SEPARATIONS OF WEALTH

Kate Andrias

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SEPARATIONS OF WEALTH

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American government is dysfunctional: Gridlock, filibusters, and expanding presidential power, everyone seems to agree, threaten our basic system of constitutional governance. Who, or what, is to blame? In the standard account, the fault lies with the increasing polarization of our political parties. That standard story, however, ignores an important culprit: concentrated wealth and its organization to achieve political ends. The only way to understand our current constitutional predicament—and to rectify it—is to pay more attention to the role that organized wealth plays in our system of checks and balances.

This Article shows that the increasing concentration of wealth and political power in the hands of the wealthy elite, and the concomitant decline of countervailing organizations, help explain the extent of executive power, the rise of gridlock, and, ultimately, the deterioration of effective checks and balances in the federal government. A core goal of constitutional structure—to promote democratic accountability and responsiveness to the broad citizenry—is severely compromised by the power wielded by organized wealth. Moderating partisanship will not alone solve constitutional dysfunction. Nor will conventional good governance reforms like campaign finance regulation. Instead, this Article argues, the law should also facilitate organizations of ordinary Americans that can serve as a countervailing check and prod in governance.

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INTRODUCTION

Everyone seems to agree: American government is dysfunctional. Politicians are continuously at each other’s throats. Congress is paralyzed. Budgets are not enacted, legislation is not passed. Americans’ faith in government suffers.

What is to blame? According to the standard narrative the problem is political polarization. Hyperpolarized political parties mean that during unified government the legislative and executive branches collude and the executive operates with few constraints. During divided government, gridlock ensues. The President and the administrative state fill the vacuum, energetically wielding executive power to partisan ends. To solve our problems, commentators assert, we must moderate partisanship.

There is a lot of truth to this standard account. But it is not the whole story. If we want to understand our current predicament—and if we hope to have any chance of pulling ourselves out of it—we need to focus not only on partisanship but also on the problem of concentrated wealth and its organization to achieve political ends.

After a period of shared prosperity following the New Deal and World War II, the United States has, over the last generation, experienced a dramatic rise in economic inequality. Disparities in income and wealth are at levels not seen since the Gilded Age. Rising inequality has been accompanied by the concentration, or re-concentration, of political power among wealthy individuals, large business firms, and organized groups representing them, as well as by a precipitous decline of countervailing organization among middle- and low-income Americans.

References:
2 Richard H. Pildes, Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 CAL. L. REV. 273, 333 (2011) (arguing that the consequences of “radically polarized parties” are “unified government without meaningful checks and balances, and divided government that is paralyzed”).
5 See, e.g., Martin Gilens & Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, 12 PERSPS. ON POL. 565 (2014); LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING (2015); THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 135-138 (2003); see also Nicholas Confessore, Sarah Cohen & Karen Yourish, Small Pool of Rich Donors Dominates Election Giving, N.Y. Times, Aug 1, 2015 (“Fewer than four hundred families are responsible for almost half the money raised in the 2016 presidential campaign, a concentration of political donors that is unprecedented in the modern era.”).
nized wealth has overtaken other civic and social organizations as the key driving force in American politics.

Recent scholarly assessment of money in governance has focused on whether it encourages corruption and capture. But what the literature has overlooked is how wealth affects constitutional structure, and particularly the separation of powers. Not in the formal sense of the term, but in the functional sense: the dominance of organized wealth matters for how power is, or is not, diffused and checked throughout our government; for how ambition does, or does not, counter ambition; and ultimately for the extent of government’s democratic responsiveness to the citizenry.

Through a range of mechanisms—from campaign donations, lobbying, and regulatory comment, to the provision of expertise to government officials and the threat of litigation—wealthy individuals, large business firms, and their organizations dominate every step of the political process. They influence not only Congress and the President, but also the mechanisms scholars argue have replaced Madisonian branch competition.

That is, constitutional law scholars contend that the formal Madisonian schema of separated powers is, to great extent, anachronistic. The branches qua branches do not have fixed identities or interests that compete. Instead, political competition is channeled in large part through the political parties. Inter-branch dynamics shift from competitive when government is divided along partisan lines to cooperative when it is unified. Administrative law scholars agree, though they point to mechanisms within the executive branch that provide an additional or alternative system of checks and balances. Under this vision of “internal” or “administrative” separation of powers, a multilayered bureaucracy allays fears about the expanded executive, curbs excesses of power even during unified partisan government, and enables continued innovation during divided government.

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6 See, e.g., Lawrence Lessig, Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It (2011); see also infra notes __.
The “separation of parties” and the “administrative” separation of powers accounts do much to ground constitutional theory in practical realities. But they proceed largely without regard to problems of economic and political inequality. This omission stands in contrast to an earlier tradition in constitutional theory. For earlier writers, constitutional structure was not just about the formal separation of powers but rather “comprised the accountability and dispersal of power broadly construed.”

In our current political moment, questions about the relationship between constitutional structure and the distribution of political and economic power are again urgent. Today, those wielding significant wealth serve almost as a Fifth Branch of government. They check and prod the branches, the parties, and the bureaucracy. Because of the weakness of organizations representing ordinary Americans, few countervailing checks exist. The result is that power in government is both more and less concentrated than the dominant narrative, with its focus on partisanship, suggests.

Consider, for example, the recent experience with health care reform. The standard account posits the exercise of unconstrained executive power in times of unified government. Yet despite a super-majority of Democrats in Congress, the Democratic President was clearly checked. From the outset, it was evident that the President could hold his party in Congress only with the support of industry—the drug industry, the hospital industry, and the insurance industry, among others. The statute that emerged from Congress in 2010, while politically polarizing to this day, represented neither an unbound exercise of partisan power nor an ideological pole of public policy opinion.

Or consider the minimum wage. The standard account is that partisanship explains gridlock on this issue. But substantial bipartisan support for an increase in the minimum wage exists among voters. The failure of Congress to amend the minimum wage is best explained not by the divide in perspective between Republicans and Democrats, but by the

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11 The claim is that organized wealth is a fifth branch much in the same way that the media or the administrative state constitute the fourth branch. See, e.g., THOMAS CARLYLE, ON HEROES AND HERO WORSHIP (1840) (describing the media as the fourth estate); Humphrey’s Ex’r v. United States, 295 U.S. 602, 628 (1935) (declaring that administrative agencies had “become a veritable fourth branch of the Government”); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 passim (1984) (describing agencies as a fourth branch).
12 See supra notes __, and accompanying text.
success of organized business interests in ensuring the opposition of key legislators.\(^{14}\) Conversely, when Congress recently voted to repeal a restriction on big banks imposed after the 2008 financial crisis, it did so because organized business marshalled bipartisan support. Notably, those Democrats voted in favor of repeal had received the most money from the financial industry.\(^{15}\)

As these examples show, partisanship is an incomplete explanation for government’s function. The concentration of economic and political power in the hands of the wealthy elite is also a critical factor. To be sure, the power of organized wealth is not monolithic. It is greater in low-light, low-salience areas and when countervailing organizations are absent or weak.\(^{16}\) And important differences exist between the mechanisms of participation used by the wealthiest individuals, on the one hand, and business firms and their organizations, on the other.\(^{17}\) But together, wealthy individuals and organizations overwhelmingly influence elected officials, the internal bureaucracy, and the political parties in a wide range of arenas.

This systematic influence forces us to reconsider key pillars of the prevailing descriptive account of contemporary executive and legislative power. First, governmental power is systematically more constrained during periods of unified partisan government than the dominant accounts imply, at least on certain issues. Wealth participates disproportionately at every stage of the democratic process and is well positioned to exploit the system’s multiple veto points, providing a strong constraint even during periods of one-party control, and even when a majority of the public supports action. Recent experiences with health care, financial, and labor law reform under unified Democratic government illustrate the point.

Second, during periods of divided government, gridlock dominates, but it is not the neutral, cross-substantive phenomenon the dominant theory suggests, nor can it be explained by partisanship alone. Rather, wealthy interests, particularly organizations representing business, effect inaction disproportionately and benefit from it uniquely. As noted, business interests have been able to block changes to labor and employment laws, such as a raise in the minimum wage, even when such changes are overwhelmingly supported in polls. At the same time, during this gridlock, wealthy interests have achieved changes to the status quo through

\(^ {14}\) Id.


\(^ {16}\) See infra notes and accompanying text.

\(^ {17}\) For discussion of who comprises the category of “wealth” or “wealthy interests” and the different ways in which this group engages the political process, see infra notes 46-52 and accompanying text.
private ordering—such as by increasingly relying on independent contractors who fall beyond the reach of much employment law.18

Third, because internal executive branch mechanisms are so often dominated by wealth, they are worse at diffusing power and enabling innovation than their proponents assert. The experience of financial regulatory reform in the aftermath of Dodd-Frank provides just one example of this phenomenon.19 In short, wealth both augments and retards the various dynamics of functional checks and balances, and prods and pleads, in ways that are systematic and comprehensive, but not adequately considered by the standard accounts.20

Some might contend that the systematic influence of wealth is a boon for the separation of powers’ functional aspirations because it moderates and limits government action even in times of unified government. I reject that view. Organized wealth has corrosive effects upon constitutional structure’s functional goals—namely, to diffuse political power and ensure ambition counter ambition, in order to promote liberty, governmental efficacy, and democratic accountability.21 In particular, wealth’s dominance undermines the promise that our system of political checks will produce a government roughly responsive to the majority will.22

Where do we go from here? Various possibilities exist to reform the law in response to organized wealth’s negative effects on the diffusion of power and democratic accountability. One such set of reforms proposals is familiar: to reform both voting and campaign finance laws in order to make individual political participation more equal. While these proposals are important, the analysis of this Article suggests that their promise has been oversold. Additional, less familiar proposals aimed at involving organizations of citizens in governance and politics are necessary com-

18 See infra notes __ and accompanying text.
19 See supra notes __ and accompanying text.
21 Though this Article engages debates about constitutional aims, it is agnostic on the question of the Founders’ original intent. Instead, it adopts the dominant perspective of contemporary constitutional and administrative law theory regarding the functional goals of the separation of powers. See infra notes __ and accompanying text.
22 Of course, no government is perfectly responsive to its citizenry and perfect responsiveness may not even be an aspiration of our constitutional system. See, e.g., Adrian Vermeule, The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution, 123 HARV. L. REV. 4 (2009). Still, there is general agreement among theorists that citizens in a democracy ought have equal opportunity to influence the political process, and that government ought to be responsive to their views. See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 327 (1993); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 144-45 (1967). This Article takes that premise as a given, without trying to articulate an optimal distribution of political power. For a similar approach, see Benjamin I. Sachs, The Unbundled Union: Politics Without Collective Bargaining, 125 YALE L. J. 148, 158 (2013) (citing Richard H. Pildes, The Theory of Political Competition, 85 VA. L. REV. 1605, 1612 (1999) (“In theory and in doctrine, we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.”)).
plements. In a system premised on ambition countering ambition, it is essential to facilitate countervailing organizations.

A final note at the outset: Much of the contemporary literature on capture and corruption refers generally to the problem of “interest groups” and “special interests.” This Article refuses that framing for two reasons. First, the discussion often implicitly or explicitly assumes that participation of organized groups in politics and governance is bad, in part because such participation leads to the incapacity of governmental institutions to serve the public interest. This Article rejects the proposition that participation in government, including through organizations, should be discouraged. Second, and more importantly, referring to “interest groups” or “special interests” generically obfuscates the distribution of group power. On economic issues, that power is heavily weighted toward business interests and agglomerations of private wealth, and away from the vast majority of Americans. It is this unequal distribution of power that is at the heart of the problems explored in this Article—not the fact of organized participation in democracy.

The paper proceeds as follows. Part I begins by describing contemporary legal theory’s focus on partisanship and administrative checks. It then synthesizes several strands of social science research often treated independently from one another to show that wealth systematically influences elected officials, the political parties, and the bureaucracy.

Part II revises the prevailing descriptive account of contemporary executive and legislative power. It explores how state power is, first, systematically more constrained during periods of unified government than theorists who focus on partisanship predict. Second, during periods of divided government, gridlock dominates, but it is not the neutral, cross-substantive phenomenon the dominant accounts suggest. Third, internal executive branch checks often under-deliver on their promise.

Part III evaluates the influence of wealth against the functional goals of the separation of powers as understood by contemporary scholars. It

23 On the role of countervailing power, see, e.g., JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1956).


25 For an intellectual history of capture theory, exploring how center-left critiques of the pervasive influence of industry in particular agencies morphed into a neoliberal argument against the general governmental regulatory impulse as a whole, see William Novak, A Revisionist History of Regulatory Capture in PREVENTING REGULATORY CAPTURE 25 (Daniel Carpenter & David A. Moss eds. 2014); see also Thomas Merrill, Capture Theory and the Courts, 72 Chi.-Kent L. Rev. 1039 (1997) (identifying a shift in attitudes toward the administrative state, during the period 1946-1997, from rationalism to populism to libertarianism).
argues that organized wealth’s effects are deleterious, particularly for democratic accountability. It then considers how the law might be reformed in response, arguing for the need to facilitate countervailing organizations.

I. THE POWER OF ORGANIZED WEALTH

Commentators of all stripes agree that political polarization in Washington has reached crisis levels. Because of conditions of relatively high interparty polarization and intraparty political fragmentation, Congress is paralyzed in times of divided government; and in periods of unified governments, we see legislation that is ideologically ambitious and extreme. Policy-making is now blood sport, and rabid partisanship makes political leaders less likely to compromise and less likely to govern wisely in ways responsive to public will. Americans express deep dissatisfaction with their elected officials.

Hyper-partisanship, legal scholars emphasize, is not just a political problem, it is also a constitutional problem. As Daryl Levinson and Richard Pildes wrote nearly ten years ago, a system intended to channel competition through the political branches actually channels it through the political parties; in their words, our government is characterized by the “separation of parties, not powers.” And because of hyper-polarization, the system breaks down. According to some commentators, the executive branch during unified government is dangerously unchecked; during divided government, it inappropriately pushes the bounds of formal authority to advance a political agenda. Other schol-

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28 Thomas O. McGarity, supra note 36, at 1762 (identifying partisanship as explanation for “blood sport” policy battles).

29 Pildes, supra note 2, at 275; Cass Sunstein, Partyism, U. CHI. L. FORUM (forthcoming); Patricia Wald & Neil Kinkopf, Putting Separation of Powers into Practice: Reflections on Senator Schumer’s Essay, 1 HARV. L. & POL’Y REV. 41, 52 (2007) (“On balance, we find substantial agreement even among these skeptics that things have more polarized and less conducive to good legislating in recent years and that political party domination of Congress is a root cause”).


31 See supra note ___.


33 See infra notes ___ and accompanying text.
ars are more sanguine: They acknowledge the role of partisanship but point to mechanisms within the executive branch that curb excesses of power, while enabling continued innovation.\textsuperscript{34}

The partisanship diagnosis for the affliction of constitutional dysfunction is pervasive – and has had profound impact on legal scholarship.\textsuperscript{35} It has served as the basis for a host of descriptive arguments regarding administrative law,\textsuperscript{36} separation of powers,\textsuperscript{37} and federalism.\textsuperscript{38} For example, scholars invoke polarization to explain the rise of executive power,\textsuperscript{39} including recent innovations of the administrative state,\textsuperscript{40} and to analyze the impotence of Congress.\textsuperscript{41} They also point to partisanship when exploring the relevance of historical acquiescence between the

\textsuperscript{34} See supra notes 8-9 and accompanying text.
\textsuperscript{36} Thomas O. McGarity, \textit{Administrative Law As Blood Sport: Policy Erosion in A Highly Partisan Age}, 61 DUKE L.J. 1671, 1762 (2012) (identifying partisanship as the explanation for policy failure in the regulatory state); David J. Barron & Todd D. Rakoff, \textit{In Defense of Big Waiver}, 113 COLUM. L. REV. 265, 267, 306 (2013) (noting that hyper-partisanship combined divided government, is a defining feature of national governance, and relying on the separation-of-parties theory to explain, in part, a new form of congressional delegation of broad lawmaking power to administrative agencies); Neal Devins & David E. Lewis, \textit{Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design}, 88 B.U. L. REV. 459, 479, 498 (2008) (noting that “the separation of powers between Congress and the White House has given way to the ‘separation of parties’” and using that theory to understand the operation of independent agencies); Jody Freeman & David B. Spence, \textit{Old Statutes, New Problems}, 163 U. PA. L. REV 1 (2014) (arguing that because of the influence of partisanship on inter-branch relations, Congress is increasingly absent from the policymaking process, and fails to regularly update statutes in the face of social, economic, and technological change; this leaves agencies to adapt old statutes to new problems).
\textsuperscript{37} See, e.g., David Fontana, \textit{Government in Opposition}, 119 YALE. L.J. 548, 602-03 (2009) (explaining that the vision of branch loyalty upon which the American originalist vision of a separation of powers is based has collapsed and arguing for government in opposition rules to better constrain unified government); Neal Kumar Katyal, \textit{Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within}, 115 YALE L.J. 2314, 2321 (2006) (“This expansion of presidential power is reinforced by the party system. When the political branches are controlled by the same party, loyalty, discipline, and self-interest generally preclude interbranch checking.”); William P. Marshall, \textit{Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters}, 88 B.U. L. REV. 505, 519 (2008) (“The problem, of course, is that separation of parties serves as no balance at all when both the Presidency and the Congress are controlled by the same party. In those circumstances, the power of the Presidency is effectively unchecked.”).
\textsuperscript{38} See Jessica Bulman-Pozen, \textit{Partisan Federalism}, 127 HARV. L. REV. 1077 (2014) (posing that partisanship, rather than something essential to our federal structure, explains why states check the federal government and whether Americans identify with the states as well as the nation).
\textsuperscript{39} \textit{Supra} note __.
\textsuperscript{40} See Freeman & Spence, \textit{supra} note 33.
branches, and the nature of contestation, or the lack thereof, on the state-federal dimension. Concerns about partisanship motivate numerous reform proposals: Legal scholars have explored how partisanship might be moderated and how internal executive branch innovations can mediate government dysfunction resulting from hyper-polarization, either by providing a check on the partisan executive from within or by enabling policy innovation in an era of gridlock.

The conclusion that partisanship is a driving force in government, causing both legislative gridlock and instances of executive overreach, is unassailable. A look at any recent day of news from Washington proves the point. Yet the preoccupation with partisanship has obscured another important force in contemporary constitutional governance: wealth.

To be sure, election law scholars analyze the problem of money in politics. Administrative law scholars consider the role of organized interests in the regulatory process. But only by viewing the dynamics of wealth in governance holistically, rather than as isolated problems of campaign money and agency capture, as the law literature tends to do, does wealth’s impact on constitutional function emerge. The remainder of this Part shows that wealth serves as a systematic check and prod on the political branches, the political parties, and on the administrative state, and fundamentally shapes their interactions.

Before proceeding, it is important to define the category “wealth” or “wealthy interests”—and to acknowledge the challenge of doing so. I use the term to refer to wealthy individuals—those who comprise the top one percent and .01 percent of income earners and wealth holders and those in the top socioeconomic status (SES) quintile—as well as to large business organizations, particularly corporations and their trade associations. There is considerable overlap among and between these two groups. The country’s wealthiest individuals are, for the most part, the leaders, owners, and directors of the wealthiest business organizations.

But there are also important differences among and between economic elites and wealthy business organizations. For one, individuals and organizations tend to participate in the governance process in differ-
ent ways. Organizations focus more energy on lobbying and on the regulatory process, while wealthy individuals tend to spend more on campaign donations. Individuals tend to be more partisan and ideological in their giving patterns, while businesses tend to donate to both political parties strategically.

Meanwhile, among wealthy individuals and business organizations, there are competing views and preferences. For example, when acting individually, economic elites tend to prefer lower government spending across the board, but when operating within a particular business organizations, they tend to favor more spending on that particular industry’s subsidies. Moreover, business groups and wealthy individuals are not always in agreement with one another. Sometimes there is vigorous lobbying on multiple sides of an issue. Yet recent studies suggest that divergence of opinion on economic issues among wealthy individuals is less common than one might expect. And while business groups diverge on discrete issues, e.g., to lobby for their own industry’s interest, they, like wealthy individuals, are generally unified on broad principles of economic policy, including tax policy, labor policy, and deregulation. In short, as the following sections will elaborate, the category of wealth, while not homogenous, is coherent. And wealthy interests collectively dominate the political and governing process at every step.

A. Organized Wealth in Politics

Concern about the relationship between wealth and democracy is not a new feature of American political discussion. But it is now, once

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47 See Edward T. Walker & Christopher M. Rea, The Mobilization of Firms and Industries, 40 ANN. REV. SOC. 281 (2014) (noting that “the largest share of PAC money comes from individuals” and that “corporate PAC spending is only a fraction of what firms tend to spend on lobbying”).
48 Gilens & Page, supra note 5, at 571-72. See also ... infra.
49 Id.
50 Id.; see, e.g., Joshua Brustein, Behind Closed Doors, Ford, UPS, and Visa Push for Net Neutrality, BLOOMBERG BUSINESS (Nov. 14, 2014), http://www.bloomberg.com/bw/articles/2014-11-14/net-neutrality-ford-ups-visa-and-bofa-lobby-fcc-in-secret (describing how Internet service providers have been pushing the F.C.C. for looser regulation of broadband access, while technology startups, joined by “a corporate alliance with subtle interests in [the regulatory] fight,” has been lobbying for more muscular regulation); Peggy Lowe, Hundred of Lobbying Interests Influenced the Farm Bill, NETNEBRASKA.ORG (Jul. 14, 2014) (noting that food companies and energy interest lobbies on opposing sides in the 2014 Farm Bill debate over ethanol production); Amy Schatz, Google, Wireless Industry Not Down With Marriott’s Wi-Fi Blocking Plan, RE/CODE (Dec. 22, 2014, 12:31 PM), http://recode.net/2014/12/22/google-wireless-industry-not-down-with-marriotts-wi-fi-blocking-plan/ (describing how Google, Microsoft, and the wireless industry are opposing the hotel industry’s efforts to gain the F.C.C.’s permission to block personal Wi-Fi networks on their properties).
51 Gilens & Page, supra note 5, at 570-71.
52 Gilens & Page, supra note 5; Hacker & Pierson, supra note ...
again, at the center of public debate. One can easily theorize why: After a period of relative shared prosperity following the New Deal and World War II, income inequality has returned to pre-New Deal levels. The data from economists are striking. Since the 1970s, incomes of the poor and middle class have stagnated, while the overall economy has expanded and the wealthy, particularly those at the very top of the spectrum, have grown far more so. Notably, the shift of resources has been sustained, with both income and wealth inequality increasing steadily since around 1980. The trend is not obviously related to either the business cycle or to control by a particular party in Washington.

As economic inequality has soared, so too has political inequality. Putting aside, for the moment, the normative question of whether dominance of the wealthy in politics and governance is problematic and that began Pennsylvania’s constitution warned that excessive accumulation of land or wealth is “dangerous to the Rights, and destructive of the Common Happiness” of the community. For a discussion of these sources and the broader constitutional dimension of debates about oligarchy and democracy, see Joseph Fishkin & William E. Forbath, The Constitution of Opportunity (under contract, Harvard University Press).

Rights that began Pennsylvania’s constitution warned that excessive accumulation of land or wealth is “dangerous to the Rights, and destructive of the Common Happiness” of the community. For a discussion of these sources and the broader constitutional dimension of debates about oligarchy and democracy, see Joseph Fishkin & William E. Forbath, The Constitution of Opportunity (under contract, Harvard University Press).

54 Piketty, supra note 4; see also Jacob S. Hacker & Paul Pierson, Winner Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States, 38 POL. & SOC’Y 152, 155 (2010). For a description of the literature documenting the growth of economic inequality, see Kay Lehman Schlozman, Sidney Verba, & Henry E. Brady, The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy 71 n.5 (2012) [hereinafter Schlozman et al.]. While inequality is a problem in other nations as well, the United States ranks far worse than most of its peers. The United States has one of the highest levels of inequality, as measured by the Gini coefficient before taxes and transfers, among the members of the Organization for Economic Cooperation and Development (OECD).


56 See sources supra note 54.

why, the evidence of such dominance is substantial. Consider first the disparate participation of economic elites as individuals. At every stage of the electoral and governing process, wealthy Americans—those in the top SES quintile—participate at higher levels than lower income citizens. They vote at higher rates, they contribute more frequently and in greater amounts to campaigns, they volunteer more frequently on political campaigns, and they are more likely to contact a representative about an issue. The gap between wealthy Americans’ participation in politics and that of other Americans, which narrowed in the post-New Deal period, has widened in recent years, particularly as expressed by campaign donations. For example, just three decades ago, the top .01 percent gave about 10 percent of all campaign contributions; now they are responsible for 40 percent. As top incomes have increased exponentially, the wealthy have had more money to spend on electoral politics. Meanwhile, a series of recent decisions from the Supreme Court has made it easier for the wealthy to contribute greater sums of money and to do so anonymously. In addition, wealthy individuals are, and have always been, far more likely to serve as elected and appointed leaders than are lower income Americans.

However, the extent to which wealth dominates our system of governance only becomes clear when we shift focus from the individual to

58 See infra ___.
59 The average amount of political activity rises steeply across five quintiles of socio-economic status (SES). SCHLOZMAN ET AL., supra note 54, at 6-8, 14; see also id. at 122 & n.8, 136, 169, 197.
60 SCHLOZMAN ET AL., supra note 54, at 136.
61 Adam Bonica, Nolan McCarty, Keith T. Poole, & Howard Rosenthal, Why Hasn’t Democracy Slowed Rising Inequality?, 27 J. ECON. PERSPECTIVES 103, 111-12 (2013) [hereinafter Bonica et al.].
62 SCHLOZMAN ET AL., supra note 54, at 175. Indeed, more money was spent in the 2012 election than ever before: federal candidates and independent supporters spent more than $6 billion on campaigns. In the House, the average incumbent raised $1.2 million; in the Senate, incumbents raised roughly $11 million each. DAVID CALLAHAN & J. MINJIN CHA, STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA (2014), available at http://www.demos.org/sites/default/files/imce/StackedDeck_1.pdf;
64 Millionaires make up only three percent of the population, but they have a majority in the House of Representatives and a filibuster-proof super-majority in the Senate. At the same time, people with manual-labor and service-industry jobs have made up more than half of the population since the start of the 20th century, yet people from such backgrounds have never held more than two percent of the seats in Congress. NICHOLAS CARNES, WHITE COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING (2013). For more discussion on this subject, see Russ Choma, Millionaire’s Club: For First Time, Most Lawmakers are Worth $1 Million-Plus, OPENSECRETS BLOG (January 9, 2014), http://www.opensecrets.org/news/2014/01/millionaires-club-for-first-time-most-lawmakers-are-worth-1-million-plusssf Stephen Lurie, Why It Matters That Politicians Have No Experience of Poverty, THE ATLANTIC (Jun. 2, 2014, 10:17 AM), http://www.theatlantic.com/politics/archive/2014/06/why-it-matters-that-politicians-have-no-experience-of-poverty/371857/.
the collective—or, in Madisonian terms, to the level of faction. Two important points: First, individuals in the top SES quintile participate in organized political groups at substantially higher rates than other Americans, across every domain of organized interest activity. As social scientists have explored, the affluent are better able to afford the financial costs of organization, and to command the skills, acquire the information, and cultivate the media necessary to keep organizations running.

Second, and more important, business organizations overwhelmingly dominate political activity in Washington. The majority of politically engaged groups in Washington are organized around economic goals and interests, and of these, those representing business constitute more than two-thirds. More than three-quarters of money reportedly spent on lobbying goes toward representing corporate America—a total of $2.57 billion in 2012. And there is reason to believe that these numbers significantly undercount the true corporate investments in politics, because much political influence activity is not covered by lobbying disclosure rules.

While business has always been engaged in politics, organizations representing business interests have proliferated and expanded their collective capacity over the last forty years. Very few companies, prior to the 1970s, had their own lobbyists; even at the trade association level, political engagement was limited by contemporary standards. With each passing year, corporate America has spent more on lobbying and has expanded its political operations. Today, large corporations have achieved “a pervasive position that is unprecedented in American political history.” Moreover, according to some theorists, as businesses as-

65 SCHLOZMAN ET AL., supra note 54, at 276.
66 Id. at 320.
67 SCHLOZMAN ET AL., supra note 54, at 313; SCHATTSCHNEIDER, SEMI-SOVEREIGN PEOPLE 35.
68 Id. at 320, 322 (“More than two-third of the organized interest in Washington are institutions or membership associations directly related to the join political concerns that arise from economic roles and interests” and those representing business constitute more than two-third of these).
69 Druckman, supra note __, at 8-9.
70 Druckman, supra note __, at 9.
71 HACKER & PIERSON, supra note 54, at 177. The Chamber of Commerce, for example, doubled in membership between 1974 and 1980, as did the National Federation of Independent Business. The Business Roundtable, designed to mobilize high-level CEOs for the advancement of shared interests, formed in 1972, and has been active since. Id. In addition, the number of corporations with public affairs offices in Washington grew from 100 in 1968 to over 500 in 1978. In 1971, only 175 firms had registered lobbyists in Washington, but by 1982, 2,445 did. The number of corporate PACs increased from under 300 in 1976 to over 1,200 by the middle of 1980. While small businesses figure prominently in political rhetoric, representatives of large businesses dominate in Washington. John N. de Figueiredo & Brian Kelleher Richter, Advancing the Empirical Research on Lobbying, 17 ANN. REV. POL. SCI. 163 (2014), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5895&context=faculty_scholarship.
72 Drutman, supra note __, at 9, 55-71.
73 Id.
74 Id. at 1.
sumed this dominant position in Washington, their ideological cast also changed: the more “moderate” and public-minded manufacturing-based businesses of the 1950s were replaced by more conservative and narrowly focused financial organizations.\textsuperscript{75}

The participation in politics and governance by business organizations dwarfs participation by other interests:\textsuperscript{76} Business groups and their trade associations both far outnumber and far outspend organizations representing working and poor Americans and diffuse public interest groups.\textsuperscript{77} Indeed, while business organizations have become both more prevalent and more sophisticated in their political activity, countervailing organizations have atrophied. At various points in American history public interest groups and unions served as meaningful political counterweights to corporations.\textsuperscript{78} No longer.

Beginning in the 1960s, and accelerating in subsequent decades, membership organizations of ordinary Americans built in the Progressive and New Deal Eras declined in number and scope.\textsuperscript{79} That is not to say that non-business groups altogether disappeared from the landscape. In fact, the 1960s and 70s saw the founding of numerous public interest organizations, along with the rise of transformative social movements. But for the most part, the organizations that endured past the 1980s were professionally managed advocacy groups, dominated by the elite. Today, less than a third of the organizational advocates operating in Washington are membership associations of any kind, and only about an eighth are membership associations of individuals.\textsuperscript{80} Thus, even the comparatively few organizations purporting to represent the public interest are dominated by the wealthy and funded primarily by large donors. Gone are the

\textsuperscript{75} See Mark S. Mizruchi, The Fracturing of the American Corporate Elite (2013).

\textsuperscript{76} Schlozman et al., supra note 54, at 439. Participation via amicus briefs in litigation is one exception.


\textsuperscript{78} Druckman, supra note 9-10.

\textsuperscript{79} See Theda Skocpol, Diminished Democracy: From Membership to Management in American Civic Life 135-138 (2003). See also Robert Putnam, Bowling Alone: The Collapse and Revival of American Community (2000) (arguing that Americans have been increasingly disconnected from one another).

\textsuperscript{80} Schlozman et al., supra note 54, at 319.
days when cross sections of Americans participated in governance decisions through their representative organizations.\footnote{Kate Andrias, A Hollowed-Out Democracy, 89 N.Y.U. L.J. ON LINE 48 (2014). For a discussion of how these trends affect political parties, see Part __ infra.}

Unions are one notable exception; their membership and funding is still drawn from working Americans. And unions have continued to participate at every level of politics and government, often providing a countervailing voice to organized business groups.\footnote{As political scientists Jacob Hacker and Paul Pierson write, “[w]hile there are many ‘liberal’ groups in the universe of organized interests, labor has been the only organized interest focused on the broad economic concerns of those with modest incomes.” Hacker & Pierson, supra note 54, at 186.} Since the 1970s, however, the labor movement’s size and power has shrunk considerably.\footnote{SCHLOZMAN ET AL., supra note 54, at 87-89. In the 1950s, roughly one in three workers in the United States belonged to a labor union. Since then, union density has fallen precipitously. Today, less than 11% of Americans are in unions; within the private sector, the rate is about 6%. Id. For a discussion of causes of the decline, see Richard B. Freeman, America Works: The Exceptional U.S. Market (2007).} Meanwhile, over the last decades, labor unions have often focused more on their own members’ immediate interests than on broad-based political goals.\footnote{See Katznelson, supra note 24, at 190-92, 204.}

In short, countervailing organizations that might be expected to check the power of organized business have not kept up.\footnote{In recent years, business organizations have consistently comprised between 90 and 95 of the top 100 lobbying organizations, as measured by lobbying expenditures; in four of the last 15 years not a single public interest group or union has appeared in the list of top 100 organizations. In 2012, business organizations spent $34 for every one dollar spent by public interest groups and unions combined. DRUTMAN, supra note __, at 12-13. These numbers do not take into account political activities that are not disclosed in lobbying expenditures, such as talking to the press, coalition building, and grass-roots lobbying. But there is no evidence that unions and public interest organizations even the spending disparity when such activity is considered. Id. at 14.} Unions remain politically active and continue to provide substantial campaign donations, but because there are so few of them and their funding is increasingly under attack, they do not represent a significant share of organizational activity in politics and governance.\footnote{SCHLOZMAN ET AL., supra note 54, at 368; Hacker & Pierson, supra note 54. In 2012, when corporations spent 2.57 billion on reportable lobbying expenditures, unions spent only recent legislative and court decisions prohibiting unions from collecting fees from objecting workers, while maintaining the obligation that unions represent such workers, further weaken unions’ economic and political position. See, e.g., Harris v. Quinn, 573 U.S. ___ (2014).} Meanwhile, new organizations representing poor and middle-income Americans have not filled the void. Such groups register barely a trace in studies of the organizational landscape of government.\footnote{SCHLOZMAN ET AL., supra note 54, at __.}
B. Organized Wealth in the Branches

The Framers of our Constitution, and Madison in particular, were concerned about the concentration of state power in few hands. As James Willard Hurst described the sentiment some years ago, “[w]e don’t want to trust any group of power holders to be judges upon the ends for which they use the power or the ways in which they use it.” “All forms of organized power over men’s wills should in some way be accountable to serve ends of broader concern that the purpose of the power holders.”

One mechanism to diffuse power was the separation of functions across three branches of government. The branches, at least according to the schematic version of American constitutionalism, would check one another in a way that respected the powers and prerogatives of each. Through the branches, “ambition [would] be made to counteract ambition.” Consistent with this account of separation of powers, courts have resolved relatively few separation-of-powers controversies. Instead, they have deferred to the branches themselves to reach political accommodations, except when one branch threatens to aggrandize itself at the expense of another. But, of course, as Madison himself recognized, the branches of government are not political actors with interests and wills of their own. Rather, the behavior of the branches is a product both of institutional structure and of the wills and interests that motivate the individual officials who populate them.

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88 See, e.g., THE FEDERALIST No. 48 (James Madison) (“[T]he 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.”); THE FEDERALIST No. 47 (the central challenge faced in designing governance institutions is to assure “practical security” against the excessive concentration of political power”).
89 HURST, JUSTICE HOLMES ON LEGAL HISTORY 29, 31 (1964).
90 In referring to this conception of separation of powers as “Madison’s conception,” I adopt the dominant description in the literature but take no position on whether The Federalist No. 51 accurately or fully reflected Madison’s thoughts on the matter. Accord Bradley & Morrison, Historical Gloss and the Separation of Powers, 126 HARV. L. REV. 411, 438 n.112 (citing Samuel Kernell, “The True Principles of Republican Government”: Reassessing James Madison’s Political Science, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 92, 93 (Samuel Kernell ed., 2003)).
91 THE FEDERALIST No. 51 (James Madison). Such competition would police institutional boundaries and prevent tyrannical collusion One of the virtues of this approach, Madison explained, is that it would not require that government officials act responsibly and police themselves. Rather, the model reflects a “policy of supplying, by opposite and rival interests, the defect of better motives.”
94 See Kenneth Shepsle, Congress Is a "They," Not an "It": Legislative Intent as Oxyoron, 12 INT’L REV. L. & ECON. 239 (1992) (arguing against the use of legislative intent on the ground that individuals, not Congress as a collective, have intentions and purpose); Levinson & Pildes, supra note 7, at 2317. As scholars have pointed out, the Madisonian model never made clear precisely how tension and competition between the branches were supposed to operate. The model assumes that differences in election and tenure among the branches would foster desired attachment, but it does not
There are many different constituencies, experiences, and interest groups that shape the wills and motivations of the leaders of government. But money is central to the story. Campaign spending is the most familiar mechanism by which wealth influences the political system. Wealthy individuals expend vast sums of money on campaigns through independent campaign spending and direct campaign contributions. Confirming long-held intuitions, recent empirical studies demonstrate that such spending results, at the very least, in greater access to Members of Congress and their staffs. Other scholars conclude that money does much more, ultimately resulting in the corruption of Congress.

But while campaign spending has occupied a great deal of attention from the public and legal scholars, it is only a small piece of the puzzle. Indeed, businesses focus far more energy and resources on strategies other than campaign spending. One recent study reports that almost 13 times more money is spent on lobbying and related forms of political persuasion than on campaigns.

The business of persuading Members of Congress to particular positions is multilayered and complex. Corporate and trade association lobbyists provide information in the legislative process by calling attention to issues, furnishing evidence about how problems are being experienced on the ground, and providing expertise about the anticipated consequences—both substantive and political—of proposed solutions. In this way, business lobbyists make it easier for members of Congress to support certain policies; they “subsidize” the work involved. Indeed, the legislative system relies on the provision of expertise by industry lobbyists: staffers often lack expertise and time to perform the detailed analysis lobbyists supply; staffers on the Hill are often young, stretched thin over a number of issue portfolios, and less experienced than most lobbyists with whom they engage.
Through sophisticated campaigns, organized business groups also supply pressure and mobilize congressional allies to take or block action on particular issues. And, increasingly, corporations are investing large sums in saturating the intellectual environment in order to influence policymakers and staffers. The goal, lobbyists report, is to legitimate certain arguments, ideas, and solutions. When countervailing organizations respond, they can be quite effective. But, as discussed above, they do so with a sliver of the resources and with declining numbers. On less salient and more complex issues, well-funded business groups are often the only real lobby.

That elected officials are themselves affluent, frequently having served as leaders of or counselors to large business organizations, also works to shape the wills and interests of the branches. Officials bring their own beliefs and ideologies to bear on decisions they make. More often than not, these ideological positions are relatively stable. Perhaps not surprisingly, empirical work demonstrates that legislators from “profit-oriented jobs in the private sector . . . tend to vote more conservatively on economic issues, especially compared to lawmakers who spent time in blue-collar jobs.”

While those who study campaign finance and lobbying have focused primarily on Congress, wealthy individuals and business organizations pervade the process of governing in the executive branch as well. Campaign spending obviously plays a role in presidential elections, and presidents, like Members of Congress, have almost all been drawn from the elite. But wealth saturates the non-elected executive branch bureaucracy too, undermining many of the assumptions of scholars who celebrate internal or administrative separation of powers.

103 Id.
104 Drutman, supra note __, at 36-37.
105 See SCHLOZMAN ET AL., supra note 54.
106 See de Figueiredo & Richter, supra note 71.
107 See McCarty et al, supra note 57, at 55, 76.
108 Carnes, Who Votes for Inequality?, draft, available at http://people.duke.edu/~nwc8/Carnes_Who_Votes_for_Inequality.pdf. Wealthier legislators are also less likely to vote to repeal the estate tax, while legislators who are heavily invested in the stock market are more likely to vote to protect the market from regulation. Notably, states with more of these lawmakers have higher rates of economic inequality. Id.
111 See infra notes __ and accompanying text.
Classic capture theory teaches that regulated industries enlist key Members of Congress and the President to pressure agencies to promulgate favorable regulations or to shelve less favorable proposals; they do so by lobbying elected officials while promising financial or other support for reelection efforts. Because of their scant presence and their comparative resource weaknesses, public interest organizations are unable to curb the influence of organized business interests.

Stated as such, capture theory is obviously flawed: Neither Congress nor the President is a puppet of a particular industry group nor are the agencies mere pawns of their political overseers. Meanwhile, agencies differ from one another, making some more susceptible to capture than others: some face a concentration of industry groups, the absence of countervailing organization, and a disputed mission, while others regulate diverse entities, enjoy (or endure) participation from organized countervailing groups, and have a clear statutory mission. The recent experience with net neutrality is but one example of how the wealthiest organized groups do not always win out.

Nonetheless, the empirical and theoretical research overwhelmingly supports a theory of “soft” capture in the executive branch. Wealthy interests engage the administrative state at every level, and with significant effect. Industry groups participate actively in the regulatory process,

113 George J. Stigler, The Theory of Economic Regulation, 2 BE LL J. ECON. & MGMT. SCI. 3, 3, 12 (1971); see also Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965). I use the term “classic” to refer to these works’ position in the legal canon, for although the Chicago School and Stigler are often cited as the originators of capture theory, they were preceded by accounts of public corruption from the fields of political science and history, and before that by recognition of the problem of private interest in public governance that dates back to the founding. See William Novak, A Revisionist History of Regulatory Capture in Preventing Regulatory Capture 25 (Daniel Carpenter & David A. Moss eds. 2014).


115 See supra at notes .


meeting with high-level agency officials and lower-level staffers and participating in reviews of proposed rules and regulatory-analysis documents before the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA). Throughout the process, industry officials provide not only opinions, but also information about how the regulated industry functions. Particularly where agency activity involves complex and non-salient issues, under-resourced public interest and worker groups are unlikely to provide contrary information. Well-financed groups are also able to monitor agencies and challenge administrative decisions that will negatively affect them. All else being equal, agencies would prefer not to become mired in legal challenges; they thus often seek to work with, rather than against, business groups, particularly when countervailing organizations are absent or weak and where the agency’s actions are unlikely to capture sustained public attention.

Agency officials also often anticipate entering or returning to employment with the regulated industry once their government service terminates. As a result, public choice theory posits that they either con-

in which regulated entities interact with regulators both to corrupt regulators and to secure cooperation from them).

119 THOMAS O. MCGARITY, SIDNEY SHAPIRO & DAVID BOLLIER, SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION (2004) (“When the agency publishes a notice of proposed rulemaking, the regulated companies typically dominate the public-comment process. They submit reams of material and lengthy briefs explaining why disfavored regulatory alternatives are unlawful, unduly burdensome, unsupported by the available technical studies, or unlikely to achieve the agency’s desired goal.”). See also Robert L. Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189, 1295-1315 (1986) (describing how the evolution of judicial review of agency rulemaking opened the door to industry challenges); Paul R. Verkuil, Judicial Review of Informal Rulemaking, 60 VA. L. REV. 185, 206 (1974) (“It has been widely assumed that [the arbitrary-and-capricious standard of judicial review] is applicable to informal rulemaking.”).

120 Seidenfeld, supra note __, at 464; Stewart, supra note __, at 1713-14.

121 See William T. Gormley, Jr., Regulatory Issue Networks in a Federal System, 18 Polity 595, 607 (1986); McGarity, supra note 119.


123 Barkow, supra note 122, at 22-23. See also Scott R. Furlong & Cornelius M. Kerwin, Interest Group Participation in Rule Making: A Decade of Change, 15 J. PUB. ADMIN. RES. & THEORY 353, 361 (2005) (finding that businesses are participating twice as much as public interest groups); Seidenfeld, supra note 82, at 464 (“A regulated entity frequently is a large corporation with resources to appeal agency decisions at every level.”).

124 See KAY LEHMANN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 342 (1986); Christopher N. Camponovo, Indecent Proposal: Abraham Sofaer, Libya, (continued next page)
ously or subconsciously avoid aggressively pressing an agenda in opposition to the interests of the regulated industry. Although this “revolving door” theory does not hold up in all contexts—for example, an aggressive track record as an enforcer can actually be a useful selling point when looking for post-government employment—the close affinity between regulators and industry at the very least shapes perspectives among policymakers.125

Finally, wealthy individuals and business organizations wield influence over government not only through traditional mechanisms of “capture” but also through actual responsibility for privatized government functions.126 In countless privatized areas of administration, outside firms are hired to administer the laws and programs whose substance they have already shaped.127 In addition, in a wide range of areas, industry is actually responsible for writing the federal regulatory standards that govern. Known as “incorporated-by-reference” rules or standards, these industry standards are incorporated into law only by reference and available to the public only at a charge.128 Through both of these mechanisms—private administration of government functions and private writing of government regulations—economic elites and their organizations thus exercise direct control, as well as indirect influence, over government’s operation.

In short, through donations, the provision of information and expertise, the shaping of the intellectual and policy debate, and various other forms of engagement, business groups and wealthy individuals may not capture Congress, the President, or the agencies. Government still often serves, or tries to serve, a public interest.129 Countervailing groups still mobilize or try to mobilize.130 But business organizations and wealthy individuals are ubiquitous at every step of the process. They continually check and balance—or prod and plea with—governmental actors, working to define the scope of public debate and the shape of governmental policy.


125 Compare David Zaring, Against Being Against the Revolving Door, 2013 U. ILL. L. REV. 507 (examining post-employment of SDNY prosecutors and concluding that prosecutors who go on to private sector careers do not tend to do the bidding of those they regulate while in public service) with Law & Long, id.


129 See Daniel Carpenter & David Moss, Introduction to PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST AND HOW TO LIMIT IT 1, 12 (Carpenter & Moss. Eds 2014) (distinguishing between “strong capture,” which is uncommon, and “weak capture,” which is ubiquitous).

130 Drutman, supra note __, at 43-44.
C. Organized Wealth in the Parties

Still, if political parties have replaced the political branches as the primary mechanism for political competition, perhaps none of the above matters for constitutional structure? On this view, the political parties provide a distinct mechanism for political competition, a mechanism uninfected by, or at least unrelated to, the problems discussed above. In reality, however, wealthy individuals and business organizations pervade not only the political branches, but also the political parties. An account of how the parties function as mechanisms of political competition must consider the role of money.

The two major parties in America draw support from different segments of the population, often dividing on class lines as well as on the basis of geography, race, and age. Yet both parties obtain most of their donations from the “richest communities”. And the leaders, nominees, and appointees from both parties are themselves overwhelmingly wealthy, with deep connections to corporations and the financial sector.

Meanwhile, contemporary political parties lack a grass-roots structure that facilitates participation by ordinary Americans. Today’s political parties are relatively skeletal organizations, particularly as compared to political parties in most other countries and to our own parties at other points in history. They do not, for example, require regular payment of party dues or other forms of participation. Instead, party membership usually means simply checking a box on a voter registration card. Progressive Era reforms such as the state-imposed requirement that political parties select nominees through primary elections, along with (salutary)

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135 Id.
prohibitions against political patronage, have weakened mechanisms that parties previously used to encourage rank-and-file participation.\textsuperscript{136} Indeed, today, at the national level, the formal parties function primarily as campaign service vendors and fundraising entities.\textsuperscript{137} And as the influence of Super PACs and other large-donor entities has increased within the ecosystems of the parties writ-large, the role of party activists and formal party leadership structures has declined.\textsuperscript{138}

Not only are the active participants and funders of the two political parties wealthy, but on economic redistribution issues, these voters tend to agree, at least more so than the standard narrative suggests. Recent empirical work demonstrates that elite Americans place a much lower value on equality than other Americans, even when they self-identify as progressive Democrats.\textsuperscript{139}

Relatedly, there is less space between the parties—or key segments therein—than the standard account in the separation-of-powers literature would suggest. In the legal literature, the account is of two highly ideological and cohesive political parties, representing two ideological poles. One party is liberal, the other conservative, with great difference between them.\textsuperscript{140} Recent political science scholarship shows that, in fact, party polarization has been asymmetric and uneven, particularly on economic issues. Behavioral changes have largely been driven by changes in the positioning of the Republican Party, with the Republicans, particularly House Republicans, having moved dramatically to the Right since the 1970s—during the same period economic inequality has increased.\textsuperscript{141}

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\textsuperscript{136} See Richard Pildes, Romanticizing Political Parties, 124 YALE L.J. 804, 813, n.21 (2014) (describing doctrinal changes that led to these reforms and arguing that the result was a rise in political fragmentation and a decline of control by party leaders).
\textsuperscript{139} Raymond Fisman et al., The Distributional Preferences of an Elite, 349 Science 6254 (Sept. 18 2015), available at http://www.sciencemag.org/content/349/6254/aab0096.full.
\textsuperscript{140} Legal scholars who focus on partisanship tend to describe the parties as fierce and equal contenders, representing two poles of public opinion. See, e.g., Levinson & Pildes, supra note 7, at 2338. See also id. at 2332-33, 2233-2338 (“Partisan competition in government now means a Democratic Party dominated by liberals, with few moderates and no conservatives, pitted against a Republican party dominated by conservatives, with few moderates and no liberals.”); see also sources cited supra notes .
\textsuperscript{141} Michael Barber & Noel McCarty, Causes and Consequences of Polarization, IN TASK FORCE ON NEGOTIATING AGREEMENTS IN POLITICS 21 (Jane Mansbridge & Cathie Jo Martin, eds. 2013); Christopher Hare, Nolan McCarty, Keith T. Poole, & Howard Rosenthal, Polarization is Real (and Asymmetric), VOTEVIEW BLOG (May 16 2012), http://voteview.com/blog/?p=494. On the move of the Republican Party to the right see also Hacker & Pierson, supra note 154; Mann & Orenstein,
During this same period, Congressional Democrats as a group have moved only slightly to the left, and the shift has occurred largely because of the disappearance of conservative Southern “Blue Dog” Democrats. Democrats remaining in office and their successors have not themselves shifted left.\textsuperscript{142} Meanwhile the Democratic platform has at least episodically moved away from general welfare issues to issues based on ascriptive characteristics of individuals (race, gender, and sexual preference).\textsuperscript{143}

More importantly for this paper’s focus, both parties have shifted toward more neoliberal economic policies or market conservatism.\textsuperscript{144} As political scientists Nolan McCarty, Keith Poole and various co-authors have shown in a series of studies, while the Democrats are still more closely allied with labor and lower-income voters, both parties have experienced an ideological shift toward acceptance of a “form of free market capitalism” which offers “less support for government provision of transfers, lower marginal tax rates, and deregulation.”\textsuperscript{145} Though to different extents, for the last several decades, key segments of both parties have shared the view that the primary job of government is to protect financial markets and financial interests.\textsuperscript{146} To be sure, there are substantial differences between the positions of the Democratic and Republican parties on economic and social welfare issues, and these positions continue to evolve, with Democratic leaders showing renewed interest in populist policies over the last couple of years. But the scope of that disagreement is narrower than the dominant story of hyper-polarization would suggest.

\textsuperscript{supra} note 1. On the relationship between inequality and polarization, see, e.g. McCARTY ET AL., supra note 57, at 3 (2006).

\textsuperscript{142} Id.

\textsuperscript{143} MCCARTY ET AL., supra note 57, at 11. Among other explanations for the shifting focus of the Democratic Party is the transformation of the labor movement, beginning in the 1940s, from a broad based social movement focused on the state to an interest group focused on private collective bargaining. See Nelson Lichtenstein, From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era, in RISE AND FALL OF NEW DEAL ERA (Steve Fraser & Gary Gerstle, eds. 1989).

\textsuperscript{144} See, e.g., Bonica et al., supra note 61, at 104, 106-107. The “slight liberal drift” of the Democrats has been “compositional in nature,” with moderate Democrats from the South being replaced by conservative Democrats. Meanwhile, both parties have experienced an ideological shift toward acceptance of a “form of free market capitalism” which offers “less support for government provision of transfers, lower marginal tax rates, and deregulation.” Id. See also McCarty et al. (2012, 2014); Hacker & Pierson (2010, 2011); Thomas Byrne Esdall, The Changing Shape of Power: A Realignment in Public Policy, in THE RISE AND FALL OF THE NEW DEAL ORDER 269 (1989) (“The [period from 1969-1969 has], in effect, produced a policy realignment in the absence of a political realignment. The major beneficiaries of this policy realignment are the affluent, while those in the bottom half of the income distribution, particularly those whose lives are the most economically marginal, have reaped the fewest rewards.”).

\textsuperscript{145} See, e.g., Bonica et al., supra note 107, at 104, 106-107.

Moreover, because of our constitutional structure, wealthy interests need only exercise a degree of bi-partisan influence to serve as an effective check on government: They need only exercise sufficient influence across the parties to be able to exploit critical veto points.147 Accordingly, business interests, in particular, tend to contribute strategically to members of both parties in order to obtain influence over key chokeholds.148 Studies on the campaign activity of the financial industry illustrate the dynamic: Financial industry members contribute in great numbers and great amounts to political campaigns of candidates from both parties. But they target money where it is likely to have the most influence. They give in particular to Members on the Financial Services Committee of both parties who are likely to set the legislative agenda, and they give to the more economically conservative wings of each party, who are most aligned with the policy positions of the industry.149

Historical and empirical work regarding the relative positions of Democrats and Republicans on measures designed to ameliorate inequality and regulate business confirms the success of the strategy: Through money and organization, wealth has been able to eliminate, from decisive sectors of both political parties, support for redistributive measures and greater regulation of the corporate sector.150 Key segments of the Democratic Party and Republican Party thus do not advance opposing positions on many economic issues, particularly with regard to low-salience issues of concern to organized business. The parties diverge substantially, but wealth influences enough Members of both parties to narrow the effective gap in practice.

147 For an account of parties as ecosystems, with different power centers, nodes of influence, and multiple points of entry, see Kang, supra note 131; Kathleen Bawn et al., A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics, 10 PERSPECTIVES ON POLITICS 571 (2012).
149 McCARTY ET AL., supra note 57, at 83-85.
D. A Coda: Outcomes for Governance

While it is clear that economic elites and large business organizations pervade the political parties and the political branches it is harder to measure how precisely their participation affects outputs. Political theorists have long worried that “those with greater property and wealth” would capture “the electoral process to their advantage.”  

Earlier empirical work provided only sporadic support for this notion, with some prominent scholars concluding that government outcomes favoring the wealthy cannot be explained by a failure of democratic responsiveness. Rather, poor Americans, like their wealthy counterparts, simply did not favor downward redistribution or restrictions on corporate power.  

More recent empirical research, however, provides substantial support for theorists’ concerns that government is ultimately more responsive to both wealthy individuals and organizations representing business interests. Most notably, in a recent study of two decades of congressional lawmaking, Martin Gilens found both that “[u]nder most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or does not adopt.”  

Other researchers’ work in the last few years confirms these conclusions.  

The extent to which the views of wealthy Americans diverge from those of lower-income Americans is disputed. On many issues there appears to be little divergence. But recent studies suggest that the general public is more amenable than the wealthy to a variety of policies designed to reduce inequality and strengthen economic opportunity, including raising the minimum wage, increasing the Earned Income Tax Credit, providing greater unemployment benefits, and directly creating jobs.  


152 See, e.g., JENNIFER HOSCHILD, WHAT’S FAIR?: AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE (finding, through qualitative interviews, significant ambivalence among working-class Americans about downward redistribution). For an overview of these debates, see PETER K. ENNS & CHRISTOPHER WLEZIEN, EDS. WHO GETS REPRESENTED? (New York: Russell Sage Foundation, 2011); Jennifer Hochschild, Winner-Take-All Politics: A Review Essay, 126 POL. SCI. Q. 315 (2011).


155 Benjamin I. Page, Larry M. Bartels, & Jason Seawright, Democracy and the Policy Preferences of Wealthy Americans, 11 PERSPECTIVES ON POL. 51-73 (2013) [hereinafter Page et al.]. Affluent voters are also less supportive of labor unions and less likely to support laws that make it easier for (continued next page)
For example, only 40 percent of the wealthy think the minimum wage should be high enough to prevent full-time workers from living in poverty, while 78 percent of the general public holds this view. A similar gap exists with regard to tax policy: A recent study found that 73 percent of Americans making under $20,000 believed that the gap between rich and poor should be reduced, even if achieving that goal requires higher taxes, compared to 54 percent of Americans making over $100,000.

Even where the wealthy and the middle class and poor agree on policy, they prioritize differently. Polls over the past several years have repeatedly found that addressing unemployment, creating jobs, and improving the economy are priorities for lower income Americans, while higher income Americans rank reducing the deficit as their top priority.

Irrespective of the degree of divergence in views, when divergence occurs, Members of Congress tend to respond to the views of wealthy individuals, from whom they regularly hear, as opposed to those of lower and middle income Americans, who participate much less and do so with less money and organization. For example, Gilens’s study found that federal legislators “consistently appear to pay no attention to the views of millions of their constituents in the bottom third of the income distribution.” When preferences between the rich and the poor diverge, “government policy bears absolutely no relationship to the degree of support or opposition among the poor.” Even when middle-class preferences align with those of the poor, Congress is responsive to the affluent and not at all to the poor and middle classes.

Business organizations similarly affect legislative outcomes. Gilens and Page found that organizations representing business in governance are relatively cohesive in their positions on economic policy questions in ways that correlate negatively with the preferences of average citizens. And, along with their wealthy owners and leaders, business groups substantially affect legislative outcomes, whereas the scant groups represent-


Callahan & Sha, supra note 118, at 5-6, notes 6-8 (collecting polls). Results of a pilot study of the Survey of Economically Successful Americans (SESA) showed that 87 percent of affluent households believed budget deficits were a “very important” problem, the highest percentage of all listed problems. Page et al., supra note 155, at 54.

Schlozman et al at 6, 142.

Bartels, supra note 154, at 282 (emphasis in original).

Gillens, supra note 153, at 81.

Id. at 84. Gillens concludes that representational inequality is genuinely rooted in economic inequality and cannot be reduced to partisan bias. Id. at 247-48.

Id. at 574.

Draft – please do not cite or circulate.
ing ordinary citizens have little aggregate effect.164 This should not be surprising given that, as previously discussed, the composition of the U.S. interest groups is heavily tilted toward corporations and business associations and business groups are by far more active and better funded.165 And the trends hold no matter which party is in power.166 The related data on economic distribution is consistent: Inequality has increased more quickly during Republican Administrations,167 but it has also increased during periods of Democratic control.168 And the gap has widened during both divided and unified government.169

Wealthy interests also shape regulatory outcomes, though here the role of business is far greater than that of wealthy individuals. Agency responsiveness to the desires of the industry or groups being regulated is well modeled as a theoretical matter and well documented as an empirical matter.170 As Richard Stewart has observed, “[i]t has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decisionmaking results in a persistent policy bias in favor of these interests.”171 That is not to say agencies fail to regulate in the public interest at all, but they often become closely identified with and de-

164 Gilens & Page, supra note 6, at 572.
165 Id. at 574. Gilens and Page’s research is consistent with prior studies showing a clear bias in legislative outcomes to the wealthy. E.g., Frank Baugarten et al., Lobbying and Policy Change (2009); Bartels, supra note 154.
166 Gilens, supra note 153; Gilens & Page, supra note 6.
167 Scholars attribute this to differences in macroeconomic and tax-and-transfer policies. See Bartels, supra note 154 (citing Tufte (1978), Hibbs (1987), Hibbs and Dennis, (1988)).
168 Lane Kenworthy, How Much Do Presidents Influence Income Inequality? 53 Challenge 90, 92-96, 103-108 (2010). Notably, the relationship between the president’s party and patterns of income growth weakened considerably after the 1970s when the organizational landscape of American politics shifted. Since the 1970s, income inequality has risen sharply and the correlation between the President’s party and movement in inequality has been much weaker than in earlier years. Id at 107.
169 Id. at 92.
171 See Barkow, supra note 122, 21-22 (2010); Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975). See also, e.g., Adkins v. VIM Recycling, Inc., 644 F.3d 483, 499 (7th Cir. 2011) (noting that “regulatory agencies are subject to the phenomenon known as ‘agency capture’”); Wood v. General Motors Corp., 865 F.2d 395, 418 (1st Cir.1988) (describing agency capture as the “undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public”).
pendent on the industries they are charged with regulating. Several different researchers find systematic biases that favor regulated parties in rules promulgated by several different agencies. The bias exists even in agencies like EPA that are generally viewed as resistant to traditional forms of agency capture. It is sometimes hard to identify when an agency decision is the product of undue interest group pressure as opposed to an exercise of the agency's independent judgment. But notwithstanding limitations of public choice theory, there is little dispute that, overall, organized business and wealthy interests participate at far greater rates than others, and with significant effect.

II. ASSESSING THE “FIFTH BRANCH”: THE EFFECTS OF ORGANIZED WEALTH ON EXECUTIVE POWER AND LEGISLATIVE CAPACITY

The focus thus far has been to show the extent to which wealth is able systematically to check and prod the political branches, the political parties, and the executive branch bureaucracy. This Part builds on that analysis, demonstrating that existing descriptive accounts of executive and legislative power need revision. It shows that because of the influence of wealth, on a host of important issues, unified government is more constrained in its output than dominant constitutional theories suggest; gridlock is more biased in its operation and results; and internal checks


are less effective at diffusing concentrated power and enabling innovation than proponents assert.

The partisanship story dominant in the law review errs not because it expressly asserts hyper-polarization on economic matters. Rather the literature typically speaks in generic terms about intense polarization, without considering the role of wealth. That is, those who write about government dysfunction frequently evoke partisanship in expansive terms without drilling down into where and when issues are polarized—and where and when they are not. In the words of one recent piece, “In our highly polarized system, it sometimes seems like we disagree on everything.”175 The number of recent articles invoking hyper-polarization or intense partisanship as the cause of government dysfunction, without qualification, is significant.176 And where the constitutional governance literature does recognize that wealthy interest groups and campaign money play a role in shaping partisanship, and in shaping governance, it tends to treat the dynamic as an exception to the basic rule, rather than as a systemic feature.177 As a result, the picture drawn is incomplete.

A. Unified Government

A central preoccupation of separation of powers and administrative law scholars is the growth of executive power over the last century. Supporters of a strong, unitary executive celebrate the trend. They contend that the Constitution creates a hierarchical executive branch, with the President empowered to direct administration of all federal laws.178 Others are less convinced that the Constitution’s text compels a strongly unitary executive, but assert that a powerful Executive is permissible, when authorized by Congress, and necessary to respond to exigencies of modern life. These theorists celebrate the distinct qualities of the executive:

176 For just a few recent examples, see Zachary S. Price, Politics of Nonenforcement, 65 CASE W. RES. L. REV. 1119, 1121 (2015) (describing “intense political polarization and partisan disagreement over policy” as leading to nonenforcement); Daphna Renan, Pooling Powers, 115 COLUM. L. REV. 211, 235 (2015) (describing ours as an “age of divided and polarized government” and identifying “pooling” of administrative resources as a response); .
177 Levinson and Pildes, for example, contend that “party is likely to be the single best predictor of political agreement and disagreement.” Levinson & Pildes, supra note 7, at 2324-25. And although they concede that “[i]n certain aspects of trade and environmental policy, for example, the relevant cleavages may correspond more closely to geography and interest-group support than to party,” 2324, they treat the role of organized business interests on those issues as an unusual exception from the rule. Gillian Metzger acknowledges that economic inequality has helped contribute to polarization, but she too emphasizes that it is “[t]he signal characteristic of national politics today is increasing political polarization.” Metzger, Appointments, Innovation, and the Judicial-Political Divide, 64 Duke L.J. 1607, 1634-35 (2015).
access to information, decisiveness of decisionmaking, and ability to respond to changing circumstances. Numerous scholars, along with many Presidents and executive branch lawyers, advance this view. A third group worries intensely about the rise of executive power, arguing that expanded presidential authority poses a grave threat to the future of the United States’ government.

As a positive matter, however, there is little dispute: Our executive has expanded greatly since the Founding, and particularly so in recent years. Scholars point to partisanship as one explanation for why executive power has so expanded: During times of unified party government, the executive, beholden to a highly polarized and ideologically coherent party, pushes an aggressive, politically extreme legislative agenda. Congress is not only willing to enact partisan policy, but is more likely to delegate power to a fellow partisan and is unlikely to check abuses of that power. As a result, across administrations, during periods of unified government, the administrative state expands and the executive operates with few checks.

The problem is that this account is essentially undifferentiated. It speaks about presidential power and hyper-polarization in general terms. As a result, it implies that partisanship explains government action across issue domains, and that executive power’s expansion is trans-substantive. As discussed in Part I, however, polarization has been asymmetrical between the parties and uneven across issues. Because of organized wealth’s systematic influence, executive power on a host of issues is more constrained, or differently constrained, than partisanship-focused law review literature on executive power would suggest.


180 See, e.g., Ackerman, supra note 3. See also PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009) (arguing that presidents’ increasingly assertive claims to unilateral authority have subverted constitutional checks and balances).

181 See, e.g., Richard Pildes, Law and the President, 125 HARV. L. REV. 1, 4 (“Thus, presidential power expanded through liberal hands for most of the century, and just as liberals began to have second thoughts, conservatives propelled the expanding presidency further.”); Ackerman, supra note 3, at 120 (“Today, both major parties are in love with the presidency.”). At the same time, Jerry Mashaw has demonstrated the degree to which the administrative state preceded the New Deal. JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 6 (2012) (arguing that “there has been no precipitous fall from a historical position of separation-of-powers grace to a position of compromise; there is not a new administrative constitution whose legitimacy should be understood as not only contestable but deeply problematic”).


183 See supra note __, and accompanying text.
Numerous theorists have recognized that unified government is checked by factors both internal and external to the government. External checks discussed by scholars include the media, watchdog groups, foreign governments, and general political sentiment.\(^\text{184}\) Yet even these theorists who recognize the importance of external political constraints, as distinct from partisanship, tend not to consider the systematic role played by wealthy interests.\(^\text{185}\) They therefore provide an incomplete, and sometimes misleading, picture.\(^\text{186}\)

The constraints imposed on unified government by wealth should be evident from Part I. Through campaign donations, lobbying, and participation throughout the bureaucracy and administrative process, wealthy individuals, businesses, and their organizations effectively check governmental efforts that oppose their interests, even during periods of unified government. And, indeed, empirical research suggests that proposals contrary to business interests, advanced during periods of unified government, have fared particularly poorly. Democratic Administrations, who have pushed such proposals more frequently, thus appear to fare worse in terms of legislative output during periods of unified government.\(^\text{187}\)

Recent experience illustrates the point: When, during the first years of the Obama Administration, both the Executive and Legislative branches were controlled by Democrats—with a filibuster proof majority in the Senate—the parties-not-powers theory would suggest that we should have seen a great deal of legislation, easily passed. According to the theory, such legislation should have expanded the power of the executive immensely and should have advanced a hyper-partisan liberal agenda.\(^\text{188}\) To some extent, that account holds up: The legislative


\(^{186}\) Eric Posner and Adrian Vermuele, for example, use financial reform as a key example of how the executive is unconstrained by inter- and intra-branch checks, but checked by political forces. But they fail to consider the distribution of political power with respect to financial regulation. They point to the importance of whistleblowers, and general political backlash, barely mentioning the outsized role money plays in government. Perhaps for this reason, they are much more sanguine about the effectiveness of existing checks. See Posner & Vermuele, The Executive Unbound (2010). Cf. Jack Goldsmith, Power and Constraint (describing various forms of watching and checking the presidency in the form of courts, members of Congress, human rights activists, journalists, lawyers, watchdog groups, whistleblowers and others in the context of the war on terror).

\(^{187}\) See Mayhew, Partisan Balance 66, 79 (2011). David Mayhew has found that during unified government Republican presidents have a 71.4 percent probability of success with high-priority proposals, compared with Democrats’ 42.1 percent, though he has advised against overinterpreting the data.

\(^{188}\) To be clear, my argument does not rest on the notion that the Democratic Party is inherently liberal and that it somehow abandoned its true mission. Rather, my claim is simply that narrative of hyper-polarization erroneously implies an ideological divide that in practice either does not always exist or does not always produce the division of powers asserted.
achievements that preceded the Democrats’ loss of Congress in 2010, primarily health care reform and financial regulatory reform, were significant progressive reforms. They also were politically polarizing and involved substantial new delegations to the executive branch.

But when one considers the entire process of enactment, as well as the legislation championed during the preceding political campaign but not passed, the picture is more complicated. Both the health care and financial reform laws were far harder to enact than the model offered by separation-of-parties scholars would have suggested. And the multiple veto gates that made enactment difficult systematically favored organized wealth, particularly regulated industry. Of course, wealthy interests were not the only groups involved in the governance process and wealthy individuals and groups were not monolithic in their views. But money served to constrain in ways that undermine, or at least amend, the narrative of an unchecked and hyper-partisan executive during times of unified government.

Consider the Dodd-Frank Wall Street Reform and Consumer Protection Act. Signed into law in July of 2010, Dodd-Frank included a package of financial regulatory reforms unparalleled in scope and depth since the New Deal. A reaction to regulatory failings brought to light by the most severe financial crisis since the Great Depression, the Act was politically possible not only because of popular anger at the banks, but also because of unified government. But this is only part of the story. Despite both unified Democratic government and strong popular support, passing the legislation was immensely challenging. Moreover, the content of the legislation was systematically influenced by economic elites and business interests and, particularly in areas of low-light, this influence was largely unchecked by countervailing forces.

Financiers exercised their influence through multiple channels, consistent with the mechanisms described in Part I. For example, leading up to the writing of the legislation, they were more active in politics than the average American. In particular, they were substantially more likely to contribute to ongoing campaigns, including, on occasion, through coordinated campaigns. Their contributions flowed to members of both political parties, as they targeted key Democrats while rewarding staunch Republican supporters. Following up on their campaign contributions,

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190 Id.

191 88 percent of those employed in finance and insurance reported voting in the presidential election compared to 76 percent of other respondents. They were also more likely to try to influence the votes of others, attend a campaign meeting, rally or speech, and work on a campaign. McCARTY ET AL., supra note 57, at 79-83.

192 MCCARTY ET AL., supra note 57, at 79-83.

193 Id. at 83-85.
the industry spent a great amount of time and money lobbying. Meanwhile, Congress heard much less from consumers and their representatives—not surprisingly, for the issues were technically complex and consumer groups were comparatively smaller and less resourced.\textsuperscript{194} Meanwhile, past leaders of finance filled the relevant leadership positions of both the outgoing Bush Administration and the new Obama Administration.

Ultimately, although the banks were not able to stop Dodd-Frank’s enactment, they were successful at limiting its reforms. This occurred despite an executive governing with a strong majority in Congress.\textsuperscript{195} In areas of low-light, the banks’ checks and prods were particularly strong. For example, Citigroup played a significant role in drafting a bill to exempt broad swathes of trades from new regulation. The bank’s recommendations were reflected in more than 70 lines of the House committee’s 85-line bill. Two crucial paragraphs, prepared by Citigroup in conjunction with other Wall Street banks, were copied nearly word for word.\textsuperscript{196}

Again, the point is not that the Dodd-Frank Act falls short of achieving its stated ambitions or that it fails to reform the industry in a way that will prevent future crises—though many experts take that position.\textsuperscript{197} Rather, whatever the final Act’s strengths or failings, what is important from a separation-of-powers perspective is that, throughout the lawmaking process, the financial industry provided substantial and systematic constraint on unified government, particularly on more technical issues of low-light, checking and prodding its actions. Meanwhile, countervailing voices of consumers were much fainter and more diffuse.

\textsuperscript{194} Id. at 79-80.

\textsuperscript{195} One example is the Volcker Rule, meant to limit proprietary trading by banks. In its original conception, the Volker Rule would have prohibited proprietary trading. Following substantial lobbying by the banking industry, the final bill instead limited the amount of money dedicated to this function to 3 percent of a bank’s Tier 1 capital. The result is that all but a few banks can continue to engage in proprietary trading in the same way they have in the past. See Daniel Indiviglio, 5 Ways Lobbyists Influenced the Dodd-Frank Bill, THE ATLANTIC (Jul. 5, 2010, 10:15 AM), http://www.theatlantic.com/business/archive/2010/07/5-ways-lobbyists-influenced-the-dodd-frank-bill/59137/. Whether or not the original Volcker Rule would have been better policy, the bill simply does not reflect unchecked power of unified government. Rather, bank lobbyists played a major role in the shaping of the legislation, with little counter-balance from consumers. McCarty et al., supra note 57; see also Kimberly D. Krawiec & Guangya Liu, Pointless Pluralism: An Empirical Study of Volcker Rulemaking (draft, on file with author) (undertaking a case study of the Volcker Rule and concluding that industry representation in formulation of rule dominated).


The story of health care reform similarly reflects the imposition of checks by regulated industry on the actions of unified government. According to nearly all observers, industry priorities fundamentally structured the health care reform bill. At every step in the legislative process, participation by business interests outweighed that of consumers. And Administration officials were frank that, in their view, the bill’s ultimate success would depend largely on support from the relevant business interests, including the insurance and pharmaceutical industries.\textsuperscript{198} To be clear, the health care bill was a significant, even historic, progressive achievement. But the persistent influence of wealth, particularly business groups, demonstrates the degree to which unified government is checked—from a particular direction.

Moreover, to the extent these two high-profile pieces of legislation support the partisanship theory of the separation of powers—and they do to a point—they are atypical. Despite the presence of a super-majority during Obama’s first year, there were few legislative accomplishments on policies aimed at reducing inequality or otherwise opposed by wealthy interests. This includes policies championed by the formal platform of the Democratic Party, the Obama campaign, and the Obama administration. For example, President Obama campaigned on proposals to cap executive compensation, raise and index the minimum wage, and make the tax code more progressive. Yet proposals to rein in executive pay were “largely symbolic and fleeting, focused on companies that had taken bailout money and not yet repaid it”;\textsuperscript{199} and the minimum wage and tax reform went nowhere during the period of unified government. This was true even though these issues captured majority support in opinion polls, particularly from low- and middle-income voters.\textsuperscript{200} Of course, the absence of such legislation can be explained in part by a lack of time and resources; the government prioritized health care and finan-


\textsuperscript{199} Hacker & Pierson, supra note 154, at 279. On the Obama legislative agenda and the role of lobbyists, see generally \textit{Id.} at 278-85.

cial reform and had little bandwidth for more. But that explanation circles back to the role of organized wealth: Part of why health care and financial reform occupied so much time was because of the political economy sketched above.

Systematic constraints by organized business interests on unified government are not a new phenomenon. Like the Obama Administration, recent prior Democratic administrations have rarely enacted legislation opposed staunchly by wealth, even during periods of unified government—and even after making campaign promises to prioritize such reforms. A look at the history of labor law reform illustrates the point. The statute governing collective organization of workers—the National Labor Relations Act (“NLRA”)—was enacted in 1935, and substantially amended in 1947 with the passage of the Taft-Hartley Act. Altered in minor ways with the Landrum-Griffin Act of 1959, the text of the statute has otherwise remained unchanged. On several occasions over the last thirty years, Democratic Administrations, governing with Democratic Congresses, have offered major legislation to amend the NLRA.

The motivation for the continued attempts at law reform by Democrats is clear: While globalization and other exogenous factors help explain the decline of unions in this country, the governing legal regime is also an important cause of their weakness. Put bluntly, the National Labor Relations Act, in its current form, fails to protect workers’ ability to organize and bargain collectively with their employers. The law not only permits employers to express their opposition to unionization, it also recognizes their right to compel employees to listen to them in “captive audience” meetings and at the same time to exclude union representatives from the workplace, and it enables employers to use delay tactics aimed at suppressing organization. So, too, existing law fails to effectively prevent or punish coercive and illegal forms of employer opposition. The incidence of employer law-breaking has risen significantly since the 1970s.

More fundamentally, the Act is mismatched with the structure of the contemporary economy. The statutory regime excludes from its cover-

201 See Hacker & Pierson, supra note 154; Gilens, supra note 153.

203 To some extent, the failure of the governing statute to protect workers can be traced to early Supreme Court decisions that “deradicalized” the original Wagner Act and that reintroduced into the labor law many of the common law doctrines that the Act was meant to repudiate. See Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 MINN. L. REV. 265, 265-70 (1978). See generally JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 9-10 (1983) (discussing early Supreme Court cases). Congress ultimately entrenched many of these decisions with the Taft-Hartley Act.

204 Estlund, supra note 202, at 1536-37.
age independent contractors, temporary workers, “knowledge” workers, and, to some extent, undocumented immigrant workers—precisely those workers that increasingly comprise the labor market. It effectively permits employers to exclude themselves from the definition of employer and the responsibility of bargaining by contracting out their supply chains. And because American labor law has been centered in a single preemptive federal statute, with exclusive enforcement powers vested in a single federal agency, labor law has been insulated from other avenues of rejuvenation and reform, making federal statutory reform all the more necessary.

Yet, despite the close alliance between the Democratic Party and the labor movement, Democratic controlled Congresses, under Democratic Presidents, have been responsible for three major legislative defeats for the labor movement since the 1970s—the period during which labor’s organizational strength began to decline. In 1978, unions made a major labor law reform bill their top political priority. Large Democratic majorities in the House and Senate and a Democratic president initially committed support. But business interests energetically countermobilized and, although reform passed the House and commanded majority support in the Senate, the bill’s opponents were able to sustain a filibuster by picking off a substantial number of Democrats. Labor law reform during the Clinton Administration met a similar fate, as business again mobilized against a further weakened labor movement. Pushing for a new social bargain, the Clinton Administration, through the vehicle of a high-profile commission, sought a reform package that would have eased restrictions on so-called company unions, while making it easier for workers to organize. But the deal collapsed even before the Republicans captured control of Congress in 1994, with the business community unwilling to countenance the renewed growth of trade unionism even in exchange for concessions that would have produced more flexibility for businesses. Again, in 2008, President Obama promised to reform labor law with the Employee Free Choice Act, which would have made it significantly easier for workers to unionize and would have required arbitration for first contracts. But after the Chamber and other wealthy and

206 See 29 U.S.C. § 152 (defining “employer” and “employee”).
business interests targeted red state democrats, the bill died in a heavily Democratic Congress.212

In short, Congress has not enacted broad, redistributive labor law reforms even under unified governments that purport to support such reform. A similar story could be told about tax law213 and banking law,214 and little progress has been made on environmental law, given business opposition, even during unified Democratic government.215 This pattern does not show that the parties are equivalent—but it does demonstrate the need to revise constitutional theory’s depiction of unified government. Wealth seriously constrains the actions that even a unified government can take.

B. Divided Government and Gridlock

Along with the growth in executive power, constitutional theorists worry about the decline of legislative power and the rise of gridlock. Congress today, many contend, is far more paralyzed than the Framers intended. The reason, theorists explain, is that “when combined with today’s highly polarized political parties, veto points that once promoted bargaining and compromise now produce intransigence and gridlock.”216 Again, a bi-partisan and trans-substantive account undergirds the story: Gridlock is near universal and the parties are to blame.217 In practice, however, gridlock is not a substantively neutral or consistently occurring phenomenon—and, although partisanship is clearly part of the problem, it is an insufficient explanation for the most worrisome forms of gridlock.

That is, not all gridlock is equivalent from a constitutional governance perspective. Political inaction due to true and insurmountable policy disagreements between large pluralities may actually reflect popular will; political action due to equally powerful opposing forces that represent different sectors of the citizenry may follow the Madisonian schema of

212 See Hacker & Pierson, supra note 154, at 278-79.
213 See, e.g., Edward McCaffery, Buy, Borrow, Die (unpublished manuscript) (on file with the author).
215 See Hacker & Pierson, supra note 154, at 280.
217 E.g., Levinson & Pildes, supra note 7, at 2341; Pozen, supra note 1, at 9; Freeman & Spence, supra note 36, at 1-17.
ambition counteracting ambition. Many examples of partisan gridlock are just that.218

But political inaction can also result when power is concentrated in few hands, without countervailing inputs. Wealth is an important source of this latter sort of gridlock. There are several reasons why. First, given our contemporary political economy, wealthy individuals and business organizations have the greatest capacity to create gridlock even when majorities support reform.219 Using the range of mechanisms detailed in Part I—from campaign donations to lobbying to aggressive engagement in the regulatory process—wealth has the resources to find and exploit veto points. And, as previously demonstrated, given contemporary American organizational life, countervailing forces are often lacking.220

Second, wealth also frequently has the greatest incentive to create gridlock because it has won at an earlier iteration of the process. That is, the status quo reflects the distribution of power in previous rounds of the policy process.221 Because the status quo reflects the outcome of prior power dynamics, often with “much greater benefits going to the privileged and the wealthy than to the needy and the poor”, changes to the equilibrium tend to reflect changes to the mobilization of wealth.222 And research suggests that the greatest success of paid lobbyists occurs when they seek protect the status quo from a proposed change.223

Finally, the wealthy also have the most power over the changing market conditions in which law intervenes. That is, legal stasis does not preclude wealthy interests, particularly large business organizations, from obtaining actual change through private ordering. When government fails to amend formal rules in the face of changed social and economic conditions, the result is distinct from preservation of the status quo. Political scientists Jacob Hacker, Paul Pierson, and Kathleen Thelen term this kind of gridlock “drift”. It occurs when the circumstances around policies or institutions change in ways that alter the effects of those policies or institutions on the ground such that they no longer serve their intended purposes. Yet, alternative rules would reduce the degree to which these shifts in outcomes occur. In other words, the shifts are po-

218 Josh Chafetz, for example, takes issue with the normative aspects of the separation-of-parties theory—the sometimes explicit, sometimes implicit, assertion that partisanship’s effect on governance is something to be concerned about. As he points out, “[i]t is a democratic feature of the system, not a bug, that parties are more or less able to enact their agenda depending on their degree of dominance.” Chafetz, The Phenomenology of Gridlock, 88 NOTRE DAME L. REV. 2065, 2087 (2013) (arguing that unified versus divided government should be understood as “dependent . . . on the will of the people, as expressed through electoral mechanisms”). Accord Josh Chafetz, Multiplicity in Federalism and the Separation of Powers, 120 YALE L.J. 1084, 1124 n.242 (2011).
219 See supra notes ___ and accompanying text.
220 See supra notes ___ and accompanying text.
222 Id. at 23.
223 Id. at 147, 236.
tentially remediable, but efforts to update the rules fail. Business interests typically cause and benefit most from this form of gridlock.

Federal wage law illustrates the point. Congress has failed to increase the minimum wage since 2007. At first glance, this looks like policy stasis. But because the cost of living has increased steadily, in real terms, minimum wages have declined. Policy has changed through drift. Moreover, the failure to amend federal minimum wage law has occurred not because of a deeply divided population represented adequately by warring political parties or branches. Opinion polls regularly reflect widespread support for minimum wage increases. Rather, gridlock in this context has occurred because certain segments of organized business and other wealthy stakeholders have been able to influence key veto points in Congress and in the political parties. Through the mechanisms discussed in Part I, wealth has influenced enough members of both parties and both political branches to stop policy change. Moreover, wealthy interests have not only helped bring about federal paralysis on the minimum wage, business interests have most benefited from policy stasis.

There are structural reasons why this is so: Because employers wield greater market power over employment conditions than do low-wage workers, they need not obtain legislative reforms to achieve policy goals; they can impose them through private ordering.

The National Labor Relations Act provides another example: As described above, more than 50 years have passed without any significant statutory change in the NLRA. At first glance, this looks like a story of balanced partisan gridlock, i.e., of warring interest groups aligned with warring political parties, neither with sufficient power to enact change. On that view, this is a separation of powers success: Ambition has been made to counteract ambition. In fact, however, the story is more complicated. Business interests have been able to achieve change without statutory reform. Through tactics such as outsourcing, subcontracting, and globalizing, they have altered on-the-ground conditions of employment structures. Of course, businesses may have multiple motivations for such

224 Jacob S. Hacker, Paul Pierson, Kathleen Thelan, Drift and Conversion: Hidden Faces of Institutional Change, draft (on file with author) (terming this form of gridlock “drift”).
225 Hacker & Pierson, supra note 54, at 191 (describing “a clear and important example of drift—where organized political action effectively prevents the updating of policy in response to changing market outcomes that were advantageous to the wealthy and powerful”).
227 See supra notes 182 and accompanying text; see also Estlund, supra note 202, at 1535 (“The text of the NLRA has remained virtually untouched since 1959.”)

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restructuring; nonetheless, one effect is to render the labor law largely impotent.228 Cynthia Estlund recounts, “The proof is in the political process: While organized labor has mounted several major efforts at labor law reform in the past thirty years, employers—equipped though they are with all of the political advantages of organization, internal unity, access, and wealth—have made almost no such efforts since 1959. For the most part, employers who oppose unions and collective bargaining are willing to bide their time in the political process, batting down periodic reform proposals that might tip the scales in unions' favor, and watching union strength ebb away.”229

Similar stories could be told about a host of other policy areas. Consider environmental law. The Toxic Substances Control Act (“TSCA”) was passed in 1976 in order “to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment.”230 Yet after years of rapid technological advancement, the Act, according to the Environmental Protection Agency, is now outdated and fails to regulate many potentially dangerous substances.231 When efforts at modernization stalled in 2012, business groups rejoiced; one industry-oriented blogger wrote, “gridlock promises to be the best solution to a heated debate concerning legislation to reform the federal law dealing with chemicals.”232

In short, legal theorists and popular commentators are clearly correct in identifying partisanship as an important cause of gridlock. But in focusing on partisanship alone they miss key ways in which gridlock varies by issue and in effect. Given the contemporary political economy, gridlock is not merely a problem of the parties. Rather, wealth has both unmatched capacity and incentive to bring about gridlock.


229 Estlund, supra note 202, at 1544.


C. Administrative Checks

Of course, divided government brings not only gridlock but also presidents and agencies with incentives to push the bounds of formal power. Faced with intransigent legislatures from the opposing party, hyper-partisan presidents have found new tools to set policy unilaterally, without congressional approval. Presidents direct methods, such as executive orders, presidential memoranda, and signing statements. They also act indirectly, pressing executive branch agencies to advance the Administration’s policy agendas through rulemaking, waivers, guidance policy, enforcement efforts and so on. At the same time, internal separation-of-powers scholars emphasize, a host of non-partisan bureaucratic checks constrain such executive action. Thus, according to the dominant narrative, across domains, the President’s use of unilateral power is at once extensive and checked from within.

While the above story is, in broad strokes, unassailable, it is also incomplete. Again, the problem is that the account is undifferentiated: it implies that the use of unilateral power is robust and hyper-partisan, no matter what the issue, and that the internal bureaucracy serves as a neutral, effective check irrespective of substantive content. It largely fails to consider circumstances where this is not the case. Yet, as with gridlock, unilateral executive power and internal bureaucratic checks are shaped fundamentally by wealth. Because of their systematic influence, economic elites, large businesses, and their organizations define both unilateral presidential action and internal checks on many issues.

Consider executive orders. The partisanship model teaches that, in this highly ideologically polarized environment, presidents use executive orders to pursue hyper-partisan agendas. The implication of this theory is that, when government divided in 2010, the Democratic President should have issued executive orders to advance liberal policies not achievable in Congress. Indeed, on a host of salient issues President Obama moved forward quickly with aggressive executive actions. The most striking examples were the decision not to defend the Defense of Marriage Act and to use enforcement discretion to benefit immigrant children through Deferred Action for Childhood Arrivals. These were aggressive and partisan uses of executive power that polarized the electorate. But both poli-

233 See William G. Howell, Power Without Persuasion (2003) (studying the rise of various means of direct presidential action and explaining that, “[w]hile it was relatively rare, and for the most part inconsequential, during the eighteenth and nineteenth centuries, unilateral policy making has become an integral feature of the modern presidency.” Id. at 179.). See also Kagan, supra note 179 (chroncling use of unilateral power during Clinton presidency); Kate Andrias, The President’s Enforcement Power, 88 N.Y.U. L. Rev. 1031 (exploring rising use of enforcement as unilateral policy tool).

234 Id.

235 See sources cited infra note __ [Metzger, Katyal, Johnson].

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cies were also highly salient and had little opposition from business interests or economic elites more generally.236

In contrast, the President’s labor-related Executive Orders—including those that aim to raise the minimum wage for executive branch contracts and impose penalties on contracting employers with labor and employment violations—were issued a full six years after partisan supporters called for such action. These orders, like the others, had strong support from the party’s base. And as a formal legal matter they were no more aggressive than the gay rights and immigration orders: Rather, the D.C. Circuit has interpreted liberally the president’s authority to implement the contracting law including through imposition of employment-related requirements.237

Given the strong support for a minimum wage hike and basic employment rights among the Democratic base, the separation-of-parties theory would suggest that there should have been a quick issuance of pro-worker executive orders. Yet the orders were strenuously opposed by the business community—and they faced bi-partisan inter- and intra-branch opposition. That is, Members of Congress and bureaucratic officials with long-term relationships with the contracting community repeatedly sought to squelch the orders.238 Ultimately, the labor executive orders were issued only after significant countervailing forces mobilized: federally-contracted workers repeatedly went on strike calling attention to their poverty wages, as did workers in other low-wage industries, most notably fast food.239 Meanwhile, popular concern and commentary about economic inequality mounted.

It should not be surprising that presidential unilateralism has been cautious on issues opposed by business interests. Recall the many ways Presidents and their White Houses confront wealth. But there is considerable tension between this account and the picture of an unbound and


238 Steven Greenhouse, Plan to Seek Use of U.S. Contracts as Wage Lever, N.Y. TIMES, Feb. 25 2010. Cf. Josh Eidelson, Federal Workers to Strike March on White House Wednesday, Salon, Sep. 24, 2013 (noting, in 2013, that a “high road” contracting policy that would have offered companies with higher standards a leg up in securing contracts, was under consideration by the Administration in 2010, but “never came to pass”).

hyper-polarized president. In short, an examination of presidential actions in light of political economy leads to a more complicated picture of unilateralism than that depicted in the literature.

When one considers agency action—and the mechanisms of internal separations of power—the impact of money becomes even more evident: When government does act contrary to organized wealth, attention shifts to the less visible administrative process.

Return to financial regulatory reform. Despite its broad reach and several thousand pages of text, few provisions of the Dodd-Frank Act took effect in the summer of 2010. Instead, the details of the Act were left for the federal rulemaking process. That process has been overwhelmingly dominated by the financial services industry, with regulators meeting regularly with representatives from big banks and banking associations, and much less often with consumer and pro-reform groups. The amount of money spent by Wall Street on persuading regulators and Members of Congress during this period also far dwarfed countervailing resources. Meanwhile, the banking industry provided campaign donations to both Republican and Democratic members who had capacity to influence rulemakers.

Meetings and money, of course, do not prove influence. But as the broader studies discussed in Part II.A indicate, organized wealth has long been successful at moderating the implementation of statutes through a host of interrelated tactics. And, indeed, the progress of financial regulatory reform to date suggests that the lobbying by, and contributions from, the financial industry have been effective: at the two-year anniversary date, the deadlines for more than half of the required rulemakings had expired but regulators had finalized rules for only one-third of those

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240 Tarbert, supra note 189.
241 During the year following the passage of the Dodd-Frank Act, regulators at the three major banking regulatory agencies—Treasury, the Fed and the Commodities Futures Trading Commission (CFTC)—reported meeting with 20 big banks and banking associations on average a combined 12.5 times per week. That compares to just 2.3 meetings with reform-oriented groups on average per week. The top 20 banks appear 1,298 times in meeting logs at the three agencies, while groups favoring tighter regulations of the financial markets show up just 242 times. Nancy Watzman, Ex post facto lobbying: Banks blitz regulators to soften Dodd-Frank's impact, SUNLIGHT FOUNDATION BLOG (Jul. 22, 2013, 10:24 AM), http://sunlightfoundation.com/blog/2013/07/22/cross-border-lobbying/. The gap widened following the first year. With regulators increasingly focused on more technical rules (e.g., swap exchange facilities, position limits, proprietary trading), regulators met 560 times with the big banks in 2012, but just 81 times with reform groups. And during the first year of rulemaking, regulators met 738 times with the big banks as compared to 161 meetings with the reform groups. Id. See also Lee Drutman, Big Banks Dominate Dodd-Frank meetings with regulators, SUNLIGHT FOUNDATION BLOG (Jul. 19, 2012, 4 AM) http://sunlightfoundation.com/blog/2012/07/19/dodd-frank-two-years-later/.
243 Lipton & Protess, supra note 196.
rulemakings with statutory dates, missing the deadlines for the rest.\footnote{244} Sheila Bair, who was appointed to head the Federal Deposit Insurance Corporation by George W. Bush in 2006 and served in that role until 2011, placed the blame for regulatory inaction on the resistance to reform posed by an industry with hundreds of lobbyists and hundreds of millions of dollars to spend: “At the end of the day, the regulators are outgunned.”\footnote{245} One striking example of the strength of industry lobbyists is the evolution of the “de minimis exemption” to the requirement that dealers selling derivatives register with the CFTC. The original proposal was that when a dealer’s annual revenue from credit default swaps topped $100 million it would have to register and comply with a regulatory regime. After the industry weighed in, the exemption was inflated dramatically: the 2013 final rule set a threshold of $8 billion, which would shrink to $3 billion after three years.\footnote{246}

There is little reason to think that Congress counteracts business’ influence over internal mechanisms of checks and balances. Indeed, the existing data suggests Congress fails to intervene on behalf of any diffuse public interest against industry interests.\footnote{247} For example, during recent financial regulatory hearings, “most of the Democrats on the committee, along with 31 Republicans, came to the industry’s defense, including the seven freshmen Democrats—most of whom have started to receive donations this year from political action committees of Goldman Sachs, Wells Fargo and other financial institutions, records show.”\footnote{248}

The literature also provides little to no support for the possibility that the President or OMB regularly intervenes to make agency rules more protective of the public interest and less protective of business, particularly once the issue is no longer salient. To the contrary: the available evidence suggests that White House and OMB review, in the aggregate, further favors industry.\footnote{249}

And there are countless other areas of administration where the influence of concentrated wealth has systematically checked and prodded the internal bureaucracy, without faint checks or inputs from the coun-

\footnote{244} Heath P. Tarbert, \textit{The Dodd-Frank Act-Two Years Later}, 66 CONSUMER FIN. L.Q. REP. 373 (2012).
\footnote{245} Gary Rivlin, \textit{Wall Street Fires Back}, THE NATION, May 20, 2013, at 11, 14 (noting commercial banks such as Wells Fargo, Citigroup and JPMorgan Chase, along with their trade groups, spent $55 million lobbying in 2010, the year Dodd-Frank became law, $61 million in 2011 and another $61 million in 2012).
\footnote{246} \textit{Id.} at 22; 17 C.F.R. § 204.3a71-2.
\footnote{247} See Wagner et. al., \textit{supra} note 173 (examining Congressional intervention in context of EPA rulemakings).
\footnote{248} See Lipton & Protess, \textit{supra} note 196.
\footnote{249} For example, recent studies of OMB identify a distinct anti-environmental bent that is consistent across administrations. See Wagner, \textit{supra} note 173 (collecting literature).
tervailing organization or the vast majority of Americans. Environmental and trade policy are two other striking examples.

Certainly, unilateral executive action does not always favor business interests. As the above discussion demonstrates, the checks and prods imposed by wealthy individuals and organizations are weaker when issues are highly salient and countervailing organizations act in opposition. Furthermore, agencies do not typically neglect their missions altogether even when they are pushed by business interests or adjust course in response to those interests. But while the effect of wealth on internal administrative checks is neither simple nor linear, it is systematic.

III. ORGANIZED WEALTH AND THE FUNCTIONS OF CONSTITUTIONAL STRUCTURE

Thus far, the project of this Article has been largely descriptive and critical: wealth systematically checks the branches and the parties in ways that complicate a partisanship focused account. This Part shifts to a normative analysis. It asks how the dominance of wealth advances or impedes attainment of the functional goals of the separation of powers—as understood by contemporary scholars—and concludes that democratic accountability is severely injured. It then considers what should be done in response.

One caveat before proceeding: Though this Part engages debates about constitutional aims, it takes no position on the question of the Founders’ original intent. Some scholars have argued that our system of separated powers and checks and balances, with its multiple veto points and lack of a truly popular lower house, was hard-wired to produce government by the wealthy and propertied classes. Others counter that although the Founders were concerned about popular tyranny, and advocated checks and balances as one way to limit the masses’ power, they were also fundamentally committed to a Republican government de-

250 For another example involving the financial sector, see, e.g., Tara Siegel Bernard, Brokers Fight Rule to Favor Best Interests of Customers, N.Y. TIMES, June 13, 2014, at B1.
252 See supra notes __ and accompanying text.
253 See Carpenter & Moss, supra note 129.
dependent on the will of the people. Indeed, theorists have argued that relative equality among the citizenry (albeit an overly narrow citizenry of white men) was a precondition for the constitutional vision.

While these debates form an important backdrop, I do not attempt to elucidate them. Instead, I adopt the dominant perspective of contemporary constitutional law and theory: that the purposes of the separation of powers include to preserve liberty, promote governmental efficacy, and enhance democratic accountability. For these purposes, I also adopt the dominant perspective that some substantial measure of intergovernmental competition and checks and balances is desirable, or, at the very least, that the basic system is unlikely to be amended.

A. Functions of Constitutional Structure

Legal scholars and judges—at least those who embrace a functional, rather than formal, approach to the separation of powers—focus on several overarching goals of our separation of powers. These include preserving liberty, promoting governmental efficacy, and enhancing democratic accountability, all through diffusing political power. Scholars focusing on partisanship and internal checks embrace these goals as well. Given the limitations of inter-branch political competition in practice, they argue, political parties and internal executive branch checks provide an alternate way to achieve or undermine these functional goals. But how does wealth shape the ability of the branches, parties, and internal checks to achieve these goals?

1. Liberty

In the conventional telling, liberty is a central aim of the separation of powers. By dividing functions among the three branches and enabling

256 HANNAH ARENDT, ON REVOLUTION 31-32, 157 (arguing that “revolution in the modern age has always been concerned with both liberation and freedom,” and emphasizing equality, among existing citizenry, as a precondition for American constitutionalism).
257 See Levinson & Pildes, supra note 7.
259 See, e.g., Metzger, supra note ___.
260 See supra notes __.
the various branches to check one another, the theory runs, the Framers sought to reduce “the amount of damage to liberty or other interests that any fallible or corrupt official might be able to inflict.”261 According to some commentators, hyper-polarization and the related growth of the executive branch at the expense of Congress threatens this promise.262 On this account, the over-empowered Executive directs vast domestic and national security programs, and is virtually unchecked even when government actions threaten individual liberty interests.

For such critics of executive power, the political economy sketched above could assuage concerns, at least in so far as the particular executive actions in question implicate market and business interests. As discussed in Part II.A, even during periods of unified government when the partisanship theory predicts legislative and executive collusion, wealth, particularly business organizations, functions to moderate and limit government action. Indeed, when there are opposing interests within the business community, as is often the case, potential government intrusions on liberty interests decrease further; it becomes difficult for any one particular interest group within the category of wealthy interests to propel government action past multiple veto gates. And in times of divided government, when the executive may attempt to push the boundaries of formal power, wealth often has sufficient influence throughout the bureaucracy and the White House to provide a check where one otherwise may be lacking.263

Yet in other important ways, money in governance operates at cross-purposes with liberty goals: Wealth can overwhelm internal executive branch mechanisms designed to protect individual fairness and due process. For example, within agencies, the separation of adjudication from legislative, investigatory, and enforcement activities aims to promote due process, while the civil service is designed to depoliticize governmental administration in order to ensure regularity and the rule of law.264 Wealth’s systematic influence over these internal mechanisms weakens their ability to deliver on their promise.265 More importantly, perhaps, the notion that minimizing government action necessarily promotes liberty, particularly in the economic sphere, rests on a Lochnerian vision of indi-

261 The notion is that, because branches independent of Congress would ultimately apply the law, legislators would have strong incentives to define punishable misconduct with precision and moderation, thereby benefiting all citizens, whether friends of Congress or not. AMAR, AMERICA’S CONSTITUTION 63 (2005). See also Rebecca Brown, Separated Powers and Ordered Liberty, 139 U. PA. L. REV. 1513, 1516, 1531 (1991) (arguing that the primary separation of powers goal is to protect individual rights against encroachment by a tyrannical majority).
262 E.g., Shane, supra note 180; Ackerman, supra note 180; cf. Levinson & Pildes, supra note 7, at 2350, 2355.
263 See supra Part II.C.
264 Metzger, supra note 8, at 429-30.
265 See supra Part ____.
vidual freedom. Should one reject that view, recognizing that government inaction often allows for private invasions of liberty interests or, more fundamentally, that market ordering is itself a legal construct, the argument for organized wealth’s political checks would further weakened.

2. Efficacy

While the separation of powers is often thought of as a way to check government action, the division of governmental functions can also serve to promote effective government. Indeed, scholars have argued that our constitutional structure is aimed not only at checking government action, but also at establishing productive and energetic government, a break from the national experience under the Articles of Confederation. The idea is that by engendering competition among and between the branches, government actors can be stirred to act. And by enabling each branch to concentrate on a different function, expertise can flourish. Our constitutional structure thus seeks to facilitate necessary action and to increase the efficacy of government.

A common refrain in the literature and commentary on constitutional dysfunction is that hyper-polarization has impeded governmental energy and efficacy. Because of partisan divides, the branches do not stir one another to act, but rather remain locked in opposition. According to more recent work, the problem is not just polarization but fragmentation. Because contemporary parties are fragmented and decentralized, the parties’ formal leaders, who should have the most incentive or greatest inclination to compromise, are insufficiently able to control other members.

To these critics of contemporary political partisanship, there is a positive story to tell about the effects of wealth on Congress. Through the mechanisms discussed in Parts I and II, wealth mitigates polarization on important issues. Wealth exerts substantial influence over both parties,

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267 See Loving v. United States, 517 U.S. 748, 757 (1996) (by “allocating specific powers and responsibilities to a branch fitted to the task,” the Framers created a National Government that is “effective”). Amar, supra note 261, at 64; ARENDT, ON REVOLUTION 152-155 (discussing Montesquieu and Founders’ incorporation of his theories).


269 Amar, supra note 210, at 64.

270 See Ewing & Kysar, supra note __, at 366-67 (emphasizing the capacity of divided authorities to push each other to action when changing social conditions require it).

271 See, e.g., Pildes & Levinson, supra note 35.

272 See Pildes, supra note 2.
ensuring that key segments of each support their positions. Thus, in practice, compromises are often more likely to be reached when government action is essential for business interests.

Whether this phenomenon is something to celebrate, however, is contestable. The answer depends in large part on one’s policy perspective—on one’s estimation of the compromises reached. Moreover, government action produced by wealth’s influence over both parties may be in tension with the third functional goal of separation of powers: democratic accountability. That is, such action may not be responsive to or reflective of majority viewpoints, and may sometimes be more aptly described as capture than compromise.273

Finally, and most important, just as wealth can help narrow the gap between the political parties in order to promote governmental action, wealth also prevents action where legislators across partisan divides might otherwise agree. As Part II.B discussed, business interests often have particular ability to affect gridlock: Campaign donations, lobbying, personal connections, the revolving door, expertise over technical issues, and other mechanisms enable wealth to exercise influence over various veto points in the legislative process, and thereby to block incipient action. And business interests have particular incentive to affect gridlock: They are able to exercise significant control over the market conditions in which law attempts to intervene, making legislative change less appealing.

Within the executive branch, a similarly mixed picture of the relationship between wealth and governmental efficacy emerges. Scholars who study the administrative state often emphasize its ability to produce energetic and effective government: In an era of polarization and gridlock, when the inter-branch system fails, executive branch agencies continue to innovate and govern.274 According to these scholars, internal separations and checks encourage inter-agency competition and the development of expertise, both of which enhance governmental productivity.275

Checks and prods by wealthy interests sometimes enhance this dynamic. Business groups can be instrumental in pushing agencies to innovate. They also can provide important information throughout the regulatory process, enhancing expertise. On the other hand, organized wealth is just as likely, if not more so, to stall regulation.276 Indeed, even when one part of an agency innovates through new regulatory or enforcement tools,

273 See infra III.A.3.
274 See Kagan, supra note 179; DeShazo & Freeman, supra note 114.
275 DeShazo & Freeman, supra note 114; Barron & Rakoff, supra note 36.
276 See notes ___ and accompanying text.
business groups often find ways to check the putative policies before they are enacted or to challenge them once implemented.\(^{277}\)

### 3. Democratic Accountability

The third function attributed to our constitutional structure by both the Court and contemporary theorists is that of furthering democratic accountability.\(^{278}\) According to numerous scholars, the Founders sought to create a government influenced by, and in service of, the citizenry generally—as opposed to a regime by and for “the cabals of a few.”\(^{279}\) Separating powers across branches was one way to achieve this goal. By establishing multiple centers of recourse, many places to which citizens can appeal when they are not receiving satisfaction from other centers of government, government becomes more responsive and accountable, while still respecting liberty interests.\(^{280}\) Because each government entity is selected in a different way by a different constituency, government policy, the theory runs, is more likely to reflect multiple indices of popular sentiment.\(^{281}\) And while a faction might be able to capture one branch, it is less likely to acquire power over all three.\(^{282}\)

Scholars who focus on alternate mechanisms of political competition emphasize democratic accountability as well. For example, internal separation-of-powers scholars contend that the separation of functions within agencies and the presence of multiple loci of appeal within the administrative state help preserve the accountability of the bureaucracy, while making capture more difficult.\(^{283}\)

It is not inconceivable that the political economy described above could be construed as consistent with a vision of democratically accountable government. Indeed, the current majority of the Court has so argued. According to Chief Justice Roberts, writing for the majority in *McCutcheon v. FEC*, removing limits on campaign contributions allows those persons (natural or otherwise) who care the most about issues to organize effectively and make their views heard.\(^{284}\) On this view, systematic checks and prods by wealthy individuals and business organizations help

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\(^{277}\) See notes __ and accompanying text.

\(^{278}\) See *Loving*, 517 U.S. at 757 (emphasizing accountability, along with efficacy, as a separation-of-powers goal). For descriptions of accountability as a core separation of powers value, see Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42-45 (1995) and Lessig & Sunstein, *supra* note 179, at 93-94.

\(^{279}\) *The Federalist No. 10* (James Madison).

\(^{280}\) *Amar, supra* note 261, at 64.

\(^{281}\) *Id*.


\(^{283}\) See Metzger, *supra* note 8.

\(^{284}\) 572 U.S. ___ (2014). But see id. (“Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.”).
conform government action to the views of those who care enough to get involved.

On the other hand—and I think this is the correct view—wealth’s disproportionate influence at every step of the political and governing process and the lack of effective countervailing participation mean that government leaders often fail to consider, and government action often fails to reflect the views and interests of the vast majority of Americans. Instead government hears from and responds to the interests of a particular faction. As a result, the democratic accountability promised by inter-branch competition, as well as by alternative mechanisms of political competition, is missing. And one need not settle on a single theory of democratic accountability to conclude that capture by faction is inconsistent with the ideal.

At the most fundamental level, our constitutional structure aims to preserve republican government and protect the citizens from the emergence of tyranny “by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle.” As James Madison wrote long ago, “It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.” As the preceding section demonstrates, because of the pervasive influence of wealth across branches and parties, and within the executive branch, power is far less diffused than constitutional theory promises. The multiple heads of authority in government and in politics do not consistently perform the checking and prodding function anticipated, or at least do not do so in ways reflective of and accountable to the citizenry generally.

B. Reforming Constitutional Law

Wealth corrodes constitutional structure, leaving us with a government in which power is frequently not diffused and democratic responsiveness is undermined. What should be done? This section first considers the possibility of using greater judicial review of executive and legislative action to check the role of wealth. It ultimately concludes, however, that institutional design reform—namely reform aimed at building countervailing organization, as well as more familiar election law and lobbying reform—is more promising than an expanded role for the judi-

285 See supra notes ___ and accompanying text.
286 For one theory of representation, see HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 144-45 (1967) (a delegate “must do what his principal would do, must act as if the principal himself were acting . . . must vote as a majority of his constituents would”).
287 Strauss, supra note __, at 578.
288 THE FEDERALIST NO. 51 (James Madison).
ciary. Finally, it responds to critics who would argue that such reform is wholly impossible given the political economy described in this article.

1. Enhanced Judicial Review

One possible response to the power of wealth in politics and governance would be something akin to the tiered judicial scrutiny of executive action established by Justice Jackson’s famous concurrence in Youngstown Sheet and Tube Co. v. Sawyer.289 Or, more familiarly, the heightened scrutiny defended in United States v. Carolene Products’ famous footnote four.290 Courts could impose more intense judicial review of legislative or executive action in circumstances where wealth has dominated without countervailing checks. For example, courts might impose greater scrutiny when wealthy interests have participated at disproportionate rates in the administrative process, or where a particular governmental action serves to further concentrate power among the wealthy. Conversely, where the executive acts to remediate the concentration of wealth or where the government effectively involves countervailing organizations in the governance process, more deference would be due.

Indeed, courts, for a time, sought to redress imbalances in interest group power in the context of administrative law cases. Beginning in the late 1960s, judges on the Court of Appeals for the District of Columbia made a concerted effort to consider the role of concentrated power in administrative law cases.291 In the view of these judges, the costs and dynamics of political organization meant that industry and other business interests were overrepresented. As a result, environmental, consumer, and other interests were due special solicitude. The judges thus fashioned new procedural rules that required agencies to offer more procedures than the Administrative Procedure Act (“APA”) mandated.292 The D.C.

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291 See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 53 (D.C. Cir.), cert. denied, 434 U.S. 829, reh. denied, 434 U.S. 988 (1977) (“we are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners”); accord MCI Telecomms. Corp. v. FCC, 561 F.2d 365, 380 (D.C. Cir. 1977); Wilderness Soc’y v. Morton, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973).

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Circuit essentially attempted a power diffusing project, in which the judicial role was heightened when countervailing checks were absent.293

The Supreme Court unanimously put an end to this approach in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*294 Holding that hybrid procedural requirements had no basis in the APA, the Court emphasized that in reviewing agency rules, judges should “not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.”295

Outside of the APA context, however, judicially imposed heightened scrutiny is not foreclosed, for *Vermont Yankee* was an interpretation of the APA, not a general rejection of the use of judicial presumptions to counter-balance powerful interest groups. Indeed, in the 1980s, drawing on public choice theory, numerous scholars urged variations of this approach, albeit not from a separation-of-powers perspective.296 For example, courts could apply less scrutiny to executive orders or regulations designed to redress economic inequality or to protect the environment. The theory would be that those are the kinds of policies unable to pass Congress even in unified government due to the aggregation of power in

293 Bruce Ackerman has referred to this as a democracy-enhancing project. *Beyond Carolene Products, 98 HARV. L. REV. 713 (1985).*


295 Id. at 549 (1978). See also id. at 524 (the APA “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. . . . [R]eviewing courts are generally not free to impose [additional procedural requirements].”). See also, e.g., *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983) (warning against overly stringent arbitrariness review).

296 Numerous scholars have used public choice theory to argue for heightened judicial review in the constitutional context. See, e.g., Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution, 103 HARV. L. REV. 43, 46-47, 78, 80-81 (1989) (arguing that the susceptibility of the politically accountable branches to interest group pressure undermines the case for deferential constitutional review); Richard A. Epstein, *Toward a Revitalization of the Contract Clause, 51 U. CHI. L. REV. 703, 705-17 (1984) (advocating far-reaching substantive judicial review under the Takings and Contract Clauses to curb rent seeking); Jerry L. Mashaw, *Constitutional De-regulation: Notes Toward a Public, Public Law, 54 TUL. L. REV. 849, 874-75 (1980)* (using interest group theory to support his argument that the Supreme Court should invalidate some “private-regarding” legislation); Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review 2, 17-25, 31-40 (1966)* (arguing that, at least in the First Amendment area, the Court should not defer to a political process driven by interest group politics but rather should advance the cause of the groups the political process underrepresents); Sunstein, *supra* note 24 (supporting use of more rigorous constitutional scrutiny to invalidate legislation that rewards the raw political power of interest groups). Scholars have also argued that judges should employ the tools of statutory interpretation to render interest group capture more difficult or less effective; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 471, 486 (1989)* (advocating narrowly construing statutes that represent interest group transfers); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 VA. L. REV. 275, 279, 298-99, 303-09, 324-25 (1988)* (arguing for narrowly interpreting statutes when the benefits are concentrated and the costs distributed, and broadly interpreting statutes when the benefits are distributed and the costs are concentrated). For discussion of the literature, see Elhauge, *supra* note __.
the hands of wealthy individuals and business organizations. Conversely, when an executive order benefits a narrow and well-funded interest, and there are no countervailing checks, courts could follow Justice Jackson in tilting toward rejection of executive action, particularly when that action amounts to a novel expansion of executive power.

Such an approach finds support in existing case law. Following Vermont Yankee, lower courts have continued to worry about agency capture, and those concerns have influenced their decisionmaking. For example, courts have observed, that, in light of the problem of agency capture and the outsized role of industry in rulemaking process, “if there are policy reasons to exempt federal agencies from . . . suits, it is up to Congress to assess them and to determine whether the scope of its sovereign immunity waiver should be revisited.” Other courts have fashioned rules, not found in the text of the APA, to guard against ex parte contacts with powerful interest groups. Courts could do still more to impose heightened review in similar circumstances. To that end, legal scholars, in recent work, have sought to reinvigorate arguments for

297 See supra notes __ and accompanying text.
298 See, e.g., Adkins v. VIM Recycling, Inc., 644 F.3d 483, 499 (7th Cir. 2011) (citing the risk of agency capture as a justification for holding that a state enforcement action against solid waste facility did not trigger statutory bar against a subsequent citizen suit); Am. Horse Prot. Ass’n, Inc. v. Lyng, 812 F.2d 1, 6 (D.C. Cir. 1987) (finding that an agency’s correspondence with representatives of the regulated industry cast doubt on the agency’s interpretation of available data and suggested that the agency’s refusal to act was not the product of reasoned decision-making); Litton Systems, Inc. v. AT&T, 700 F.2d 785, 809 n. 36 (2d Cir.1983) (holding that the “sham exception” to the rule that joint efforts to influence public officials do not violate antitrust laws is applicable in situations of agency capture); Michigan v. U.S. Army Corps of Engineers, 911 F. Supp. 2d 739, 753-54 (N.D. Ill. 2012) (citing the risk of agency capture to support a public nuisance claim against a federal agency).
300 Home Box Office, Inc. v. FCC, 567 F.2d at 51-58. In the years since Vermont Yankee, the D.C. Circuit has effectively limited the prohibition on ex parte contacts to informal rulemakings that resolve conflicting claims among identifiable claimants rather than establish general policy. See Iowa State Commerce Comm’n v. Office of the Federal Inspector of the Alaska Natural Gas Transp. Sys., 730 F.2d 1566, 1576 (D.C. Cir. 1984); Sierra Club v. Costle, 657 F.2d 298, 401-02 (D.C. Cir. 1981).
heightened judicial scrutiny of laws that discriminate on the basis of wealth or that reflect the political powerlessness of the poor.\textsuperscript{302}

2. Problems with Heightened Judicial Review

Greater judicial scrutiny is appealing for anyone concerned about wealth’s role in governance. Yet, ultimately there are reasons to be wary of relying on the judiciary to reduce the checks and prods imposed by wealth.\textsuperscript{303} For one, while substantial evidence demonstrates the dominance of wealth interests in governance overall, it is much harder to determine whether wealthy individuals and businesses have dominated in a single case. Likewise, while there is little doubt that governmental policy overall has contributed to rising inequality, it is not always easy to determine if a particular regulation or statutory provision would further concentrate economic and political power.

More importantly, courts may not be particularly effective at making these determinations. Under the adversarial system, courts generally consider only the arguments of the actual litigants. Individuals or organizations interested in the future implications of a case, but not in the judgment itself, generally lack standing and receive inadequate consideration.\textsuperscript{304} Courts also are often not presented with the full array of arguments. And because they focus on the particular parties and adjudicated historical facts before them, courts tend to underweigh, or be underinformed about, the systemic context and consequences of their decisions.\textsuperscript{305}

Furthermore, even if courts could determine whether the influence of concentrated wealth had resulted in an absence of political checks in a particular instance, or whether a particular policy was likely to further concentrate power with wealth, more intrusive judicial review might not actually redress the problem.\textsuperscript{306} Litigation, like legislation and regulation,

\textsuperscript{302} See Ross & Li, supra note __; Nicholas Stephanopoulos, Political Powerlessness, 114 N.Y.U. LAW REV (forthcoming 2015).

\textsuperscript{303} For an excellent elaboration of the problems associated with enhanced judicial review to combat interest group power, see Elhauge, supra note 114. See also NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 98-150 (1994) (making the case for comparative institutional analysis between politics, the market, and courts, and explaining that the groups that are over-represented or under-represented in the political process may also be over-represented or under-represented, as the case may be, in the courts and in the economic marketplace). For a qualified response, see Thomas W. Merrill, Does Public Choice Theory Justify Judicial Activism After All?, 21 HARV. J.L. & PUB. POL’Y 219, 229-30 (1997) (arguing that judicial policymaking may be less susceptible to interest group distortions—but only within a narrow range of controversies where each of the contesting positions is represented by a group with significant (but not necessarily equal) organization strength, and only when the outcomes reached in these circumstances will not be trumped by a legislated solution).


\textsuperscript{305} Elhauge, supra note 114, at 77.

\textsuperscript{306} Elhauge argues that “any defects in the political process identified by interest group theory depend on implicit normative baselines and thus do not stand independent of substantive conclusions (continued next page)
is susceptible to wealthy interest group pressures. Litigation is expensive. Well-financed groups are able to litigate more frequently, to influence more effectively the information tribunals receive, and to strategically settle cases that may produce unfavorable precedents. These methods do not require that judges sympathize with any particular view. Rather, they depend on parties’ differential abilities to litigate and settle.307

Finally, there is also the separate concern that at least some portion of judges might be predisposed to favor wealth. Wealthy interest groups influence judicial appointments and are more likely to do so if judges serve as more general regulators.308 And judges, perhaps even more so than elected officials, are drawn from the elite.309 Though Article III judges are not subject to the same capture and corruption mechanisms at work in the political branches, they too are likely to bring their own beliefs and experiences to bear on decisions they make.310 As with other proposals that would change judicial review to make it less deferential to political outcomes, greater scrutiny of laws here would expand the lawmaking power of the judiciary.

In short, increased judicial review could perversely augment the influence of wealth, further limiting checks on their power. And indeed, business interests have had remarkable success, of late—in cases involving labor rights, health and safety, and consumer protection—in convincing judges on the D.C. Circuit and elsewhere to protect wealth from national regulatory intrusion, even if it means developing new doctrine to do so.311

about the merits of particular political outcomes.” Supra note 114, at 34. This is a valid point; however, this article answers it by offering, albeit without developing at length, a baseline norm of a more equal distribution of political power on the axis of wealth.

307 Id. at 80; Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC’Y REV. 1 (1974)


309 CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 60 (1995) (“Federal judges are already drawn from the ranks of educated political elites.”)

310 See id. See also Nicole E. Negowetti, Judicial Decisionmaking, Empathy, and the Limits of Perception, 47 AKRON L. REV. 693 (2014) (discussing the effects of a judge's prior assumptions, values, and experiences on judicial decisionmaking). Cf. McCarty et al., supra note 57, at 55, 76.

311 See e.g., NAM v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) (striking down NLRB rule that compelled employers to post a notice that recounts employee rights under existing law and invoking aggressive interpretation of the commercial speech doctrine, as well as agency’s statutory authority, to do so); National Ass’n of Mfrs. v. S.E.C., 748 F.3d 359 (D.C. Cir. 2014) (striking down SEC regulation mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was designed to require disclosure of the origin of “conflict minerals”); R.J. Reynolds Tobacco Co. v. Food and Drug Admin., 696 F.3d 1205 (D.C. Cir. 2014) (striking down, under commercial speech doctrine, rule requiring disclosure on cigarette packages).
C. Democratic Institutional Design and the Law of Organization

1. From moderation and insulation to participation and organization

Though lawyers often look to courts to solve problems, judge-made doctrine can only do so much to diffuse political power. Given the limits of judicial intervention, institutional design may well be a more promising avenue for addressing the dominance of wealth in governance. Existing reform proposals in the constitutional structure literature are, not surprisingly, inadequate to the task. They typically focus on moderating the power of the partisan Executive and on insulating the bureaucracy from partisanship. Such proposals would do little to diffuse power lodged with wealth. Even if the President’s power were reduced, wealthy groups and individuals would continue to have unmatched resources to participate disproportionately in agency meetings and comments, to provide regulators access to vital information, and to appeal to different governmental actors regarding the interpretation of law and regulation. Indeed, it is telling that some independent agencies, structurally insulated from the full extent of presidential power, have suffered capture by organized business interests no less than executive agencies. Similarly, proposals to amend legal rules and institutions to make political parties more ideologically “moderate,” or to strengthen the powers of the minority political party, may be helpful for other reasons, but would be unlikely to diffuse the power of wealth. Indeed, some such proposals are likely to create additional veto points for wealth to exploit.

One obvious place to turn, then, is to proposals to reform campaign finance law and to increase voting rights of less affluent Americans, of-
ten disenfranchised in practice if not by rule. These proposals are important and, depending on their form, could help reduce the dominance of both affluent individuals and business entities in politics.

At the same time, these proposals have commanded an undue amount of scholarly attention given their limited promise. Reform efforts focused on restricting the flow of money—i.e., on insulating government actors from money’s influence—face significant, perhaps even insurmountable, practical hurdles: Money finds new channels when regulators shut down one avenue. Without additional reforms, simply capping campaign contributions is unlikely to have much effect. So too, efforts to protect the right to vote at the individual level are unlikely, alone, to redress the significant imbalances in participation and power detailed in this Article: participation through voting is only one small way in which citizens participate in politics and governance.

The separation-of-powers frame advanced in this Article helps illuminate a complementary path for reform, and one that has received far less attention: If the goal of the Madisonian system is for ambition to counter ambition, law reform should focus on facilitating countervailing organizations, as well as moderating the role of money in campaigns and facilitating individual voting rights. Without reforms encouraging orga-


316 The separation-of-powers arguments raised in this Article could potentially provide further normative support for the effort to resist the Supreme Court’s recent jurisprudence striking down campaign finance regulations. The basic outline of such an approach should be evident from the preceding Parts: In brief: political competition and the diffusion of political power throughout the polity are independent constitutional values, worthy of protection. Yet the dominance of wealth in politics, combined with rising wealth inequality, degrades political competition in government and concentrates power in too few hands. Unregulated money and laws that burden voting rights of less affluent Americans thus stand in tension with the goals of separated powers. Such an approach is, however, entirely unlikely to prevail in the current Court, and is of limited practical promise, as discussed below.

317 Campaign finance, voting, and lobbying law have received and continue to receive extensive scholarly attention. For just a few examples: on campaign finance, see, e.g., LESSIG, supra note __; RICHARD I. HASEN, PLUTOCRATS UNITED (forthcoming, Yale University Press 2016); ROBERT POST, CITIZENS DIVIDED (2014); on voting, see, e.g., Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 VA. L. REV. 1413 (1991); Pamela S. Karlan & Daryl J. Levinson, Why Voting is Different, 84 CAL. L. REV. 1201 (1996); Ellen Katz, Race and the Right to Vote After Rice v. Cayetano, 99 Mich. L. Rev. 491 (2000); on lobbying, see sources cited in notes __, supra.


319 See supra notes __ and accompanying text.
nized participation in governance by ordinary Americans, election law reform is unlikely to counter the systematic influence of wealth throughout the governing process.

From this perspective, some existing good-government reforms appear not only unsuccessful but also counter-productive. Certain strategies, while unable in practice to reduce the flow of money,\(^\text{320}\) have actually undermined organized, popularly rooted mobilization.\(^\text{321}\) Limits on coordination, for example, have reduced the ability of popular organizations to join together with political parties and candidates. Other regulations have weakened political party efforts to mobilize new voters.\(^\text{322}\) As a group, these well-intentioned laws have made it harder to draw ordinary people into politics.\(^\text{323}\) Meanwhile, they have done little to counteract the influence wielded by business organizations in lobbying Congress, participating in the regulatory process, and exploiting the revolving door and other mechanisms of influence.

Scholars in election law are increasingly moving away from insulation—or efforts to “level down” campaign spending—and toward “leveling up” reforms aimed at bringing countervailing voices into public debates. Bruce Cain has supported “the Madisonian idea of fighting faction with faction.”\(^\text{324}\) He writes that “another way to neutralize political advantage aside from capping and prohibiting is to support countervailing voices.”\(^\text{325}\) The mechanism he favors, along with other campaign finance scholars and good governance groups, is public financing. Others extend this argument to the lobbying context, arguing that we should find ways to level up by publicly financing lobbyists and making them available to congressional staff.\(^\text{326}\)

In the administrative law field, scholars make similar leveling-up arguments. Wendy Wagner argues that institutional design reform should focus on making participation by a diverse range of participants easier, for example by lowering the cost of information and access.\(^\text{327}\) She urges


\(^{321}\) Skocpol, supra note 79, at 281.


\(^{323}\) Skocpol, supra note 79, at 281.

\(^{324}\) Bruce Cain, More or Less: Searching for Regulatory Balance, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 263, 277 (Guy-Uriel E. Charles, Heather K. Gerken, & Michael S. Kang eds., 2011). For discussion of this shift, see Sachs, Unbundled Union, supra note __.

\(^{325}\) Cain, supra note 324, at 277.


\(^{327}\) Wendy Wagner, The Participation-Centered Model Meets Administrative Process, 2013 Wis. L. Rev. 671, 677, 692 (2013) (“In administrative law, agency bureaucrats and appointees are held accountable through a pluralistic system of oversight whereby the affected parties are invited to comment and then have an opportunity to seek judicial review of agency rules that stray outside the authorization of the statute or are arbitrary with respect to the agency’s underlying choices. In order (continued next page)
reforms that would make access and information throughout the regulatory process less costly. Nina Mendelson has similarly focused on expanding public participation, urging agencies to take large volumes of comments more seriously.

Such proposals to increase participation through public financing, decreasing costs of access, and taking existing mass petitions more seriously are all promising from a separation-of-powers vantage point—they seek to enhance political contestation and provide missing checks on wealthy interests. Still, these proposals do little to redress the underlying imbalance in organization—an imbalance fundamental to the problem identified in this Article.

Legal interventions designed to facilitate organization are a necessary complement. Indeed, they may even have an important advantage over laws focusing only on individual access. Reforms aimed at increasing organizational capacity enable under-represented citizens to check and prod as do their wealthier counterparts—to exercise organized political power throughout the processes of politics and government. Organizations permit individuals with low per capita resources to pool resources and speak with a stronger voice. As Benjamin Sachs writes, “a well-organized political group can mobilize voters and influence elections; it can lobby and influence legislation; it can buy media time and influence public opinion.” Well-organized groups can also help shape regulatory agendas, comment on proposed rules, press for agency enforcement activity and so on. And to the extent such organizations are membership groups, rather than professionally managed “check-book” organizations, their participation helps facilitate more representative and diffuse political involvement. Organizations funded by and directed by a

to make this administrative law work, however, the full range of affected groups must participate throughout the process without allowing one set of interests to dominate the process and capture the agency.”

As Wagner notes, id., while the costs of commenting on a noticed rule is superficially low, there are multiple points of entry beyond notice and comment. The period before Notice of Proposed Rulemaking and the process of OIRA review, for example, are less transparent and more costly to access, providing significant opportunities for imbalances in influence.

Skeptics of Mendelson’s argument express concern that mass comments are group-facilitated and that signatories might be signing because of group rhetoric. Mendelson correctly retorts that excluding rulemaking comments because groups are involved or rhetoric is used would leave very few comments, but the problem is deeper than that: group participation should be encouraged and facilitated, not feared. Id.


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range of Americans, representing their interests, can provide checks and prods now often missing.

An organization-focused approach is supported by both historical and empirical evidence. Historians have illuminated the instrumental role played by mass membership organizations in the passage of wage and hour laws, labor legislation, progressive taxes, and civil rights legislation, even in the face of staunch opposition from wealth.334 More recent empirical work also supports the conclusion that organization is essential to our basic system of fighting faction with faction.335 Martin Gilens, for example, finds an exception to the general rule that policy makers are far more responsive to the interests and preferences of the wealthy: Where countervailing interest group power is exerted, government policy no longer simply tracks the preferences of the wealthy. 336 Rather, on issues where organized groups advance the preferences of low- and middle-income Americans, government outcomes more often correspond to the preferences of low- and middle-income Americans.337 Consistent with these findings, the state and local governments that have been most active in attempting to redress wealth inequality of late are those operating in regions with higher levels of organization among working people.338 Recent experience regarding presidential executive orders, such as the issuance of the labor executive orders following activity by worker groups, further supports the conclusion that countervailing organization can diffuse concentrated power.339

2. Building countervailing organization

How then might legal and institutional reforms facilitate broader and more equitable participation in organized political life? How might countervailing organizations be brought into governance? A full exploration of that question obviously cannot be tackled in the remaining pages of this Article. In a separate piece, I will examine the extent to which our

334 Lichtenstein, supra note 143.
335 See Sachs, supra note 151.
336 Gilens, supra note 153, at 121, 157-58.
337 Id. For example, Martin Gilens found that unions are among the most important forces moving policy in a direction desired by the less well off.
339 See supra Part __.
Civil society deficit is not simply a political problem, as is typically understood, but also a legal problem—a product of legal structures that discourage or inadequately facilitate organization—with possible legal solutions. Here, I identify several strategies, drawn from disparate fields in law and policy, worth further exploration.

First, administrative law and process could do more to provide a formal role in governance for public interest organizations, particularly organizations that derive high proportions of funding from membership contributions (from natural persons) and have members who enjoy rights to participate in associational decisionmaking. Rather than simply lowering the barrier to enter the political or governing process and hoping that lower-income individuals or under-resourced organizations take advantage, membership organizations could be assigned more prominent roles of participation. This could be done through any number of routes, such as soliciting their participation in congressional hearings, Federal Advisory Committees, and in meetings with OIRA, the Domestic Policy Council, and other administrative offices. In addition to involving organizations in notice and comment, agencies could also establish mechanisms to solicit input from membership associations regarding regulatory agendas and proposed rules. Legislative offices could do the same. Consumer empowerment programs advocated by such scholars as Ian Ayres and John Braithwaite, or new governance models, such as those advocated by Charles Sable and William Simon, offer a variation of this approach. These programs have been successful, although not uniformly so, at creating countervailing checks in the regulatory process. They could potentially be more so if targeted at organizations with a membership, rather than a management, character.

Public interest organizations could also be involved in helping agencies achieve compliance with the law. For example, Janice Fein and Jennifer Gordon demonstrate how labor inspectorates that have given organizations like unions and worker centers a formal, ongoing role in enforcement in low-wage sectors have had greater success. While Fein and Gordon’s aim is to achieve greater legal compliance, involving civil society in enforcement efforts could also serve to strengthen political competition and to diffuse power: It provides agency officials the perspectives of a different segment of the population and counteracts cap-

341 For an analysis of potential problems with empowerment of stakeholders as a means of creating collaborative government and a discussion of the contexts in which collaborative governance has been most successful, see Mark Seidenfeld, Empowering Stakeholders: Limits on Collaboration As the Basis for Flexible Regulation, 41 WM. & MARY L. REV. 411 (2000).
342 See id. at 500 (emphasizing need for interest group internal democracy).
ture by well-funded industry groups. Furthermore, involving membership associations more directly in setting policy agendas, developing policy ideas, and achieving compliance makes it more worthwhile for ordinary Americans to join the discussion.  

Second, to make such governance reforms work, organizations representing low- and middle-income Americans must be much more prevalent. To that end, the revitalization of worker organizations is essential. As previously discussed, among the interest groups operating in the United States today, labor unions’ policy positions are most closely associated with the preferences of the less well-off.  

In the United States, unions have successfully organized lower- and middle-income Americans for political action to greater extent than any other non-party actor. Though their track record has been checkered, they constitute some of the few mass-membership organizations remaining. Meanwhile, there are indications that recent efforts by the labor movement are more focused on political action and class-based legislation, and less focused on site-by-site organizing and bargaining.

Building on those efforts, labor law should be reformed to encourage worker organizations and to facilitate their active participation in politics and governance. While scholars have offered a host of labor law reform proposals, few have trained their attention specifically on the political capacity of worker organizations. More thought is needed on that subject, as well on how law can facilitate organization among low- and middle-income Americans in contexts other than the workplace, including in schools, public benefit offices, churches and other religious institutions, and community based organizations.

Third, political parties could be redesigned to strengthen the role of rank-and-file members and to shift the balance away from elites. To that end, some scholars have suggested that we reform campaign finance law to channel contributions back to the formal political parties and away from large-donor governed “shadow parties” like Super PACs. Others advocate amending political law to ease restrictions on grassroots organ-

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344 Skocpol, supra note 79, at 290.
345 Sachs, supra note 151, at 168-69 (quoting Gilens, supra note 153). For further discussion, see supra notes and accompanying text.
346 Kate Andrias, Labor Law Beyond the New Deal Order (in progress).
347 Benjamin Sachs’ “unbundled union” proposal is a notable exception. Sachs, supra note 151, at 155 (arguing that opposition to collective bargaining impedes unions’ ability to serve as a political-organizing vehicle for lower- and middle-income groups and advocating an “unbundled labor law” that would allow workers to form a “political union,” which would be barred by statute from engaging in collective bargaining, but would be able to serve as a vehicle for collective political voice for workers who decided to join).
348 For some tentative ideas on how law might facilitate organization among low-income Americans, see Sachs, supra note 151.
Reinvigorated political parties might not lead to less partisanship, but they could enhance government accountability. Indeed, as Walter Dean Burham has argued, strong, participatory parties with coherent ideologies help government minimize the influence of powerful, rent-seeking economic interests.

Fourth, we could unfetter the political activity of existing membership associations by reforming tax law. Under the current regime, non-profit organizations are penalized for engaging in political activity and they receive little benefit from being representative in structure. Law reforms could alter existing incentives. For example, rules designed to create firewalls in non-profits between partisan and non-partisan activities could be repealed. Tax law could provide incentives for associations that derive high proportions of funding from natural-person membership contributions and have members who enjoy rights to participate in associational decision-making.

An obvious objection to these proposals is that if wealth is so powerful, no such changes could ever be enacted. The critique is true to a point. Significant reform is unlikely in the current political environment. But as this Article has acknowledged, the power of wealth ebbs depending on circumstance and alignments: When issues become particularly salient, the power of wealthy individuals and their organizations can be overcome and their views can shift. And, indeed, in recent months it appears that public concern about economic inequality is mounting, creating pressure on elected officials, Democrat and Republican, to respond. The goal is to suggest that if and when significant political and governance reform becomes possible, it should focus beyond efforts at insulation from, and moderation of, partisanship, and even beyond efforts

350 Bauer, supra note 322, 69.
351 WALTER DEAN BURHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970) (arguing that strong parties with coherent ideologies are an important mechanism by which the government can minimize the influence of powerful, rent-seeking economic interests).
352 See, e.g., Dana Brakman Reiser, Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits, 82 Or. L. Rev. 829 (2003) (discussing the significant social costs of a trend away from member-driven organizations and suggesting tax benefits for membership organizations as one of several potential responses to mitigate these costs).
to control campaign money, to reforms that would shift long-term distribution of political and economic power. 355

Whether any of the particular strategies identified above is worth pursuing depends on their attendant costs to other democratic values and on the relative merits of institutional and doctrinal alternatives. Greater participation, for example, does not always lead to greater organization. For present purposes, however, the goal is to highlight the intimate relationship between constitutional structure and the role of organization in American civic and political life. The rules that structure American organizations should be seen as an essential complement to the Article I and Article II provisions creating the competing interests of the political branches—and they should be seen as no less foundational to constitutional governance than the political parties and the internal bureaucracy.

CONCLUSION

Leading constitutional law theorists and many public commentators worry intensely about the nefarious impact partisanship has had on our system of constitutional governance, and particularly on the expansion of the executive and the impotence of Congress. Americans, they argue, must, if nothing else, overcome political polarization. Those who study the internal workings of the executive branch agree, though they are more optimistic; they promise that bureaucracy and internal checks offer a shield against partisanship, gridlock, and the unbound executive. While both of these accounts have considerable purchase, their failure to consider how wealth systematically shape the branches, the parties, and the executive’s internal mechanisms leads to descriptive oversights. Whatever one’s normative take, executive power, legislative gridlock, and internal executive branch checks cannot be understood absent a political economy analysis.

But while the primary goal of this Article has been critical and descriptive, the claim is also normative: Even when partisan and internal executive branch checks are in place, power is concentrated in too few hands—in ways detrimental to liberty, governmental efficacy, and, particularly, democratic accountability. Ultimately, if such goals remain aspirations of American government, reforms encouraging the participation of not only individuals but also countervailing organizations are paramount. This Article has only suggested some potential reforms to that end. The project of thinking them through is all the more urgent as inequality soars, membership in labor organizations declines, and the voices

of middle- and lower-income Americans become fainter throughout the political and governing process.