
POWER IN PUBLIC LAW: SOME REACTIONS[†]

*John Ferejohn**

In his Foreword Professor Daryl Levinson complains that “[t]he law and theory of constitutional structure remains fixated on the 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.’”¹ But “the distribution of power at the structural level seldom bears any systematic relation to the distribution of power at the level of interests.”² It is “merely superstructural,”³ with no normative significance. Levinson suggests that we have no intrinsic reason to care if governmental powers are separated or balanced: “[B]eyond 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.”⁴ He remarks:

[O]ne 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. . . . In constitutional law and theory as it currently stands, [however,] 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.⁵

[†] Responding to Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016).

* Samuel Tilden Professor of Law, New York University School of Law. Thanks (without blame) are due to Professors Roderick Hills and Pasquale Pasquino.

¹ Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 36–37 (2016) (quoting Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 517 (2015)).

² *Id.* at 40.

³ *Id.* at 142.

⁴ *Id.* at 37.

⁵ *Id.* at 38. It is unclear whether Levinson thinks that the wealthy have already captured government and if they have what could be done about it. I am skeptical that we know enough about wealth and influence to rush to judgment. Levinson cites an important empirical study in MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012). Levinson, *supra* note 1, at 38 n.35. But because of data limitations, that study lacks the bandwidth to tell us what we need to know. See John Ferejohn, Forum Response, *Under the Influence: Who Decides What's in the Public Interest*, BOS. REV. (July 1, 2012), <https://bostonreview.net/forum/under-influence/who-decides-what%E2%80%99s-public-interest-john-ferejohn> [<https://perma.cc/7GG5-KQ39>] (noting Gilens’s “reliance on the relatively small samples in national public opinion surveys”). The results of that study — which showed that congressional votes correlated with the views of those in the top decile of the income distribution — seem open to several different interpretations. As every member of Congress is comfort-

Levinson argues that in fact “[t]he 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.”⁶ For Levinson, power relations among these entities should be the focus of the constitutional law concerning separation of powers, checks and balances, and federalism. Levinson appears to acknowledge, however, that the structural features of the Constitution may have *causal* effects on the relative powers of individuals and social groups.⁷ For this reason, “[l]ocating policymaking power . . . 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.”⁸ According to Levinson, “the law and theory of the structural constitution seldom take this second step,” and thus “standard analyses of power are not only dubiously accurate as far as they go but also crucially incomplete.”⁹

Levinson suggests, in effect, returning to something like the older (pre-Philadelphian) constitutional tradition of mixed government. That tradition sought to represent important social groups — the parts of the city — in government.¹⁰ He finds echoes of that model in Madison’s own *The Federalist No. 10*.¹¹ Levinson’s version is modernized to democratic conditions, presumably entitling groups only to weight somehow deriving from the status of their members as free and equal citizens.¹² Levinson reminds us that concerns about the distribution of power are not foreign to American law. Indeed, regulating the powers of people and groups as democratic actors is a well-established project of several areas of public law, including administrative law (as it deals with limiting or preventing the “capture” of agencies or their policies by narrow interest groups), voting rights law, equal protection law, and

ably in the top income decile, *see* GILENS, *supra*, at 235, it is hard to say whether Gilens’s regressions show that senators are influenced by the wealthy or whether they are simply acting on views they share with the wealthy. *See* Ferejohn, *supra*.

⁶ Levinson, *supra* note 1, at 141.

⁷ *Id.* at 86–87 (“But, of course, shifting power at the level of government institutions often will have real consequences for interest-level power and hence policy outcomes.” *Id.* at 86.).

⁸ *Id.* at 53.

⁹ *Id.*

¹⁰ *See id.* at 93–102.

¹¹ *See id.* at 142 (citing THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 2003)). Actually this theme was probably more central for the opponents of the Constitution. For example, Federal Farmer said: “We talk of balances in the legislature, and among the departments of government; we ought to carry them to the body of the people. . . . Each order must have a share in the business of legislation actually and efficiently.” Letter from The Federal Farmer (Dec. 31, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 264, 266 (Herbert J. Storing ed., 1981).

¹² It is unclear how to do this given the complex and overlapping group memberships and affiliations in modern society.

other areas as well.¹³ Levinson acknowledges, as he must, that judicial interventions in these areas have often been both narrowly targeted (as in the case of civil rights and voting rights law) and of very uneven effect (in the case of administrative law).¹⁴ But he suggests that the projects of these legal regimes could be expanded to focus constitutional law on regulating real power disparities among citizens rather than concerning itself with institutional superstructure.¹⁵

Focusing constitutional law on addressing real power disparities among citizens is a thrilling idea that is both impressively researched and persuasively argued. The question is whether constitutional law — specifically the law that seeks to regulate constitutional structure (separation of powers, checks and balances, and federalism) — has any role to play. Levinson seems to say “no” except in those rare cases in which structural features have effects on real power relations among people and social groups (insofar as these can be “parse[d]”¹⁶). Otherwise it seems that courts ought to let interinstitutional power relations be fought out politically.

I want to raise some issues: First, there is no reason to believe that equalizing political powers among individuals in a democracy will automatically lead to more equitable governmental policies.¹⁷ As long as we settle critical questions by voting, policies need only favor mere majorities, and thus from a theoretical point of view unequal outcomes are hard to avoid.¹⁸ Second, I argue (on related grounds) that Levinson’s

¹³ See Levinson, *supra* note 1, at 112–13.

¹⁴ See *id.* at 113–33.

¹⁵ See *id.* at 112–13.

¹⁶ *Id.* at 142.

¹⁷ This can be seen by considering a three-person divide-the-dollar game under majority rule. It is easy to see that for every division of the dollar among three people, there is another division preferred by the majority. Consider any allocation among three people — x , y , and z — where each person receives a nonnegative portion of \$1 and all sum to \$1 ($x+y+z=\$1$). For convenience, let’s assume that x has more than y , who in turn has more than z ($x>y>z$). Now consider a new allocation (*) where x loses his portion, which is divided evenly between y and z ($x^*=0$, $y^*=y+x/2$, and $z^*=z+x/2$). Note that the new allocation still adds up to \$1 ($x^*+y^*+z^*=1$), and that each person still possesses a nonnegative portion of \$1. Obviously, persons y and z prefer the second allocation to the first, so they would prevail in a majority vote. So the allocation among x , y , and z cannot be a majority rule equilibrium. And as this allocation was chosen arbitrarily, it shows that there is no majority winner in a three-person divide-the-dollar game. Richard McKelvey showed that this implies that in this case there is a majority rule cycle over all alternative divisions of the dollar. For a more general proof, see Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976). In this structure virtually any outcome can be reached in some game-theoretic “solution.”

¹⁸ See David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 AM. POL. SCI. REV. 1181 (1989) (discussing a game-theoretic model in which equilibrium outcomes necessarily favor bare majorities). While this example may seem simple, the arguments in the cited papers extend to voting games on multidimensional policy spaces generally. In fact, even if the Court were to regulate power imbalances stringently, there is no reason to think that equal economic outcomes

idea of parsing power, understood as seeing the apparent power of officials and institutions as merely superstructural, is implausibly reductionist and fails to take sufficient account of the distinctive agency issues that plague (or characterize) democratic rule.¹⁹ The power of political leaders cannot be reduced to that of their support coalitions: elected and appointed officials retain significant autonomy, which they are relatively free to use or abuse.²⁰ By itself, this consideration gives us reason to regulate the relations among officials and institutions, as well as their authority over us. Third, I believe Levinson misconstrues Madison's effort (in *The Federalist No. 51*) to justify the Constitution's divisions of powers. Madison followed Montesquieu in seeing liberty as freedom from *arbitrary* rule, which he understood to require that judging not be intermingled with legislating or governing (that is, executing the laws).²¹ While Madison wanted a stronger central government, he also wanted to be sure that liberties were protected from its most dangerous branch, which he thought would be the legislature and especially its lower house.²² While Madison overestimated the capacity of Congress to usurp powers from other branches, as legislative

or equality of opportunity would be assured, or that inequalities of wealth and income would not continue and possibly increase.

¹⁹ While I am skeptical that power can be parsed in the way Levinson wants, I think the idea of parsing the "incidence" or impact of policies on individuals and groups is more promising, as I suggest below.

²⁰ It is possible that Levinson wishes to advance a less stringent reductionism when he says, for example, that "the ultimate holders of power in American democracy are not government institutions like Congress and the President but democratic-level interests." Levinson, *supra* note 1, at 38. These interests may include political officials acting in other capacities — as party leaders, for example, or perhaps as members of interest groups. *See id.* at 40. But I read his Foreword, especially when it worries about the political influence of the wealthy, as making the stronger claim that economic and social interests tend to control policies rather than the less interesting claim that some officials are less powerful than others.

²¹ This seems clear from *The Federalist No. 47* where Madison agrees with Montesquieu that liberty requires that the exercise of judicial power be separated from legislative and executive control. *See* THE FEDERALIST NO. 47, *supra* note 11, at 298–300 (James Madison). The point of that essay, however, is that adequate separation is consistent with giving each branch some means to check usurpations by the others. *Id.* Moreover, it is evident elsewhere in his *Federalist Paper* writings that Madison's main worry is about *congressional* incursions on the powers of the other branches. *See* THE FEDERALIST NO. 48, *supra* note 11, at 305–07 (James Madison) ("[S]ome more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."). Montesquieu, on the other hand, was more concerned about the capacity of the king, using the legislative and executive powers, to interfere with judging and thought it the great success of the English that they had managed to secure judicial independence in the 1701 Judiciary Act. *See* MONTESQUIEU, THE SPIRIT OF LAWS 152 (Prometheus 2002) (1748) ("[M]any of the Princes of Europe, whose aim has been levelled at arbitrary power, have constantly set out with uniting in their own persons all the branches of magistracy, and all the great offices of state."). I read this as directed to his French audience, who knew the reference to arbitrary power alluded to the Bourbon kings.

²² *See* THE FEDERALIST NO. 48, *supra* note 11, at 305–06 (James Madison).

powers have drifted away from Congress, the possibility of arbitrary rule may persist within the executive or the judiciary insofar as judicial, legislative, and governing powers are intermingled. Many of Madison's answers may be inadequate, but as far I can see, the Madisonian project — regulating how the constitutional powers are exercised — remains as urgent as it ever was.

None of this discussion is to disparage existing efforts in law to remove unfair discrimination, or to seek to reduce power inequalities among people and groups, but it is to worry how far those efforts could be sensibly extended. Levinson points out that the Supreme Court seems to have backed away even from its limited antidiscrimination commitments in recent years: “While the Court continues to point to political powerlessness as a reason for heightened equal protection scrutiny, the animating theory of equality has shifted from an antisubordination focus on protecting disadvantaged groups to an anticlassification prohibition on the use of particular group characteristics in allocating benefits and burdens.”²³ Political and other forms of inequality certainly deserve much more judicial attention than they have received. But that does not deny that we have a continuing interest in ensuring that governmental powers are not exercised in ways that undermine our liberties.

I. JUST PASSING THROUGH

I will argue that one cannot simply factor out public officials in the analysis of power.²⁴ Here's why: the agency problem in a democracy is radically different from the classical agency problem, in which a sin-

²³ Levinson, *supra* note 1, at 132–33.

²⁴ This was essentially Professor Robert Dahl's point in *WHO GOVERNS?* (1961). Against the economic reductionism of FLOYD HUNTER, *COMMUNITY POWER STRUCTURE* (1953) and C. WRIGHT MILLS, *THE POWER ELITE* (1956) and others, Dahl argued that neither economic nor social or cultural elites were able to drive important policies in New Haven; rather, political leaders accumulated sufficient (electoral) power to push through some creative policy initiatives even in the face of strong resistance from social and economic elites. See DAHL, *supra*, at 63–84. He did not claim that political power dominated economic or social power but argued that each had influence and autonomy in different and overlapping areas. See *id.* at 84. Subsequent literature (on the “faces” of power, cited by Levinson) argued that Dahl's methodology led him to seriously underestimate the power of economic and social interests and that he did not prove that there was no power elite in the city. Levinson, *supra* note 1, at 39 & n.39–40. Dahl's view that there was no power elite in New Haven has been seriously undermined by those critics. See G. WILLIAM DOMHOFF, *WHO RULES AMERICA NOW?* 184–96 (1983) (arguing that downtown financial interests and Yale University were much more important than Dahl argued). However Domhoff's work also emphasized the pivotal role of Senator Prescott Bush, see *id.* at 192–95, an elected official, who was free to involve himself or not. Moreover, Domhoff assumes that financial and university interests were very well aligned with each other, which may be contested. I think the critics have fallen short of proving the existence of a socio-economic elite capable of imposing its will on elected officials. The main conclusion from this literature must surely be that the analysis of power and “who governs” is immensely difficult.

gle principal induces an agent to pursue the principal's interests by establishing (and enforcing) an incentive scheme for the agent. The distinctive feature of *democratic* agency in a liberal democracy — in which people are free to hold diverse values and preferences and make decisions by voting — is that the democratic principal (the “people”) is heterogeneous,²⁵ and its members cannot generally agree on the objective the agent should pursue. As such, voters cannot easily coordinate on an incentive scheme for their officials even if they have shared interests in doing so. Because no individual or small group is necessary to a majority, a candidate for office is able, effectively, to pick which majority to please. This induces competition among potential supporters, driving down what each could demand for her support. This implies that political officials are very hard to control democratically.²⁶ The consequence is that, in a democracy, officials have a very large amount of agency “slack” that they can use in various ways: spend more time with the family, please favored constituents, take trips to exotic places, or even pursue their view of the public interest. This is not to say that officials never get punished for overdoing things. Misunderestimation is always possible in a democracy. But, given the diversity of the democratic principal, punishing an official depends on a majority agreeing that she behaved badly enough to warrant a vote against her reelection. Democratic officials (if they are competent) tend to be skilled at undermining the formation of potential oppositional majorities by distributing favors or promises to marginal members.²⁷

²⁵ Voter heterogeneity is the “normal” situation in any plausible liberal democracy. As long as the policies to be decided have distributional or allocational features, the policy “space” will be multidimensional; and if there are at least two dimensions, except under knife-edge conditions, there will be no majority rule. Charles R. Plott, *A Notion of Equilibrium and Its Possibility Under Majority Rule*, 57 AM. ECON. REV. 787 (1967). The standard example is a three-person divide-the-dollar game that has a two-dimensional space of alternatives and (therefore) no majority winner. See *supra* note 17. For a survey of results on voting drawing from social choice and game theory, see generally DAVID AUSTEN-SMITH & JEFFREY S. BANKS, POSITIVE POLITICAL THEORY I: COLLECTIVE PREFERENCE (2000).

²⁶ I initially developed these ideas in John Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5 (1986). That paper asks how well voters can control an incumbent using their votes to reward or punish an incumbent and shows that if preferences are weakly heterogeneous, the incumbent officeholder will be somewhat responsive to voter preferences. See *id.* at 19. But if preferences are heterogeneous, control is impossible unless voters are able to coordinate on a single dimension for evaluating the incumbent. See *id.* at 21–22. In effect, the coordination would reduce a heterogeneous to a weakly heterogeneous electorate. See *id.* at 22.

²⁷ See *id.* at 21. The argument in Ferejohn, *supra* note 26, was developed in context of majority rule but extends to any system of “democratic” decisionmaking in which there is no homogeneous interest group — a “power elite” more unified in purpose than Professor C. Wright Mills could have thought possible — with enough power to hire and fire public officials. So in the three-person divide-the-dollar game, see *supra* note 17, the players might as well be interpreted as interest groups that exercise influence outside of elections. As long as no single group is necessary for a decision, this system will have the same formal structure as a majority-rule game.

This argument simply recognizes that government has a tragic aspect: if people want the benefits of government (whether for Hobbes's reasons or Kant's), creating the state necessarily alienates power to officials, and that power can outweigh the power of the principal.²⁸ This alienation of power makes it unlikely that the operations of government will *automatically* result in normatively desirable outcomes. Historically, the common response to the heterogeneous-principal problem has been for a part of the people to create a (relatively homogeneous) faction or political party that can "agree" on the qualities and/or standard of conduct for their representatives and enforce those standards at the ballot box. If one part of society organizes a party, however, other parts will be motivated to do the same in order to compete for voter support. The chronic problem for a faction or party is to prevent its adherents from defecting from the agreed-on strategy: some adherents may be tempted to vote for a candidate who fails to meet the party's standard or vote for another party's candidate. Indeed, smart incumbents will figure out how to buy off enough voters to free them from party-imposed restrictions. If there is only one party (that is, if entry of other parties could be prevented) the discipline problem is relatively simple to solve. But when there are two or more parties it can be very difficult for a party to control its representatives. As a result the party "solution" to agency slack works imperfectly at best. Except in Leninist one-party systems (and probably not even in such systems), officials retain significant power and can, to some extent, ignore the wishes of their constituents.²⁹

The point is that, in democracies, voters are not very good at controlling their representatives, even if they organize themselves into relatively well-disciplined parties.³⁰ This can be good or bad. On the one hand, representatives are somewhat free to pursue the public interest as they see it. On the other, elected officials need not take the public interest as their aim, and even if they do, they could be misguided. Other means are necessary if we want to maintain some con-

²⁸ Hobbes argued that people would rationally establish government to provide security, THOMAS HOBBS, *LEVIATHAN* (C.B. MacPherson ed., Penguin Books 1985) (1651); Kant argued that we had a natural duty to establish a government in order to ameliorate moral wrongs that cannot be corrected individually, IMMANUEL KANT, *The Metaphysics of Morals*, reprinted in *PRACTICAL PHILOSOPHY* 353 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) (1797). Either way, an autonomous actor is established and authority is alienated to it.

²⁹ Of course in party-dominant systems, agency slack simply reappears inside the party.

³⁰ The power of American political parties to "control" congressional members is disputed in the political science literature. For one view, see Keith Krehbiel, *Where's the Party?*, 23 *BRIT. J. POL. SCI.* 235, 237–38 (1993) (arguing that apparent party discipline in roll-call voting is conflated with intraparty policy agreement). For an opposing view, see GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA* (2005) (contending that agenda-setting powers confer significant disciplining power on congressional parties). For an intermediate view, see DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991).

trol over our officials. Criminal sanctions may limit blatant misuses of office (taking bribes, engaging in extortion, stealing from the treasury, and so forth), but these are blunt and dangerous instruments. Sometimes mechanisms of direct democracy are deployed, but these are easily corrupted. The more common methods are structural — getting politicians, in or out of office, to compete with and control each other. Every democracy enlists political leaders (among others) to criticize and control governments. Madison summarized the problem: “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.”³¹ Madison thought that the Constitution provided a solution; evidently, it has not worked perfectly.

Maybe the people, arranged in social groups, *should* be the deciders: that is certainly the sentiment behind President Abraham Lincoln’s paean to a government “by” the people.³² But was that declaration much more than poetry? President Lincoln also emphasized that the wellbeing of the people (government “for” the people) is the appropriate objective of democratic government.³³ When we consider constitutional structure or any reform of it, we ought to take account of its effects on the people. That is to say that what we ought to “pass through” is not *power* but *incidence* or *impact* on the wellbeing of the people. Madison himself endorsed this idea:

[T]he real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union.³⁴

II. MADISON AND THE SEPARATION OF POWERS

The point of separating powers, for Madison as well as Montesquieu, was and still is to assure that, ordinarily, government is restrained by law operating through an independent judiciary, that laws are made in ways that are reasonably transparent (in an open and argumentative legislature), and that government is responsive to the interests of its free and equal citizens. The attractions of these ideas have not really changed since the time that Montesquieu wrote. Of course it is true that the government must address issues in real time and that prag-

³¹ THE FEDERALIST NO. 51, *supra* note 11, at 319 (James Madison).

³² President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

³³ *Id.*

³⁴ THE FEDERALIST NO. 45, *supra* note 11, at 286 (James Madison).

matic considerations may sometimes dictate derogation from statutory or constitutional requirements in emergencies.³⁵ But there is a difference between derogation and abrogation that is still worth preserving.

Madison's worry was that desirable power separations would be unstable in a popular government — one open to the people. Madison was correct; he still is. He was wrong, however, about where the threats would arise. He failed to see, until it was too late constitutionally, the attraction of letting a popularly elected president with the capacity to address (and even solve) urgent problems do so without congressional action or even much popular approval.³⁶ And he did not see the dangers of the vaguely defined powers conferred in Article II. After 1791 he was forced to play catch-up, first by creating a political party to oppose the Federalist adventures and later by inventing a novel quasi-constitutional appeal to the state legislatures.³⁷ Finally, when these efforts failed, he joined with Thomas Jefferson to run a popular (not to say populist) campaign to extirpate the Federalists from power. All this must have been anathema to him.

The administrative state continually raises power-separation issues. As powers shifted toward new agencies, both the courts and Congress struggled to retain some degree of control of events. The courts succeeded for the most part in retaining powers to supervise the new agencies and, for a time, Congress sought to keep some hold on the agencies through its powerful and autonomous committees (using, for example, the legislative veto and appropriations powers). But the erosion of committee autonomy and power in favor of party caucuses after the 1970s has undermined these defenses,³⁸ as have Court decisions limiting congressional influence on agency policymaking.³⁹ There have of course been congressional efforts to regulate internal operations of administrative agencies by insulating adjudication and regularizing rulemaking processes (in the Administrative Procedure Act and other statutes). These efforts may have succeeded to some degree with respect to agency *adjudication*, but agency *rulemaking* remains fairly opaque to the public, very loosely regulated judicially, and potentially subject to capture by affected interests.⁴⁰ The question of

³⁵ See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 9–10 (2010).

³⁶ See *id.* at 13.

³⁷ See John A. Ferejohn & Roderick M. Hills, Jr., *Publius's Political Science* (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Working Paper No. 16-03, 2016).

³⁸ Christopher J. Deering, *Ebb and Flow in Twentieth-Century Committee Power*, in CONGRESS RESPONDS TO THE TWENTIETH CENTURY 137, 147 (Sunil Ahuja & Robert Dewhirst eds., 2003).

³⁹ See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (holding that the one-house legislative veto of agency action was unconstitutional).

⁴⁰ See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).

how to stabilize desirable separations of power remains vital. Its importance is amplified by the electorally induced impatience of Presidents to achieve good policy outcomes before the next election. For this reason I think Madison's project in *The Federalist No. 51* remains as important as it ever was, even if the answers he proposed there are inadequate in our world.

Levinson sees *The Federalist No. 51* (the defense of checks and balances) as a failed and (indeed) futile project and seeks to return to the model of *The Federalist No. 10*, which he understands as seeking (affirmatively) to balance/equalize powers among individuals and groups in society.⁴¹ He argues that there is a disconnect, or even a contradiction, between these two essays. I read *The Federalist No. 10* differently: it makes a negative sociological argument, predicting that liberty will be safe in a large, extended representative government (a republic, in Madison's sense). This is so for two reasons: first, elections will tend to select high-quality leaders who will moderate (turbulent and erratic) popular demands;⁴² second, the diversity of interests in a large and extended republic makes it hard (for these representatives) to form *legislative* majorities that might threaten liberty (should they seek to do so).⁴³ Thus, not only will liberties be safe; so too will the powers of the weaker branches.

The Federalist No. 51 presented various checks as a backstop just in case the sociology of *The Federalist No. 10* did not work out as he predicted. It is clear from that text (and other numbers) that Madison thought that dangers to liberty, if they were to arise, would emerge from the legislative power intruding on the judicial and executive.⁴⁴ For that reason, most of the checks are aimed at weakening that body — Congress — to which most of the legislative power is assigned. It was divided in two, each part was given a separate constituency, the Executive was given a checking role *ex ante*, and the courts were given a checking role *ex post*. In effect, even if a factional majority were to form (in Congress), the weaker branches would still have the means to protect their powers.

I think there are two distinct notions of balance in Madison's constitutional project. One is explicit in *The Federalist No. 51*, where the title itself speaks of "Proper Checks and Balances Between . . . Departments."⁴⁵ I think this is just the idea that the departments should be strong enough to preserve their constitutional jurisdictions from each other and particularly that the weak branches (the judiciary and

⁴¹ Levinson, *supra* note 1, at 142.

⁴² THE FEDERALIST NO. 10, *supra* note 11, at 77 (James Madison).

⁴³ *Id.* at 78.

⁴⁴ See THE FEDERALIST NO. 51, *supra* note 11, at 319 (James Madison).

⁴⁵ *Id.* at 317.

executive) should have sufficient autonomy to do their jobs. It requires only that each department remain sufficiently independent from the others to be able to exercise its core vested power autonomously. The second notion is specific to the distribution of *legislative* power across departments. This type of balance has become important only as Congress has proved unable to defend its hold on legislative power. We can think of the original distribution of legislative powers in Article I as yielding an equilibrium or balance in policy space.⁴⁶ If the legislative power migrates toward the Executive (and the judiciary) either by successful assertion⁴⁷ or by congressional delegation, then we may ask how this shifts the balance.

In an earlier paper, Professor William Eskridge, Jr., and I proposed a theoretical method for assessing such shifts and used it to examine (theoretically) the effect of two important court decisions regarding the administrative state, *INS v. Chadha*⁴⁸ and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁴⁹ showing that these decisions probably moved outcomes significantly toward the President's position and away from the positions of the median members of the congressional chambers.⁵⁰ There we suggested that this metric — the location of legislative outcomes — would be relevant to separation of powers analysis. But this analysis applied specifically to the balance of legislative powers. Perhaps in some areas, the policy shift toward the President or the executive branch could be good. Whether that is so requires careful normative and contextual analysis. Shifts in legislative power to the Executive or the judiciary (as in the creation of administrative agencies) or judicial rewriting of statutes may often be justified on pragmatic or normative grounds.

I believe that Madison was wrong about the sufficiency of the protections in *The Federalist No. 10*. Events soon proved that it was much easier to build (partisan) legislative majorities than Madison had thought, especially if the adventure could be coordinated by an active and well-organized executive department. He was appalled at the ease with which Hamilton's Federalist allies — whom Madison and Anti-Federalists saw as a small minority of financial and commercial elites — were able to push through unconstitutional legislative projects (such as the creation of the first Bank of the United States). And he underestimated how easy it could be to exploit the fear of foreign ac-

⁴⁶ This idea is modeled in William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

⁴⁷ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 453 (2012).

⁴⁸ 462 U.S. 919 (1983).

⁴⁹ 467 U.S. 837 (1984).

⁵⁰ See Eskridge & Ferejohn, *supra* note 46.

tors to enact unconstitutional, liberty-threatening schemes in Congress even without much help from the other branches. This implied that the auxiliary precautions defended in *The Federalist No. 51* would have to bear much more of the weight of protecting liberties than he thought. Events soon proved that those precautions were unable to bear that weight.

The checks and balances described in *The Federalist No. 51* have also not worked as Madison predicted. Indeed, the failures were evident almost immediately as Madison's congressional Republicans were unable to stop executive branch-led initiatives either domestically (with the creation of the Bank and the funding of the debt) or in foreign affairs (with the Neutrality Proclamation and the Jay Treaty). But the important point is that checks and balances have worked unevenly, not that they have not worked at all. Against the energy and decisiveness of the Executive (which remains always in session) and the judiciary (which claims the last word on what the law is), Congress, as it emerged from the Convention, had little independent capacity to act or react on its own.⁵¹ The Constitution saddled Congress with extra problems of collective action (beyond those that arise from it being a large body with no control over its membership) of a kind that did not hobble the hierarchical Executive or the decisive and quasi-hierarchical judiciary. This is not to say that, historically, congressional collective action problems have not been solved from time to time.⁵² Madison's own efforts in organizing opposition to Hamiltonian projects (and later to the Alien and Sedition Acts) might constitute a handbook of attempts to do just that. But such solutions, unless institutionalized, tend to be unstable and temporary. In any case his efforts to stop the Federalist's constitutional adventurism were largely unsuccessful until the Republicans were able to appeal to the "People Themselves"⁵³ in the 1800 elections.

In fact, the immediate beneficiaries of the constitutional checks described in *The Federalist No. 51* were the President and Hamilton's Treasury Department. Over the longer long run even the weakest branch was able to move up the league table as it gained more control over constitutional and legal interpretation. This may be a good or bad thing. The bad thing is that the desirable aspects of power sepa-

⁵¹ Of course it did not help that Madison's Republicans could not manage to get a majority until after the 1800 elections.

⁵² See COX & MCCUBBINS, *supra* note 30, at 17–37 (arguing that the majority party has often been able to cartelize agenda formation to solve some collective action problems). But as Levinson and Professor Richard Pildes suggest, the collective action problem for the majority party tends to be to pursue its partisan interest and not necessarily to solve the collective action problem for the House or Senate or the Congress. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

⁵³ LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004).

ration (independent judges, an energetic and agile Executive, a deliberative and transparent Congress) may be undermined or lost. The good thing is that government has proved able to cope with dangerous new problems. But even though the mechanisms Madison defended in *The Federalist No. 51* have worked unevenly, I am not convinced that his concern with stabilizing power separations is pointless.

III. NOT SO FAST

Many scholars want us (courts, the legal academy, intelligent opinion) to accept the natural evolution of constitutional structures in the twenty-first-century world: permitting more scope for the President and the executive branch to take initiatives both in foreign and domestic policy. Levinson may agree. He accepts the Hamiltonian vision of an energetic (or heroic) Executive and endorses some version of what Professors Terry Moe and William Howell call presidential “unilateral action.”⁵⁴ Levinson appears to agree with those who argue that the President has internalized deliberative and legal procedures within executive decision processes so that, for the most part, external legal and political constraints tend to be superfluous.⁵⁵ Like Professors Eric Posner and Adrian Vermeule, he raises doubts about the extent to which law can really constrain a President anyway, especially when she is pursuing an urgent or popular policy or one that requires secrecy or dispatch.⁵⁶

It is important, however, to separate (as far as possible) the requirements of governing from legislating. In *The Federalist No. 70*, Hamilton insisted on a sharp distinction: “In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses

⁵⁴ Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 132 (1999). Recently, Moe and Howell have urged that legislative unilateralism be embedded in the Constitution by giving the President constitutional “fast-track authority.” WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT 145 (2016).

⁵⁵ See, e.g., JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at xi–xii (2012). Taking issue with Professors Eric Posner’s and Adrian Vermeule’s claim that “[w]e live . . . in an age after the separation of powers, and the legally constrained executive is now a historical curiosity,” POSNER & VERMEULE, *supra* note 35, at 4, Goldsmith points to “giant distributed networks of lawyers, investigators, and auditors, both inside and outside the executive branch, that rendered the U.S. fighting forces and intelligence services more transparent than ever, and that enforced legal and political constraints, small and large, against them,” GOLDSMITH, *supra*, at xi–xii.

⁵⁶ See POSNER & VERMEULE, *supra* note 35, at 7. As Levinson points out, however, the Court has recently seriously deflected President Obama’s health care, immigration, and environmental initiatives, and the President has had to go along.

in the majority.”⁵⁷ He then went on, famously, to argue his main point: “When a resolution too is once taken, the opposition must be at an end.”⁵⁸ The distinction between legislating and governing may have made sense back in the day, but in the modern presidency and administrative state, these things tend to run together. In some areas at least, governing involves making and enforcing rules or laws rather than merely exercising discretion pragmatically. The internal institutions of the modern Executive are indeed truly impressive in this respect, and there are good arguments that Presidents (and their agencies) are often well disposed to take a wider and more “lawlike” view of things than many members of Congress.⁵⁹ However, insofar as internal legal practices are put in place in order to anticipate external political or legal reactions, it is not clear that external restraints have been ineffective. Indeed, they would seem to have been hyper-effective in allowing the Executive to anticipate external reactions without requiring that courts or Congress raise a finger.

I agree with those who argue that the President has made efforts to develop internal policymaking processes that take account of law and justice in ways that rarely emerge from the rough and tumble of congressional argument. But there are limits on how far this can go inside the Executive and how transparent it can be. Presidents are always in a hurry to do things quickly and efficiently. They are often told that they have 100 days to get their big projects in place legislatively; after that their congressional majority (if they have one) will shrink or disappear and they will be forced to rule administratively. And, in the end, the presidency and executive branch are quite hierarchical and information flows slowly and incompletely in hierarchies.⁶⁰ President Obama’s presidency is no different in this respect from many others. Corners will be cut, if often for good reasons, and some interests will be ignored or slighted. That is harder to do in Congress.

I am not convinced, moreover, that the public good is a unitary objective that can be or ought to be pursued single-mindedly in a heterogeneous society. We are a diverse people who disagree deeply about many things. Different communities and interests have their own views of the good, and reconciling these with each other and with

⁵⁷ THE FEDERALIST NO. 70, *supra* note 11, at 425 (Alexander Hamilton).

⁵⁸ *Id.*

⁵⁹ See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 205 (2015); see also WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES 34 (2010) (defending “administrative constitutionalism”).

⁶⁰ The classic cite is to F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945), but game and organizational theorists have explored the issue as well. See, e.g., THE HANDBOOK OF ORGANIZATIONAL ECONOMICS (Robert Gibbons & John Roberts eds., 2013); JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS (1958); Jean Tirole, *Hierarchies and Bureaucracies: On the Role of Collusion in Organizations*, 2 J.L. ECON. & ORG. 181 (1986).

some conception of national interests is necessarily difficult and conflictual. When a big and controversial program is proposed which affects the (real or imagined) interests of many people — Obamacare, immigration reform, carbon taxes — one expects heated and messy arguments often filled with as much emotion as rational discourse. Deliberation in such situations is bound to be hard and often disappointing. In principle, democracy allows each of us the chance to win sometimes but not always. It asks us to be graceful (or at least peaceful) in accepting the inevitable disappointments.

IV. CONCLUSION

I have argued that political officials retain significant autonomy and we have, therefore, reasons to pay attention to how they exercise their offices. It matters *who* governs, as Levinson argues, but it also matters *how* powers are exercised. Levinson presents a second reason to pay attention to power allocation and exercise: the structural constitution may have causal effects on the power of groups or individuals which he thinks (and I agree) are first-order concerns of political morality. The third reason, given by Montesquieu and accepted by Madison and many subsequent thinkers, is that it matters to our liberty that we preserve the capacity of independent judges to enforce law. And, as Madison and Hamilton argued, it matters to our democracy that we preserve the capacity of the legislature to deliberate openly in making the laws under which we live. And, as Hamilton argued, it matters to our public safety and defense that the Executive have effective powers to govern (as the Romans put it when conferring emergency powers on the Executive: to take care that no harm comes to the republic).⁶¹ I agree with Levinson that these matters are not likely to be completely self-enforcing and some regulation is important.

I have not argued that judges are able or likely to fulfill this necessary task. Unlike some European nations, we have not been able to get judges to see themselves as guardians of the Constitution with a general obligation to maintain a constitutional balance of powers in evolving political conditions. The biggest hurdle on my account is that maintaining desirable separation requires that judges and legal scholars develop a jurisprudence that specifically protects congressional powers, which are those most likely to erode. Such a jurisprudence would be an immense about-face for the judiciary, but it is a job that legal and political scholars could undertake. And it is a task worth doing if we want to preserve and protect effective and democratic government.

⁶¹ See 5 THE HISTORIANS' HISTORY OF THE WORLD 669 (Henry Smith Williams ed., 1907).