voting power and maintain political dominance.<sup>499</sup> In contemporary politics, partisan gerrymanders allow narrowly or temporarily prevailing parties to establish disproportionate and durable legislative majorities.<sup>500</sup> Campaign finance regulation is a further means of securing disproportionate electoral power for incumbent parties and officeholders, as well as for corporations and wealthy donors at the expense of less-capitalized constituencies.<sup>501</sup>

The constitutional and statutory law of democracy has imposed some limitations on the use of each of these tactics. Courts have invalidated (or upheld Congress's authority to invalidate) poll taxes, literacy tests, and other mechanisms of minority disenfranchisement.<sup>502</sup> The

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<sup>496</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 86–93 (rev. ed. 2000); KLARMAN, *supra* note 27, at 28–29.

<sup>497</sup> See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* (1974).

<sup>498</sup> See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (plurality opinion) (recognizing that “partisan considerations may have played a significant role” in Indiana’s decision to enact a voter identification law); Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1371–76 (2015); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 324–30 (2014) (describing the new array of franchise restrictions and their partisan consequences).

<sup>499</sup> See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 700–03 (1998).

<sup>500</sup> See Stephanopoulos, *supra* note 498, at 286, 348–49 (presenting empirical evidence on the efficacy of partisan gerrymandering).

<sup>501</sup> See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522–23 (1997); Pildes, *supra* note 494, at 130–53.

<sup>502</sup> See, e.g., *Oregon v. Mitchell*, 400 U.S. 112 (1970) (reaffirming Congress’s ban on literacy tests); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding Congress’s power to ban literacy tests); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down the poll tax);

judicially imposed rule of one person, one vote has done away with the malapportioned electoral districts that once inflated the political power of rural voters and protected incumbent politicians.<sup>503</sup> Gerrymandering districts for the purpose of ensuring minority representation is to some extent required by the Voting Rights Act<sup>504</sup> but also limited by the Equal Protection Clause.<sup>505</sup> The Supreme Court has deemed partisan gerrymandering a constitutional problem, even if not one that is easily amendable to a judicial solution.<sup>506</sup> And the Court has rejected most limitations on campaign spending outside of direct contributions to candidates as violations of free speech.<sup>507</sup>

As election law scholars have emphasized, these and other judicial incursions into the “political thicket”<sup>508</sup> have conspicuously lacked any “unified vision” or “organizing principle.”<sup>509</sup> Courts have tended to focus on enforcing individual rights, marginalizing systemic concerns about how electoral rules and institutions affect the power of political interests and social groups.<sup>510</sup> In at least some areas, however, courts have been attentive to the systemic distribution of democratic power. The doctrine of one person, one vote was motivated by the perceived need to prevent the “systematic frustration of the will of a majority of the electorate” by malapportioned districts.<sup>511</sup> The Court has also been concerned about protecting democratic majorities against incumbent officials seeking to entrench themselves in office even after having lost majority support. Expressing skepticism of campaign finance regulation, Justice Scalia warned that “[t]he first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”<sup>512</sup> In the context of political gerrymandering, the Court has

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Guinn v. United States, 238 U.S. 347 (1915) (invalidating a grandfather clause that disenfranchised virtually all blacks in the state of Oklahoma).

<sup>503</sup> See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

<sup>504</sup> See 42 U.S.C. § 1973 (2012).

<sup>505</sup> See Shaw v. Reno, 509 U.S. 630 (1993).

<sup>506</sup> See Vieth v. Jubelirer, 541 U.S. 267 (2004).

<sup>507</sup> See, e.g., McCutcheon v. FEC, 134 S. Ct. 1434 (2014); Citizens United v. FEC, 558 U.S. 310 (2010).

<sup>508</sup> Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

<sup>509</sup> Pildes, *supra* note 494, at 39; see also Issacharoff & Pildes, *supra* note 499, at 646 (“[T]he Court’s electoral jurisprudence lacks any underlying vision of democratic politics that is normatively robust or realistically sophisticated.”).

<sup>510</sup> See Issacharoff & Pildes, *supra* note 499, at 644–46, 717. *But cf.* Pildes, *supra* note 494, at 40–41, 46 (seeing courts as “enforcing structural values concerning the democratic order as a whole, albeit erratically and not always self-consciously,” *id.* at 46).

<sup>511</sup> See Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 753–54 (1964) (Stewart, J., dissenting); see also Klarman, *supra* note 501, at 532.

<sup>512</sup> McConnell v. FEC, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part).

identified the “consistent[] degrad[ation]” of a group of voters’ “influence on the political process” as a constitutional problem.<sup>513</sup>

Moreover, in at least one area of election law the goal of redistributing political power has always been front and center: the enfranchisement and political empowerment of previously excluded black voters. That project began with the imperative that minority voters be permitted to register and cast ballots. Once this right to “participation” had been established,<sup>514</sup> courts, together with Congress and the Justice Department, took up the task of ensuring that minority votes were being fairly aggregated and minority groups “effective[ly] represent[ed].”<sup>515</sup> This required doing away with at-large election schemes that “diluted” the power of minority groups and mandating the creation of majority-minority districts to enable these groups to elect candidates of their choice.<sup>516</sup> Voting rights enforcement along these and other dimensions has gone a long way toward closing the gap between black and white voting rates and legislative representation.<sup>517</sup> In the context of race, the law of democracy has served centrally and self-consciously as “a device for regulating, rationing, and apportioning political power among . . . groups.”<sup>518</sup>

Many scholars would embrace that mission for the law of democracy more generally.<sup>519</sup> Some would direct election law toward ensuring that electoral majorities hold governing power. Professor Michael Klarman, for instance, has advanced a framework for “anti-entrenchment” review of electoral rules and arrangements to guard against incumbent officials or electoral coalitions seeking to retain their hold on power even after having lost majority support.<sup>520</sup> Also focused on majority control, Professor Nicholas Stephanopoulos would center election law on the “alignment” principle that representatives should share the partisan and policy preferences of their median con-

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<sup>513</sup> *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion); *see also Vieth v. Jubelirer*, 541 U.S. 267, 361 (2004) (Breyer, J., dissenting) (recognizing “[t]he democratic harm of unjustified entrenchment,” which results from a redistricting plan that awards a party receiving a minority of statewide votes a majority of legislative seats).

<sup>514</sup> *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–12 (1993).

<sup>515</sup> Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1363 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994)).

<sup>516</sup> *See id.* at 1363–65; Karlan, *supra* note 514, at 1712–16.

<sup>517</sup> *See generally* QUIET REVOLUTION IN THE SOUTH, *supra* note 515 (describing the impact of the Voting Rights Act).

<sup>518</sup> *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment) (describing the Voting Rights Act in particular).

<sup>519</sup> *See generally* Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 42 (2003) (elaborating on a “group-disadvantaging conception of political equality”).

<sup>520</sup> *See* Klarman, *supra* note 501, at 497–502.

stituents and that “the balance of power in the legislature [should] reflect the balance of opinion in the electorate.”<sup>521</sup> Professors Samuel Issacharoff and Richard Pildes emphasize the importance of free and fair electoral political competition and the corresponding need to guard against “lockups” by officials, parties, and other power holders seeking to suppress challengers by exercising monopoly power.<sup>522</sup> Also concerned about redistributing power among political actors, Guinier has developed a pluralist “Madisonian” model that would allow racial and other minorities to “share in power” with other groups and secure a fair share of political outcomes reflecting their interests.<sup>523</sup> The least common denominator of these views is that “the right to vote is meaningful in large part because it affords groups of persons the opportunity to join their voices to exert force on the political process,” and that the focus of the law of democracy should be on fairly distributing “the ability of groups of voters to exercise political influence.”<sup>524</sup>

Reorienting the law of democracy around the distribution of power in this way would require a major leap from where the Court currently stands in a number of respects. To the extent election law has been concerned with the empowerment of social groups, the near-exclusive focus has been on racial and ethnic minorities.<sup>525</sup> The possibility of protecting other groups or balancing power along other dimensions has barely been explored. Despite the increasing partisan bias of congressional districting plans and the correspondingly decreasing congruence between House members’ voting records and their constituents’ policy preferences, the Court has refused to invalidate even the most blatantly partisan gerrymanders.<sup>526</sup> And other salient power imbalances have been ignored altogether — or worse. Campaign spending is arguably the most flagrant source of inequality in the American political system, inasmuch as it permits business interests and wealthy individuals to exert exorbitantly disproportionate political influence.<sup>527</sup> But the Court has insisted for decades that political spending is a constitutionally protected form of speech and has definitively rejected “the concept that government may restrict the speech of some elements of our society in order to enhance the relative

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<sup>521</sup> Stephanopoulos, *supra* note 498, at 310; *see also id.* at 288–89.

<sup>522</sup> *See* Issacharoff & Pildes, *supra* note 499, at 648–50.

<sup>523</sup> *See* GUINIER, *supra* note 384, at 4–6, 10. In Guinier’s view of political equality, neither majorities nor minorities should be permitted to exercise “disproportionate power.” *Id.* at 92–93.

<sup>524</sup> Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361, 362 (2007).

<sup>525</sup> At least part of the explanation, of course, is that the Voting Rights Act, the Fifteenth Amendment, and much of equal protection jurisprudence are focused on race.

<sup>526</sup> *See* Stephanopoulos, *supra* note 498, at 290.

<sup>527</sup> *See generally* LESSIG, *supra* note 37.

voice of others.”<sup>528</sup> That principle stands in direct opposition to the project of balancing electoral power.

Even in the context of race, election law jurisprudence has been more concerned with descriptive representation — electing black or Hispanic representatives — than with bolstering the substantive representation of minority group interests. In fact, descriptive representation for racial minorities has sometimes come at the cost of substantive representation for minority interests, as when the creation of minority-controlled districts has led to the election of more Republicans.<sup>529</sup> The law of democracy has been more concerned with “who is present in the legislative assemblies” than with “more urgent questions of what the representatives actually do.”<sup>530</sup> This “politics of presence” speaks to a different set of concerns than empowering groups in the sense of protecting and advancing their substantive policy interests.<sup>531</sup>

The distinction between descriptive and substantive representation points to a more fundamental limit on election law as a project of redistributing political power. The law of democracy’s concern with the distribution of power among groups has been limited to elections and representation, stopping short of government decisionmaking and policy influence. Guinier has criticized the myopic focus of election law on the election of minority representatives as mere “tokenism” given the reality that a handful of minority legislators can be routinely outvoted by legislative majorities who do not share their interests.<sup>532</sup> Other scholars have likewise noticed that the Court has turned away from a theory of “protective democracy” that would prioritize the ability of minority groups to influence actual policy outcomes,<sup>533</sup> and has given short shrift to the “[v]oting as [g]overnance”<sup>534</sup> concerns such as “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.”<sup>535</sup> The problem is that electing some number of minori-

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<sup>528</sup> *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

<sup>529</sup> See Stephanopoulos, *supra* note 498, at 354–55.

<sup>530</sup> PHILLIPS, *supra* note 488, at 3.

<sup>531</sup> The two projects can be linked, to the extent that minority representatives do, in fact, more effectively represent some set of policy interests shared by the minority group. See *id.* at 12–13.

<sup>532</sup> GUINIER, *supra* note 384, at 42–43. This leads her to propose cumulative voting for decisionmaking in legislative bodies as a means to empower minority groups to enact or block legislation of critical importance to them. See *id.* at 107–08. Guinier also considers the possibility of imposing supermajority voting requirements or a minority veto for “critical minority issues.” *Id.* at 108.

<sup>533</sup> See James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 927–29 (1997).

<sup>534</sup> Karlan, *supra* note 514, at 1716.

<sup>535</sup> S. REP. NO. 97-417, at 29 (1982), as reprinted in 1982 U.S.C.A.N. 177, 207; see also Karlan, *supra* note 514, at 1716–19 (discussing legislatures’ lack of responsiveness to minorities’ particularized governance concerns).



ty representatives is no guarantee that a group will exercise meaningful political power in the sense of influencing government decisionmaking and policy outcomes.

As Stephanopoulos puts the point:

If blacks seem not to be satisfied with (mostly) uninhibited access to the polls and (close to) proportional representation, this is because they should *not* be content with these achievements. What really matters in a democracy is getting policies enacted that correspond to people's views. And on this front, blacks still have a long way to go. Their opinions — on vital issues like crime, welfare, and housing — are too often ignored by elected officials when they conflict with whites' preferences.<sup>536</sup>

The same is true of other groups, as well. As Stephanopoulos and others have documented, glaring discrepancies between formal political representation and functional policy responsiveness exist not just for African Americans but also for women and the poor.<sup>537</sup> Most strikingly, a number of recent studies have found that “economic elites” and “business interests” are the groups with the most influence over government decisionmaking, whereas “mass-based interest groups” and “average citizens” have “little or no” actual influence over policy outcomes.<sup>538</sup> If that finding is correct,<sup>539</sup> the most fundamental ambition of democracy — to ensure that government is generally responsive to the interests of most citizens — appears to be going unrealized in this country.<sup>540</sup>

Inasmuch as the point of democracy is to improve “the welfare of citizens by making policies responsive to their interests,”<sup>541</sup> one might think the apparent failure of voting and representation to generate greater policy responsiveness for major groups of these citizens would be a matter of central concern for the law of democracy. Yet even the most far-reaching reformers in the field seem resigned to the view that a thoroughgoing concern with the distribution of policymaking power is, as Stephanopoulos elsewhere concludes, “too ambitious a goal for

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<sup>536</sup> Nicholas Stephanopoulos, *The False Promise of Black Political Representation*, THE ATLANTIC (June 11, 2015), <http://www.theatlantic.com/politics/archive/2015/06/black-political-representation-power/395594> [<https://perma.cc/ATP9-FHMD>].

<sup>537</sup> See Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1572–1601 (2015).

<sup>538</sup> See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

<sup>539</sup> For an overview of the most significant criticisms to date, see Sean McElwee, *To Influence Policy, You Have to Be More than Rich*, WASH. MONTHLY (Feb. 16, 2016, 11:25 AM), <http://washingtonmonthly.com/2016/02/16/to-influence-policy-you-have-to-be-more-than-rich> [<https://perma.cc/64MP-CQGF>].

<sup>540</sup> See Gilens & Page, *supra* note 538, at 577 (“America’s claims to being a democratic society are seriously threatened.”).

<sup>541</sup> Pildes, *supra* note 494, at 42.

election law to achieve.”<sup>542</sup> As the discussion to follow will emphasize,<sup>543</sup> the electoral process is just one channel of political influence among many in the U.S. system of government and is not always the most important in predicting which interests will ultimately prevail. As a consequence, the amount of political power that can be redistributed through electoral rules and institutions is inherently limited. If the democratic ideal is to equalize political power, then the reach of the law of democracy will inevitably exceed its grasp.

### C. *Rights and Political Power*

Constitutional rights are typically viewed as a counterpoint to power. In the classical liberal tradition, rights are supposed to delineate a private sphere beyond the reach of state power. More broadly, rights are supposed to place limits on what political power can be used to accomplish, standing in the way of majority will or democratic decisionmaking (and thus giving rise to “countermajoritarian” kinds of difficulties). And disciplinary boundaries divide political and constitutional theorists, who tend to “think in terms of rights and equality,” from political scientists and election law scholars, who are interested in “the organization of power.”<sup>544</sup>

But rights can also be understood as of a piece with political power.<sup>545</sup> If the point of power is to enable groups to protect and advance their interests by controlling governance outcomes, then public law might go about the project of managing power in two basic ways. One is to use rights to protect those interests directly, by blocking unfavorable outcomes or mandating favorable ones. Alternatively, public law might accomplish the same thing indirectly, by allocating influence over political decisionmaking processes in such a way as to enable groups to protect their own interests — whether through structure, voting, or other mechanisms.

The fungibility of rights and political power was a crucial premise of the U.S. constitutional design. Concerned with protecting property owners and other minorities against majoritarian oppression, but convinced that constitutional rights would create merely parchment barriers against majority will,<sup>546</sup> Madison and his fellow Framers attempted to design a structure of government that would tilt the political

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<sup>542</sup> Stephanopoulos, *supra* note 498, at 312 (asserting that “policy outcome alignment” is “too ambitious” and advocating for elections that maximize “policy preference alignment” as a substitute).

<sup>543</sup> See *infra* section III.D, pp. 134–40.

<sup>544</sup> Pildes, *supra* note 494, at 40.

<sup>545</sup> See generally Levinson, *supra* note 391 (viewing rights and votes as comparable tools for protecting minorities and other vulnerable groups).

<sup>546</sup> See *supra* section I.D.2, pp. 79–81.

playing field in favor of these vulnerable groups.<sup>547</sup> By shifting power to a national government that would be more difficult for a unified faction to capture and by insulating senators and the President from direct democratic responsiveness to popular majorities, Madison and his colleagues hoped that constitutional structure would do the work of rights in protecting the fundamental interests of minorities.<sup>548</sup> Viewed in this way, “the [structural] Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”<sup>549</sup>

Contemporary constitutional law has in some contexts followed Madison in looking to political power as a substitute for rights. Constitutional structure might play this role. For example, scholars have suggested that judicial enforcement of the separation of powers might be a better method of constraining executive power and protecting against abuses than direct judicial enforcement of rights.<sup>550</sup> So might political power through voting. Thus, the Supreme Court has viewed voting rights as special because they are “preservative of other basic civil and political rights.”<sup>551</sup> Martin Luther King, Jr., made the same point more eloquently when he proclaimed, “Give us the ballot, and we will no longer have to worry the federal government about our basic rights.”<sup>552</sup>

The possibility of political power substituting for rights finds its mirror image in *Carolene Products* (or “political process”) theory, which calls for the judicial enforcement of rights to protect “politically powerless” groups.<sup>553</sup> In the first instance, the *Carolene Products* approach calls for courts to rearrange the democratic process in order to fully empower disenfranchised groups. Failing that, however, courts are then charged with replicating the policy outcomes that would have resulted from an idealized process in which all groups exercised their fair share of power. Political process theory has provided a straight-

<sup>547</sup> See Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 359–60 (2007).

<sup>548</sup> See *id.* at 362–66.

<sup>549</sup> THE FEDERALIST NO. 84, *supra* note 1, at 514 (Alexander Hamilton). Some decades after ratification, Madison continued to believe that “[t]he only effectual safeguard to the rights of the minority, must be laid in such a basis and structure of the Government itself, as may afford, in a certain degree, directly or indirectly, a defensive authority in behalf of a minority having right on its side.” James Madison, Speech at the Virginia Convention of 1829 (Dec. 2, 1829), in SELECTED WRITINGS OF JAMES MADISON 354, 355 (Ralph Ketcham ed., 2006).

<sup>550</sup> See Issacharoff & Pildes, *supra* note 310, at 5–6, 43–45 (exploring an institutional-process approach to rights during wartime).

<sup>551</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>552</sup> MARTIN LUTHER KING, JR., “Give Us the Ballot,” *Address Delivered at the Prayer Pilgrimage for Freedom (May 17, 1957)*, in 4 THE PAPERS OF MARTIN LUTHER KING, JR. 208, 210 (Clayborne Carson et al. eds., 2000).

<sup>553</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See generally ELY, *supra* note 32.

forward justification for protecting the rights of formally disenfranchised groups, most prominently blacks in the Jim Crow South.<sup>554</sup> It has also been used to justify rights protections for groups that are formally enfranchised but lack adequate political power for other reasons — including racial minorities on an ongoing basis, as well as women.<sup>555</sup> In its equal protection cases, the Court has pointed to political powerlessness as one of the primary criteria for determining whether a group is a suspect class and therefore entitled to special protection against discrimination and disadvantage.<sup>556</sup> Pursuing that line of argument, gay rights litigation has featured political scientists offering expert testimony on the political power of gays and lesbians and debates among judges and Justices about whether this group is “politically powerless”<sup>557</sup> or, quite the opposite, “possess[es] political power much greater than [its] numbers.”<sup>558</sup>

Like any approach to distributing power through public law, political process theory faces the descriptive challenge of assessing the amount of power different groups possess, as well as the normative challenge of deciding how much power these groups *should* possess. To this point, constitutional law has not made a great deal of progress on either front.

As generations of constitutional theorists have emphasized, political process presupposes a substantive conception of ideally well-functioning democracy.<sup>559</sup> Given its focus on racial and other minority groups, political process review must operate against a background theory of democracy in which majorities are not always supposed to prevail — one in which certain minorities are supposed to exercise meaningful political power.<sup>560</sup> The most straightforward version of such a theory is Madisonian pluralism, in which numerous interests or factions form shifting coalitions to achieve political victories and no

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<sup>554</sup> See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 750–51 (1991).

<sup>555</sup> *Id.* at 828–29.

<sup>556</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (asking whether a group is “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”).

<sup>557</sup> See Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1383–90 (2011); see also KENJI YOSHINO, *SPEAK NOW* 142–54 (2015) (describing the Proposition 8 litigation).

<sup>558</sup> *Romer v. Evans*, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting).

<sup>559</sup> This point is often offered as a criticism of the Court’s attempt to police the political process while avoiding the imposition of substantive value judgments. Value judgments about how democratic politics ought to work seem unavoidable. See, e.g., Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073–79 (1980).

<sup>560</sup> See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 719 (1985).

coherent, stable majority dominates.<sup>561</sup> In a system of pluralist political competition, among the process failures that courts might seek to correct would be the inability of certain groups to enter into winning coalitions with other groups in order to obtain their “fair share” of political victories on account of illegitimate structural barriers.<sup>562</sup>

Unfortunately, courts and theorists have made little headway in identifying these structural barriers and the groups they distinctively afflict. The Court’s original focus of attention on “prejudice against discrete and insular minorities,”<sup>563</sup> such as racial and religious minorities, suggested that easily identifiable social groups segregated from the mainstream of American society would suffer distinctive political disadvantages. But upon reflection, there is little reason to believe that discreteness or insularity will tend to reduce political power. To the contrary, those characteristics may be systematically advantageous, by reducing the costs of collective action, making the most of political geography, and providing incentives to group members to choose political “voice” over “exit.”<sup>564</sup> Psychological or sociological theories of “prejudice,” of the sort prominently advanced by Ely, have been widely panned as theoretically and empirically unconvincing.<sup>565</sup> Left with little theoretical direction, courts have based assessments of political power(lessness) on an inconsistent grab bag of criteria — including groups’ numerical size, financial resources, access to the ballot, levels of descriptive representation, and ability to secure antidiscrimination legislation — but without any explanation of why these are the relevant variables or how they should be weighed against one another.<sup>566</sup>

<sup>561</sup> See ELY, *supra* note 32, at 152–53 (referring to the “pluralist’s bazaar,” *id.* at 152, of politics); Ackerman, *supra* note 560, at 719–20; Stephanopoulos, *supra* note 537, at 1545–49.

<sup>562</sup> Ackerman, *supra* note 560, at 720.

<sup>563</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); see also ELY, *supra* note 32, at 135–79 (arguing for judicial protection of minority groups whose interests are discounted by the majority on account of psychological or sociological distance).

<sup>564</sup> Ackerman, *supra* note 560, at 722–31.

<sup>565</sup> See *id.* at 734–37; Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991).

<sup>566</sup> See Stephanopoulos, *supra* note 537, at 1537–42. Of the factors just listed, only the presence or absence of antidiscrimination legislation speaks directly to the power of groups to secure favorable policy outcomes. Yet courts only sometimes view the existence of antidiscrimination laws as evidence of sufficient political power; in other cases these laws are viewed as evidence of an ongoing threat of discrimination against which the group lacks adequate power to protect itself. See Schacter, *supra* note 557, at 1369, 1377, 1381–83; see also Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323 (2016) (arguing that the enactment of laws benefitting a group does not necessarily speak to the political power of that group, and illustrating that point with empirical evidence that legislators’ support for antipoverty legislation does not reflect the political influence of the poor).

Without some better understanding of how political power should be measured and how much of it various groups should get, it is hard to know which groups should receive special judicial solicitude. Under equal protection doctrine, racial minorities, women, and more recently gays and lesbians have been the primary beneficiaries of rights protection, and religious groups have also received some measure of antidiscrimination protection under the First Amendment. But it is not at all clear that these groups are distinctively being denied a fair share of political power. In a recent study empirically examining the extent to which different groups' policy preferences influence policy outcomes on the national and state levels, and controlling for the size of the groups, Stephanopoulos finds that African Americans, women, and the poor stand out as groups whose policy preferences are significantly less likely to be adopted (as compared to the preferences of whites, men, and the wealthy, respectively), but finds no evidence that Hispanics and religious groups are underpowered in this way.<sup>567</sup> Other theorists have pointed to any number of different groups that seem plausibly powerless, including unorganized workers,<sup>568</sup> middle-income Americans,<sup>569</sup> and Muslims and immigrants who lack the power to defend themselves against the predations of security-obsessed majorities in the post-9/11 world.<sup>570</sup> More generally, Professor Kenji Yoshino has argued that judicial identification of powerless groups has been characterized by a "paradox of power," such that only groups that have managed to build a significant measure of political power have succeeded in securing the "powerless" designation, leaving truly powerless groups out in the cold.<sup>571</sup>

Whether courts will be interested in searching for new groups lacking political power or in extending rights on that basis remains to be seen, but there is reason for skepticism. The high water mark of political process theory was the Warren Court's campaign to dismantle the Jim Crow systems of segregation and criminal justice, a major contribution to making policy less hostile to the interests and welfare of disenfranchised African Americans in the South. In recent decades, however, rights jurisprudence has become largely disconnected from the project of reallocating political power to vulnerable groups or compensating for its absence. While the Court continues to point to political powerlessness as a reason for heightened equal protection scrutiny, the

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<sup>567</sup> Stephanopoulos, *supra* note 537, at 1600–01.

<sup>568</sup> *Cf.* Sachs, *supra* note 489.

<sup>569</sup> Sitaraman, *supra* note 34, at 58–59; *see also* Andrias, *supra* note 34, at 421.

<sup>570</sup> *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 981 (2002) (arguing that aliens shut out from political processes like voting should be considered a "discrete and insular minority").

<sup>571</sup> *See* Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 539.

animating theory of equality has shifted from an antistatutory focus on protecting disadvantaged groups to an anticlassification prohibition on the use of particular group characteristics in allocating benefits and burdens.<sup>572</sup> Thus, rather than protecting racial minorities against laws with disadvantageous effects, equal protection has been recast as a prohibition against all race-conscious policies, even those designed to prevent racially disparate impacts or to reallocate resources and opportunities to disadvantaged groups.<sup>573</sup> Whatever might be said in favor of an anticlassification approach to equality, it is a non sequitur to political process theory or to an overarching concern with the distribution of power among social groups.

The Court could always switch jurisprudential directions, but the potential for judicially enforced rights to substitute for political power is inevitably going to be limited. In theory, courts taking a political process approach might seek to replicate the policy outcomes that would have prevailed in a “perfected” democratic system in which power was fairly distributed among all groups and interests. Yet in practice, to the extent constitutional rights have been oriented toward sociopolitical subordination at all, the focus has been only on a small number of the most historically and sociologically salient groups. And courts have done little more for these groups than eliminate blatantly discriminatory laws and policies, shunning the possibility of casting rights as positive, redistributive claims to social and economic goods.<sup>574</sup> To the extent political process theory mandates a more ambitious project of redistributing governance outcomes to reflect a fair distribution of political power among groups and interests in society, the political process in practice will probably cause it to fall far short of that goal.

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<sup>572</sup> On the distinction, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 129–30, 157–64 (1976). On the Court’s movement, see, for example, Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in *THE CONSTITUTION IN 2020*, at 93 (Jack M. Balkin & Reva B. Siegel eds., 2009); Reva B. Siegel, *Equality Talk: Antistatutory and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1537 (2004).

<sup>573</sup> See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) (arguing that the discriminatory intent standard is inadequate to evaluate most kinds of discrimination).

<sup>574</sup> U.S. courts have resisted scholarly pushes in this direction. See, e.g., CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* 149–71 (2004); Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Courts in other constitutional systems have been more receptive. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

#### D. Resources

The preceding discussion of electoral power suggested some of the limits of voting as a mechanism for redistributing power. In particular, mounting evidence suggests that the preferences of electoral *majorities* have little weight in policymaking and are usually trumped by the policy preferences of business organizations and wealthy elites. Indeed, recent studies conclude that “the views of constituents in the bottom third of the income distribution receive[] no weight at all in the voting decisions of their senators,”<sup>575</sup> that Presidents also answer to the “narrow political and economic interests” of elites,<sup>576</sup> and, more generally, that “when preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor.”<sup>577</sup> Re-asking Dahl’s question of “who governs?,” or “who really rules?,” an influential study by Professors Martin Gilens and Benjamin Page finds the answer is not majorities or the median voter but “powerful business organizations and a small number of affluent Americans,”<sup>578</sup> leading them to conclude that “the majority does *not* rule — at least not in the causal sense of actually determining policy outcomes.”<sup>579</sup>

How can a small minority of wealthy elites overpower the electoral majorities who are supposed to prevail in American democracy? When Dahl initially framed the “who governs?” question, he did so in reference to “a political system where nearly every adult may vote but where knowledge, wealth, social position, access to officials, and other resources are unequally distributed.”<sup>580</sup> As this description suggests, votes are but one type of political resource, and not necessarily the most valuable.<sup>581</sup>

An especially valuable political resource that economic elites, by definition, possess in abundance is wealth. Money can be converted into policymaking influence through any number of different channels: donating to campaigns or making independent expenditures on behalf

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<sup>575</sup> LARRY M. BARTELS, *UNEQUAL DEMOCRACY* 254 (2008).

<sup>576</sup> JAMES N. DRUCKMAN & LAWRENCE R. JACOBS, *WHO GOVERNS? PRESIDENTS, PUBLIC OPINION, AND MANIPULATION*, at xiii (2015).

<sup>577</sup> GILENS, *supra* note 35, at 81.

<sup>578</sup> Gilens & Page, *supra* note 538, at 577.

<sup>579</sup> *Id.* at 576.

<sup>580</sup> DAHL, *supra* note 40, at 1.

<sup>581</sup> Dahl elsewhere elaborates:

Varying with time and place, an enormous number of aspects of human society can be converted into political resources: physical force, weapons, money, wealth, goods and services, productive resources, income, status, honor, respect, affection, charisma, prestige, information, knowledge, education, communication, communications media, organizations, position, legal standing, control over doctrine and beliefs, votes, and many others.

ROBERT A. DAHL, *ON DEMOCRACY* 177 (1998).



of candidates or parties; lobbying government decisionmakers; participating in administrative rulemaking; offering “revolving door” employment opportunities for officials; funding and orchestrating social movements and “grassroots” organizations; mounting sustained campaigns to shift and shape public opinion on issues like gun control or global warming; or, in the case of businesses or very wealthy individuals, threatening to leave the jurisdiction, taking their talents and tax revenues elsewhere. Through these and other pathways of political influence, economic elites, notwithstanding their deficit of votes, may very well exercise dramatically disproportionate power in the American political system.

The problem, from this perspective, is not just that concentrated wealth becomes concentrated power, but also that the two are linked together in a mutually reinforcing dynamic. The political power purchased through wealth may allow economic elites to enact self-interested policies that increase their wealth, and hence their political power. This dynamic creates a feedback loop of increasing inequality in both domains: the rich get richer; the powerful get more powerful. Progressive Era and New Deal reformers took this view of the political economy of concentrated wealth, campaigning against the rise of a “moneyed aristocracy,” “economic royalists,” and the oligarchic concentration and combination of economic and political power in the hands of a despotic class.<sup>582</sup> Similar diagnoses are increasingly prevalent in this “New Gilded Age” of extreme inequality.<sup>583</sup>

Those concerned about power imbalances stemming from unequal resources have considered two kinds of regulatory strategies. One is to attempt to block the conversion of resources into power. In the law-of-democracy domain, campaign finance reform is one obvious possibility for preventing economic elites from purchasing greater political power, though perhaps not a very promising one given both the difficulty of enacting effective regulation and the constitutional limitations imposed by the Supreme Court.<sup>584</sup> Lobbying reform is another increasingly common proposal, though one beset by similar difficulties on both fronts.<sup>585</sup> One way around the difficulties of attempting to limit the influence of wealthy elites through spending or lobbying is to *increase*

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<sup>582</sup> See Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, & the Constitution of Opportunity*, NOMOS (forthcoming) (manuscript at 36–39) (on file with the Harvard Law School Library).

<sup>583</sup> See BARTELS, *supra* note 575, at 28; see also ELIZABETH WARREN, A FIGHTING CHANCE 2 (2014) (“Today the [political] game is rigged — rigged to work for those who have money and power.”).

<sup>584</sup> See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 53–56 (2012); Sachs, *supra* note 489, at 163–64.

<sup>585</sup> See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 200–16 (2012); Kang, *supra* note 584, at 59–63; Sachs, *supra* note 489, at 164–65.

the influence of “countervailing voices” through these channels — leveling up rather than leveling down.<sup>586</sup> That could mean public financing of elections or campaign finance vouchers that would be distributed equally among citizens,<sup>587</sup> or even public subsidies that would enable currently unrepresented groups to gain access to lobbyists.<sup>588</sup>

Whatever promise these and other proposals might hold, however, they leave many other pathways of resource-advantaged political influence unaddressed. The problem, in a nutshell, is that “the political power that comes from wealth is portable across political processes.”<sup>589</sup> Indeed, it is “[t]he sheer versatility of material power [that] makes it so significant politically.”<sup>590</sup> As a result, regulatory efforts to limit the advantages of money in politics confront a “hydraulic problem”: restricting the flow through one channel just redirects the dollars into other channels.<sup>591</sup>

The difficulty of preventing inequalities of political resources from being converted into inequalities of power suggests a second and more ambitious strategy: equalizing the resources themselves.<sup>592</sup> If the political process cannot be quarantined from resource inequality, the only solution may be to address the inequality itself. Deconcentrating political power may require deconcentrating economic power through the redistribution of wealth and opportunity.

Of course, such reforms are easier called for than accomplished. If political dominance by economic elites is the problem, it may be hard to hope for a political solution.<sup>593</sup> Yet the nonwealthy and other disenfranchised groups might be able to draw upon a valuable political resource of their own: *mobilization*, in the form of mass organization,

<sup>586</sup> See Bruce E. Cain, *More or Less: Searching for Regulatory Balance*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 263, 277 (Guy-Uriel E. Charles et al. eds., 2011).

<sup>587</sup> For one proposal along these lines, see BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS (2002).

<sup>588</sup> See Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1165–68 (2011).

<sup>589</sup> Sachs, *supra* note 489, at 166.

<sup>590</sup> *Id.* (first alteration in original) (quoting JEFFREY A. WINTERS, OLIGARCHY 18 (2011)).

<sup>591</sup> See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999); see also Sitaraman, *supra* note 34, at 44–46 (generalizing the hydraulic problem from campaign finance reform to any regulatory effort to limit the influence of money in politics).

<sup>592</sup> See Sitaraman, *supra* note 34, at 6 (distinguishing between strategies of “safeguarding the political process” by “seek[ing] to create a firewall that will protect politics from economic influence,” and “countering economic inequality” by “seek[ing] to prevent economic inequality in the first place — prior to its having political influence” (emphasis omitted)).

<sup>593</sup> Cf. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013) (identifying as a fallacy the hope that legal and political institutions that have been diagnosed as failing to serve the public interest will be the source of implementing a cure for the pathologies that led to that diagnosis).

collective action, or social movements. At one extreme, mobilized groups that have been excluded from formal political channels can exercise power in the streets, whether through peaceful protests or violence. Groups of citizens can withdraw social and economic cooperation, by sitting in, refusing to pay taxes, dodging the draft, or going on strike. As the history of politically influential protest movements in the United States illustrates, from the Boston Tea Party and Shay's Rebellion to the civil rights movements, pickets and pitchforks can substitute for ballots as a source of political power.<sup>594</sup> But mobilization can also create influence through the standard processes of democratic politics. Successful social movements can shape political institutions by linking up with political parties and enlisting voters and politicians in support of their agendas.<sup>595</sup> Well-organized political groups can effectively persuade and turn out voters, lobby government officials, and influence public opinion.<sup>596</sup> Whether operating inside or outside of ordinary political channels, mobilization can enable politically disadvantaged groups and interests to compete with the wealthy and powerful.

For much of the twentieth century, for instance, labor unions were successful in mobilizing lower- and middle-class workers and enabling them to exercise effective political voice across a range of issues.<sup>597</sup> In recent decades, however, as unionization rates have dropped, this voice has concomitantly weakened.<sup>598</sup> The decline of labor as a political force has led to the rollback of many New Deal and Great Society redistributive and regulatory programs and appears to have significantly contributed to the rise of economic inequality.<sup>599</sup> Recognizing the importance of unions as a vehicle for mobilizing and empowering the nonwealthy and reducing political and economic inequality, commentators have suggested reforms designed to reinvigorate unions as political organizations. For example, Professor Benjamin Sachs proposes “unbundling” the political function of unions from the collective bargaining function in the hope of reducing managerial opposition and expanding the membership of “political unions.”<sup>600</sup> Sachs also suggests

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<sup>594</sup> See Kay Lehman Schlozman et al., *Inequalities of Political Voice*, in *INEQUALITY AND AMERICAN DEMOCRACY* 19, 63–68 (Lawrence R. Jacobs & Theda Skocpol eds., 2005). That said, successful social movements often require the leadership and support of wealthy and educated elites, *id.* at 66–67, and some are predominantly middle-class or “Rich People’s Movements,” Sitaraman, *supra* note 34, at 34.

<sup>595</sup> See generally *SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS* (Anne N. Costain & Andrew S. McFarland eds., 1998).

<sup>596</sup> See *supra* notes 582–583 and accompanying text (discussion of interest groups).

<sup>597</sup> See Sachs, *supra* note 489, at 168–71.

<sup>598</sup> *Id.* at 154.

<sup>599</sup> See JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS* 127–51 (2010).

<sup>600</sup> Sachs, *supra* note 489, at 155.

a number of other potential organizational vehicles for the nonwealthy that might further the goal of “representational equality.”<sup>601</sup>

The broader lesson is that *every* law and policy that affects the distribution of wealth or the costs of mobilizing collective action at least potentially serves to redistribute political power. Social Security and other social welfare programs create beneficiary constituencies with the resources and organization to defend these programs.<sup>602</sup> By fragmenting the financial services industry, the Glass-Steagall Act also diminished the industry’s political power, paving the way for other kinds of regulatory measures.<sup>603</sup> Rules of corporate law relating to ownership structure increase the wealth and power of different groups of stakeholders, creating path-dependent trajectories for the further development of corporate law.<sup>604</sup> Cap-and-trade approaches to climate regulation, in contrast to carbon taxes and other regulatory strategies, promise to empower commercial interests that will be invested in maintaining and expanding the regulatory system.<sup>605</sup> Republican strategists pursue tort reform and restrictive labor laws for the strategic purpose of decreasing the wealth of trial lawyers and the efficacy of unions — and therefore the political prospects of the Democratic Party.<sup>606</sup> These examples only begin to illustrate what is a pervasive phenomenon: in Professor E.E. Schattschneider’s resonant summation, “New policies create a new politics.”<sup>607</sup>

This includes the policies generated by constitutional law, which also help determine the allocation of political resources. The preceding discussion considered constitutional rights as a substitute for political power.<sup>608</sup> But rights can also be a *source* of political power. This is straightforwardly the case for rights that directly protect avenues of participation in democratic politics — starting with voting rights but

<sup>601</sup> *Id.* at 203–06 (identifying government programs, public education, public hospitals, libraries, and public recreation centers as potential vehicles to support political organizing for the nonwealthy).

<sup>602</sup> See, e.g., ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS 2–3 (2003) (arguing that Social Security has caused seniors to be more able and motivated to participate politically, but that the same is not true of welfare programs for the poor); PAUL PIERSON, DISMANTLING THE WELFARE STATE? 39–50 (1994).

<sup>603</sup> See Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2060–62 (2014) (book review).

<sup>604</sup> See Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 157–60 (1999).

<sup>605</sup> See ERIC M. PATASHNIK, REFORMS AT RISK 179–80 (2008); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1210 (2009).

<sup>606</sup> See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 432–41 (2015).

<sup>607</sup> E.E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF 288 (1935).

<sup>608</sup> See *supra* note 390 and accompanying text.

also including the First Amendment protection of political speech.<sup>609</sup> But other rights that are not self-consciously designed for the purpose of empowering groups to more effectively participate in the political process may have that effect. Rights of freedom of association and free exercise of religion may be essential in allowing some groups to organize and mobilize.<sup>610</sup> Similar democracy-facilitating arguments have been made in support of rights to education, welfare, and privacy.<sup>611</sup> Antidiscrimination rights, as well, can protect groups against forms of social and economic disadvantage that impede their political efficacy.<sup>612</sup> The same is true of rights that contribute to social and economic empowerment, for example by protecting access to birth control and abortion for women.<sup>613</sup> More generally, rights can serve as focal points for political organizing: social movements in support of racial minorities, women, gays and lesbians, and other disadvantaged groups have rallied around claims of rights.<sup>614</sup> In all of these ways, constitutional rights can facilitate the redistribution of political resources and power.

But the more general moral is that constitutional law is not special in this regard. The distribution of political power is the product not just of the public law regimes explicitly concerned with the structure

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<sup>609</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25–27 (1948) (describing the First Amendment as allowing people to voice any opinion they want in a policy debate regardless of content and the American idea of universal suffrage).

<sup>610</sup> See Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575, 577–80 (2016) (identifying a category of “organizational rights,” including associational and religious liberty rights, that facilitate collective action in the civil and political spheres).

<sup>611</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 113–15 (1973) (Marshall, J., dissenting) (describing, though ultimately criticizing, arguments for welfare and privacy rights as preconditions for democratic participation); COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS* 14 (2007) (identifying and disagreeing with an argument that welfare is “instrumental to democratic procedure”).

<sup>612</sup> See ELY, *supra* note 32, at 135–79 (making the case that social “prejudice” against minorities undermines their political power and should be viewed as analogous to disenfranchisement).

<sup>613</sup> See Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143, 143 (1978) (“Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: . . . Are women to have the opportunity to participate in full partnership with men in the nation’s social, political, and economic life?”).

<sup>614</sup> See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423–25 (2001). However, the recognition of rights can also be politically disempowering. Judicial recognition of rights sometimes provokes political backlash against the beneficiaries. See KLARMAN, *supra* note 27, at 385–421 (describing the increase in legal and extralegal resistance to desegregation after the Supreme Court mandated racially integrated schools); MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 89–118, 143–55, 165–92 (2013); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

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of government and the political process but of *all* law and policy. And the set of potential mechanisms for redistributing political power is correspondingly expansive. If the goal is equalizing the political power of disadvantaged groups and interests, the tax system, social welfare policy, antidiscrimination statutes, antitrust enforcement, financial services regulation, and labor law may be every bit as relevant as the law of democracy, and likely much more so than separation of powers.<sup>615</sup>

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This Part has attempted to show how a number of different and disconnected areas of public law might be linked by a common concern with how political power is distributed, diffused, and balanced — not at the level of government institutions but at the level of interests and social groups. One could view this as a preliminary sketch of what could be a constructive project in constitutional thought: transplanting the constitutional principle of deconcentrating power from the structural to the democratic level and calling upon courts (and legislatures) to marshal the resources of administrative law, the law of democracy, constitutional rights jurisprudence, and any number of other regulatory fields with an agenda of redistributing and equalizing political power among groups in society. At the very least, some or all of these areas of law might be pushed toward a more explicit and sustained focus on the distribution and practical efficacy of democratic-level power and on how that power is affected by a multiplicity of legal regimes.

At the same time, however, the discussion in this Part has emphasized some of the major challenges with pursuing any such project. The most obvious challenge is that constitutional law has no well-developed or widely shared theory of what would count as a fair or equal distribution of power among groups and interests. Partial and conflicting visions of majority rule, minority representation, and “fairly” balanced partisan and pluralist competition, focused on a variety of different kinds of groups, proliferate in different areas of public law with little impetus toward reconciliation or convergence. Furthermore, at a descriptive level, the difficulties of assessing how much power different groups and interests in fact possess seem nearly as formidable as the difficulties, described in Part I, of making such assessments at the institutional level.

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<sup>615</sup> See generally Jacob S. Hacker et al., *Inequality and Public Policy*, in *INEQUALITY AND AMERICAN DEMOCRACY*, *supra* note 594, at 156 (surveying the evidence on the effects of a broad range of public policies on social and economic inequality and, consequently, on political inequality).

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The limited ambition of this Part (and of the Foreword more generally) has been to suggest that constitutional law and theory would do well to confront these systemic questions about where democratic-level power is and should be located. Constitutional thought might make greater progress by redirecting its focus from the power of government institutions to the power of groups in society — and correspondingly from structural constitutional law to a broader range of legal regimes that serve to redistribute democratic power.

#### CONCLUSION

“Who governs?”<sup>616</sup> That simple question cuts to the core of how American democracy works and how the legal frameworks that constitute and regulate it, starting with constitutional law, should be designed and assessed. Unfortunately, the development of constitutional law has proceeded with very little understanding of who governs, or where power is located in the American political system.

As the foregoing discussion has attempted to demonstrate, a large part of the problem is that constitutional law has been looking for power in the wrong places. At one level, the misdirection has occurred because assessing the power of government institutions and officials is a much more difficult task than many courts and commentators seem to recognize. Power over the state is entangled with the power *of* the state. Power is often located elsewhere than the site of action and camouflaged by inaction. Apparent constraints on power may actually serve to augment it; and enhancements of power may turn out to have the opposite effect when viewed in dynamic perspective. Formal, legal grants of and limitations on power may have little to do with the *de facto* ability or inability to influence policy outcomes. Each of these observations ratchets up the difficulty of seat-of-the-pants assessments of where power is actually located in government; taken together, they cast considerable doubt on the veracity of many conventional understandings of who is wielding or accumulating power in government, and also on the ability of courts and armchair observers to make such judgments.

More fundamentally, the right answer to the “who governs?” question cannot be Congress or the President. The ultimate governors in a democracy are the voters, political parties, interest groups, and other democratic actors who compete for control over government institutions and attempt to effectuate their policy interests. Focused on the power of institutions, constitutional analysis seldom sees how that power is passed through to the level of interests. Yet power at the

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<sup>616</sup> See DAHL, *supra* note 40 and accompanying text (discussing the alignment of the policy views of the Supreme Court and lawmaking majorities).

level of constitutional structure is, in an important sense, merely superstructural.

Constitutional law's normative goal(s) of checking, balancing, equalizing, or diffusing power seem similarly misplaced. Preventing one group from dominating or subjugating another is a self-evidently attractive principle of political justice as applied to the abolition of slavery or opposition to oligarchy, but the principle loses any obvious force when it is applied to government institutions like Congress and the President. The ideal of equalizing political power shines brightly when monarchies and dictatorships are replaced by democracy, and at least dimly when balanced pluralist competition among a variety of factions or interests promotes power-sharing and prevents monopolization; but when it comes to equalizing the power of government institutions it is hard to see any spark. Madison's recourse to pluralism and countervailing power in *Federalist No. 10* makes perfect sense, but his translation of those ideas to government institutions in *Federalist No. 51* remains difficult to parse.<sup>617</sup> The idea of balancing power as a mechanism for permitting groups with deeply divergent interests to live together peacefully holds clear promise in the context of mixed government, consociational democracy, and international relations among states.<sup>618</sup> What constitutional law hopes to accomplish by way of balancing the power of government institutions that have been hollowed of interest-based constituencies and hence rivalries is much harder to say.

This Foreword has thus suggested that the constitutional impetus toward diffusing and balancing power might be better aimed at the democratic-level political actors who actually possess and compete for it. Public law has, in fact, sometimes been oriented in this direction, in the domains of administrative process, the law of democracy, and constitutional rights jurisprudence on the *Carolene Products* model. These and other pockets of public law might be productively linked with one another, and with the values of structural constitutionalism, by a common concern with balancing and diffusing power — not at the level of government institutions but at the level of political inter-

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<sup>617</sup> See *supra* notes 28–29 and accompanying text.

<sup>618</sup> The international version of the theory is that states or coalitions of states with equal power will achieve a self-interested equilibrium of peaceful coexistence, whereas an imbalance of power will lead the stronger side to provoke war. See Posner, *supra* note 73. That idea may have influenced thinking about the U.S. constitutional design. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1496–97 & n.283 (1987) (discussing early conceptions of the balance of power between state and federal governments and a similar understanding of the American role in the European balance of power); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1840 (2009) (noting that domestic separation of powers theory and international balance of powers theory arose at approximately the same time and the similarities between the two).



ests and social groups. The ambition of this Foreword has been to show how relocating power and the ideal of distributing it more fairly holds some promise to illuminate who governs and how constitutional law does and should decide.