LOOKING FOR POWER IN PUBLIC LAW

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Introduction

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

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

Managing the structural constitution in this way depends on a clear understanding of where power in government is located and how it shifts in response to legal and political interventions or changing cir-

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1 THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003); see also MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 106 passim (1995) (emphasizing “the Framers’ virtual obsession with the concentration of power” and embracing that as the core value of the structural constitution).
cumstances. Yet that understanding has been conspicuously elusive. Consider debates about presidential power. Many see the President as increasingly “imperial,”2 helming “the most dangerous branch,”3 unimpeded by the separation of powers,4 and even posing an existential threat to constitutional democracy.5 Others see the presidency not as imperial but “imperiled,”6 “manifestly underpowered,”7 “enervated [and] splintered,”8 subservient to “boundless . . . Congressional power,”9 and indeed so “constitutionally] and practical[ly] weak[]” as to pose — once again — “a threat to American democracy.”10 At the same time, still others perceive the President to be tightly constrained by “plebiscitary” responsiveness to public opinion and popular demands,11 or by a “synopticon” of legal and political “watchers” who monitor and check his every action.12 It is unclear, however, whether these constraints are supposed to alleviate “tyrannophobic” fears of unchecked presidential power13 or “strengthen” a “bigger and bigger presidency”14 — or, somehow, both.


5 See ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC, supra note 2, at 4, 188 (describing the presidency as a “serious threat to our constitutional tradition” and to “constitutional democracy”).


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


12 See GOLDSMITH, supra note 9, at xii.

13 See Posner & Vermeule, supra note 4, at 176–77.

14 See GOLDSMITH, supra note 12, at xv.
Similar disagreements or confusions abound in other areas of structural constitutional law. In separation of powers cases, the Supreme Court has constructed a jurisprudence that “focuses on the danger of one branch’s aggrandizing its power at the expense of another branch,”15 and of Congress in particular doing so.16 Yet the Court has also taken notice of the fact that the post-New Deal “growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life,”17 is a product of Congress’s apparent propensity to “yield up its own powers” by delegating policymaking authority to the executive — giving rise to competing constitutional concerns about Congress’s “abdication of responsibility.”18 In the “standard view” of American federalism, state and local power has been inexorably subsumed by an increasingly dominant national government.19 That view may or may not be compatible with an emerging school of thought emphasizing the power states wield in their role as agents of the national government — the “power of the servant,” as opposed to the “power of the sovereign.”20 Longstanding fears of “government by judiciary” have been based on the belief “that much of the task of governance and policymaking has been . . . commandeered by an unelected federal judiciary, in particular the Supreme Court,”21 an institution that has seized for itself “super-legislative [] power.”22 This is the same Supreme Court that has long been viewed as the “least dangerous branch,”23 subservient to the political branches and

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16 Id.
17 Id. at 499.
21 See Frederick Schauer, Foreword: The Court’s Agenda — and the Nation’s, 120 HARV. L. REV. 4, 7 (2006); see also GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 2 (1991) (presenting the view that the Court is “powerful, vigorous, and potent” in governing society).
popular majorities, lacking effective power to effectuate political or social change, and playing at best a marginal role in national policymaking. These and many other conflicting claims and observations about power proliferate, but it is unclear what, if anything, courts and commentators are really disagreeing about, or how divergent opinions might be adjudicated or reconciled.

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

Contemporary constitutional law has perpetuated the same divide. The law and theory of constitutional structure remains fixated on the distribution of power among government institutions, maintaining “a deep and enduring commitment to separating, checking, and balancing

25 See ROSENBERG, supra note 21, at 3.
26 See Schauer, supra note 21, at 11; see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 7 (2004) (arguing for a “middle ground” view of the influence and efficacy of Supreme Court decisions).
state power in whatever form that power happens to take.” Yet beyond ritualistic citation of the Madisonian maxim about the accumulation of power and tyranny, courts and scholars seldom pause to ask or explain what purpose the (re)distribution of power is supposed to serve or why institutionally concentrated power is so dangerous. Whatever the answer to that question, it apparently has nothing to do with the kind of factional tyranny Madison was worried about in *Federalist 10*, as the power of interests and social groups is seldom any part of structural constitutional analysis. Concerns about the distribution of democratic level power, to the limited extent they register at all in constitutional law, have been relegated to and scattered among a number of different areas of doctrine and theory. For example, the constitutional and statutory “law of democracy” allocates and to some extent equalizes electoral power with an eye toward ensuring that at least some types of groups — political parties, electoral majorities, and racial minorities — receive their fair share. And in the domain of constitutional rights, *Carolene Products* theory counsels that groups without adequate political power be granted special protection against discrimination and disadvantage. Political process theory and voting rights jurisprudence are typically viewed as their own enterprises, disconnected from the separation of powers, federalism, or the overarching structural goal of diffusing and balancing power.

That disconnect becomes strikingly evident in how constitutional law addresses — or ignores — some of the most glaring power imbalances in American society. In both its law of democracy and equal protection cases, for instance, the Supreme Court has purported to care about equalizing the political power of citizens or protecting “politically powerless” groups against discrimination. Yet evidence that some groups in society seem to have little or no political influence is viewed as beside the point of constitutional analysis. In light of the much-

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

cited Madisonian maxim, one might think that the increasing concentration of economic and political power in the hands of what many now describe as an “oligarchy” or a “moneyed aristocracy” in recent decades would be a constitutional problem of some urgency.32 Yet it is not clear how, if at all, constitutional law might speak to this kind of power imbalance.33 The apparent facts that “government policy bears absolutely no relationship to the degree of support or opposition among the poor”34 and that “the preferences of the vast majority of Americans . . . have essentially no impact on which policies government does or doesn’t adopt” have not been understood to raise voting rights or equal protection problems.35 In constitutional law and theory as it currently stands, even the most extreme claim that concentrated wealth has so completely captured control of government that America is no longer a “republic” somehow passes the Madisonian maxim in the night.36

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

The project starts with the meaning of “power.” That term is used so promiscuously in constitutional and political discourse that it might seem hopeless to insist on a single definition. But, in fact, there is a simple and intuitive understanding of power that captures most of

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

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


35 Id. at 1.

36 For a version of the claim that the corrupting influence of wealth has undermined the American republic, see LAWRENCE LESSIG, REPUBLIC, LOST (2011).
what concerns courts and theorists in the constitutional domain. For most (though not all) purposes, “power” in public law should be understood to refer to the ability of political actors to control the outcomes of contested decisionmaking processes and secure their preferred policies. When we talk about power in political life and in constitutional law, this is the kind of power we are typically talking about: the ability to affect substantive policy outcomes by influencing what the government will or will not do. Asking who has power in this sense is equivalent to asking, in Robert Dahl’s famous formulation, “Who [g]overns?"

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

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

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

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

dynamics of power in the structure of government. In so doing, the discussion casts considerable doubt on the veracity of many conventional understandings of who is wielding or accumulating power in government and, by implication, on the ability of courts and other armchair observers to make such judgments with any reliability.

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

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

In case it does not go without saying, this project bears no special relationship to the Supreme Court’s most recent Term. But the 2015
Term did contribute at least its fair share to constitutional discussions of, and confusions about, power. The Court issued a pair of terse but highly consequential decisions about power at the level of constitutional structure, imposing limits on executive “power grabs.”\(^{40}\) The decision to block the Obama Administration’s Clean Power Plan\(^{41}\) cast doubt on the viability of the Paris Agreement and also on the President’s power to act unilaterally and efficaciously on both the domestic and international fronts. The Court’s deadlock on the legality of the Administration’s immigration reform plan\(^{42}\) dealt a further blow to executive power and, more broadly, to the capacity of the national government to address major social problems under conditions of partisan gridlock — a different kind of power left diminished.

The Court’s deadlock in that case and others this Term is a reminder that the Court itself has been a conversation piece for power in the structural constitution. Another manifestation of partisan gridlock, the Senate’s unwillingness to act on the President’s nomination of a Justice to fill the vacancy left by Justice Scalia, resulted in a series of 4-4 stalemates,\(^{43}\) along with other cases in which the Justices reached agreement only by way of minimalist compromises.\(^{44}\) Less capable of deciding significant policy questions, a “less than robust” Court has been “diminished” — or, we might say, disempowered.\(^{45}\)

The short-staffed Court did manage to reach unanimity in two other major cases dealing with the power of voters and constituents, as opposed to government institutions. In \textit{Evenwel v. Abbott},\(^{46}\) the Court rejected an attempt to reinterpret “one-person, one-vote” to require


\(^{44}\) See, e.g., Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (remanding for consideration of a compromise solution that would provide insurance coverage for contraceptives to employees of religious organizations without requiring the organizations to take actions that would make them complicit, in violation of their religious beliefs).

\(^{45}\) Adam Liptak, \textit{A Supreme Court Not So Much Deadlocked as Diminished}, N.Y. TIMES, May 17, 2016; Linda Greenhouse, \textit{The Supreme Court’s Post-Scalia Term}, N.Y. TIMES, June 23, 2016 (commenting on the Court’s “less than robust” performance owing to a lack of “blockbuster” decisions).

The future of the Court now rests on a presidential election campaign that itself has focused attention on issues of structural power, provoking unusual alarm in some quarters about how the imperial power of the presidency might be put to use. \textit{See, e.g., Conor Friedersdorf, End the Imperial Presidency Before It’s Too Late, THE ATLANTIC (May 23, 2016); Eric Posner, And If Elected: What President Trump Could or Couldn’t Do, N.Y. TIMES (June 3, 2016); Marc Fisher, Donald Trump and the Expanding Power of the Presidency, WASH. POST (July 30, 2016).}

\(^{46}\) 136 S. Ct. 1120 (2016).
that election districts be drawn with equal numbers of eligible voters, as opposed to the standard practice of equalizing total population. Justice Alito’s concurring opinion called attention to the fact that “fight[s] over apportionment” have always been about “naked power,” and that this case was no exception. The transparent political stakes of counting only eligible voters would be to suppress the voting power of urban areas with large populations of non-citizens and hence to shift power from Democrats to Republicans. In McDonnell v. United States, the Court overturned the corruption conviction of the former governor of Virginia, who had accepted gifts from a business owner in exchange for political favors. The broader question implicated by the case, signaled by the defendant’s reliance on Citizens United, is what kind of government influence wealthy individuals and groups will, or must, be allowed to buy, and what uses of public power for private ends will be considered “corrupt.”

And then there were a number of other cases that might not seem to have anything to do with political or governmental power, but — as this Foreword will suggest — should be understood as of a piece. In Friedrichs v. California Teachers Ass’n, the Court came within a vote of doing away with mandatory representation fees and thereby decimating public sector unions. Given the role that unions have played in the political mobilization of workers and in making government responsive to the preferences of the poor and middle class, the consequence of that decision would have been not just greater inequality of economic power but also of political power. The two major constitu-

47 Id. at 1126–27.
48 Id. at 1146 (Alito, J., concurring).
49 See id. at 1149.
50 See Adam Liptak, Supreme Court Rejects Challenge on “One Person One Vote,” N.Y. TIMES (Apr. 4, 2016), http://www.nytimes.com/2016/04/05/us/politics/supreme-court-one-person-one-vote.html (“Had the justices required that only eligible voters be counted, the ruling would have shifted political power from cities to rural areas, a move that would have benefitted Republicans.”).
52 Id. at 2375.
54 See generally Zephyr Teachout, Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United (2014).
55 See infra notes 454–456 and accompanying text.
56 136 S. Ct. 1083 (2016) (per curiam).
57 Id.
tional rights cases from Texas, *Whole Women’s Health v. Hellerstedt*,\(^{59}\) striking down parts of the state’s restrictive abortion law, and *Fisher v. University of Texas*,\(^{60}\) upholding its race-conscious college admissions program, are also cases about political power. Judicial intervention on behalf of the socioeconomic opportunity and against the subordination of women and racial minorities might be understood to compensate for a lack of political power on the *Carolene Products* model while at the same time contributing to the empowerment of these groups.

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

I. Power in Government

“That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish . . . .”\(^{61}\) Justice Scalia’s trenchant description of the stakes of the independent counsel case might be equally well applied to any issue of structural constitutional law. Thus, in separation of powers cases, as Justice Scalia suggests, the issue is typically how institutional rearrangements affect the relative power of the branches in controlling the decisions of the national government. Does the legislative veto or some limitation on the President’s authority to remove executive branch officials impossibly diminish the President’s power over the direction of executive branch decisionmaking, shifting some measure of control to Congress or unelected bureaucrats?\(^{62}\)

Other separation of powers cases assess claims of presidential power — for example to initiate armed conflicts or detain suspected terrorists\(^{63}\) — and raise questions about what kinds of decisions the President can make unilaterally, when

\(^{59}\) 136 S. Ct. 2292 (2016).

\(^{60}\) 136 S. Ct. 2198 (2016).


Congress or the judiciary must play a role in making those decisions, and what happens when the relevant institutional actors disagree. In federalism cases, similarly, the fighting issue is typically how much policymaking turf the national government will be permitted to control and how much will be left for state governments. For example, does the individual mandate of the Affordable Care Act go beyond the bounds of constitutional federalism by opening up a “vast domain” of federal policymaking power at the expense of the states?64

Needless to say, there is a great deal of disagreement about how these and similar constitutional questions should be decided and a great deal of complexity and variability in how they, in fact, have been decided by courts and other constitutional interpreters. As in most areas of constitutional law, courts and theorists disagree about the right approach to constitutional interpretation, the relevance and weight of different sources, and the meaning of the relevant words and phrases in the constitutional text. Even within a broadly shared framework of “balancing” power, “formalists” and “functionalists” in the separation of powers context disagree about whether the balance of power among the branches is best maintained through case-by-case analysis focused on practical consequences or by strict adherence to the rules laid down in the constitutional text.65 Related disagreements arise over which normative standards should be used to measure whether power is “balanced” or has exceeded its constitutional bounds.66 And all of these disagreements are colored, and often exacerbated by, competing visions of what the structural constitution is supposed to be accomplishing. Those who view the separation of powers as being about increasing government “efficiency” will find little in common with those who view it as about preserving “liberty;” the goal of enhancing “accountability” will often point in a different direction from that of encouraging “deliberation.”67

Abstracting from all of this disagreement, however, the least common denominator of most approaches to adjudicating or analyzing

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64 See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587 (2012) (“Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.”).

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

66 See Magill, supra note Error! Bookmark not defined., at 1196.

67 For further discussion of these various functional goals, see infra notes ___ and accompanying text.
structural controversies is some assessment of where power in the structure of government is located and how it is distributed or redistributed by various legal and political arrangements.68 Unfortunately, such assessments have been beset by persistent disagreement and confusion.69 As this Part describes, structural constitutional analysis has foundered on a recurring set of ambiguities and discrepancies about the meaning and location of power in government.70

A. Power Of Versus Power Over the State

“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”71

In presenting the challenge of constitutionalism in these terms, Madison highlighted the distinction between two kinds of power. One is the power of the state to control the governed. The other is power over the state, asserted through law and politics, that keeps the government in control. Distinguishing these two forms of power, and describing their relation to one another, is an important first cut at disentangling power in the structural constitution.

1. Capacity and Control

It is often said that constitutions both build and constrain state power.72 Embedded in this statement are two different understandings of what “power” means. The kind of power that constitutions are supposed to build has been termed “infrastructural power,” meaning “the capacity of the state to actually penetrate civil society, and to im-

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

69 See supra notes ___ and accompanying text.

70 For a pioneering discussion of the under-developed and conflicting conceptions of power and what it means to “balance” it in the context of separation of powers, see Magill, supra note 30. More recently, Eric Posner has cataloged a similar set of confusions and provided an analytic framework for conducting balance of power analyses that is generally consistent with the approach taken in this Foreword. See Eric A. Posner, Balance-of-Powers Arguments and the Structural Constitution (Inst. for Law and Econ., Working Paper No. 622, 2012). The discussion that follows builds upon Magill’s and Posner’s foundational work.

71 The Federalist No. 51, supra note 1, at 319 (James Madison).

72 See, e.g., Stephen Holmes, Passions & Constraint: On the Theory of Liberal Democracy 6 (1995) (“Constitutions restrict the discretion of power wielders because rulers, too, need to be ruled. But constitutions not only limit power and prevent tyranny, they also construct power . . . .”).
plement logistically political decisions throughout the realm."\textsuperscript{73} State power in this sense means the ability to accomplish the kinds of things that states and governments are designed to be able to do: fighting wars, securing domestic order, raising revenues, promoting economic development, providing education and health care, and the like.\textsuperscript{74} This is the kind of power that “state building” projects are supposed to build. We might refer to it as power in the sense of state capacity.\textsuperscript{75}

The second ambition of constitutionalism — though it tends to be first and foremost in the minds of contemporary constitutional lawyers and theorists\textsuperscript{76} — is to constrain, or control, state power.\textsuperscript{77} To this end, constitutional law imposes rules about what the state can and cannot be used to accomplish and specifies rights that place some uses off limits. At the same time, the constitutional structure of government and the democratic political system aspire to put state power in the hands of those who are likely to make good decisions — controlling state power not by regulating its uses but by determining who its users will be. This is power in a different sense: the political power to determine what state capacity will and will not be used to accomplish. It is power over the power of the state.\textsuperscript{78}

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


\textsuperscript{74} See Daryl J. Levinson, \textit{Incapacitating the State}, 56 WM. & MARY L. REV. 181, 195 (2014).

\textsuperscript{75} See \textit{id.} at 195–96; see also Posner, supra note \textit{Error! Bookmark not defined.}, at 4 (distinguishing the “vertical” power of government to coerce citizens from the “horizontal” power of the different units of government).

\textsuperscript{76} See Waldron, supra note 30, at 29–30 (presenting the standard view of constitutionalism as the project of “controlling, limiting, and restraining the power of the state”).


\textsuperscript{78} The distinction between these two senses of power is embedded in statements like the following: “Winners of political contests are positioned to use the control of the coercive power of the state to impose their preferences on losers through public policies.” Jacob S. Hacker & Paul Pierson, \textit{After the “Master Theory”: Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis}, 12 PERSP. ON POL. 643, 648 (2014).
2. Structural Linkages

While it is important to distinguish power in the sense of control from power in the sense of capacity, it is also important to appreciate how the two are intertwined. The more power the state possesses, the more it matters who controls that power. And the more that political actors doubt that the reins of state power will be held by well-motivated hands, the more they will seek to reduce or eliminate that power. Think of state capacity as a potentially useful but dangerous technology, like nuclear power. The first-best approach to such a technology is to tightly control how it is used, harnessing the benefits while avoiding the risks. But when perfect control is impossible and the downside risks are sufficiently great, we might consider a second-best, risk-averse strategy of preventing development of the technology altogether, or taking steps to outlaw or diminish it. In the case of state power, this nuclear (or no-nuclear) option might be described as state un-building, or “incapacitating” the state.79

This basic set of arguments about controlling, building, and incapacitating state power has provided a template for constitutional debates about government structure since the Founding. The design and ratification of the U.S. Constitution was itself an ambitious project of state-building. Federalists at the Founding sought to construct a stronger, centralized government comparable to those of developed European states.80 Lacking the capacity to effectively borrow money, raise taxes, regulate commerce, promote trade, and fight wars, the national “state” under the Articles of Confederation was pathetically weak. The overarching ambition of the constitutional Framers was to create a centralized government powerful enough to fulfill the fiscal and military requirements of respectable statehood.81

But the colonial experience and revolution had left Americans deeply suspicious of centralized state power. “Standing armies, centralized taxing authorities, the denial of local prerogatives, [and] burgeoning castes of administrators” did not bring back fond memories of the colonial period.82 Debates over the Constitution thus pitted the state-

79 Levinson, supra note 74, at 197 (“Incapacitating a state simply means eliminating or withholding some of the tools or resources that contribute to state capacity — reversing or stunting the process of state-building.”).
81 See id. In addition to their material ambitions, the Framers were also seeking recognition and acceptance for the United States as a full-fledged member of the Europe-centered society of states. See David M. Golove & Daniel J. Hulsebosch, A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition, 85 N.Y.U. L. REV. 932, 952–61 (2010).
82 STEPHEN SKOWRONECK, BUILDING A NEW AMERICAN STATE 20 (1982).
building ambitions of the Convention against fears that a centralized state with expansive fiscal and military capacities would become a Frankenstein’s monster that would turn against its citizens. Antifederalists fanned these flames of doubt,83 missing no opportunity to remind their fellow citizens of “the uniform testimony of history, and experience of society . . . that all governments that have ever been instituted among men, have degenerated and abused their power.”84 If the Federalists got their way, Antifederalists warned, an expansive federal tax bureaucracy would appear in “every corner of the city, and country — It will wait upon the ladies at their toilet.”85 A standing army would allow a dictatorial president or an oligarchical cabal of senators to rule “‘at the point of the bayonet . . . ’ ‘like Turkish janizaries enforcing despotic laws.’”86 In other words: tyranny.

Federalist defenders of the Constitution advanced two kinds of arguments in response. One was that the fiscal and military powers of the national government that the Antifederalists found so threatening were also the powers necessary for national defense, domestic order, and effective governance — the “powers by which good rulers protect the people.”87 To be sure, “in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused.”88 But the Antifederalist prescription for a weak federal government would therefore be tantamount to “cut[ting] a man in two in the middle to prevent his hurting himself.”89 Publius asked incredulously whether “[w]e must expose our property and liberty to the mercy of foreign invaders and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that [the gov-

88 The Federalist No. 41, supra note 1, at 252 (James Madison).
89 Edling, supra note 80, at 93 (quoting Oliver Ellsworth, Speeches in the Connecticut Convention (Jan. 7, 1788) in 15 DHRC, supra note 85, at 273, 277–78).
ernment) . . . might endanger that liberty by an abuse of the means necessary to its preservation.”

At the same time, Federalists argued that the right response to the risks of state power was not to reduce power but to control it. Democratic control over the national government would ensure that it served the interests of citizens and did not become a tool of oppression. In place of the Antifederalist vision of “Congress as some foreign body . . . [that] will seek every opportunity to enslave us,” Federalists urged Americans to recognize that “[t]he federal representatives will represent the people; they will be the people;” their “interest is inseparably connected with our own.” So long as the power of the national government remained securely under the control of the people, Federalists assured, it would only be used for good. That was, after all, the view Antifederalists took toward state governments: states could be trusted with substantial power because they were under the close watch and secure control of their citizens. As the influential Antifederalist Federal Farmer put it, state governments ought to be both “strong and well guarded.”

These lines of debate have been carried through constitutional development to the present. Thus, Jerry Mashaw describes a “three-step process of building and binding administrative capacity” that has characterized the development of the federal administrative state since the early Republic: “First, something happens in the world. Second, public policymakers identify that happening as a problem . . . and ini-

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90 The Federalist No. 25, supra note 1, at 161–62 (Alexander Hamilton).
91 The meaning of “democratic” in the context of the founding debates is complicated. Federalists were “Republicans” in the sense that they believed the government should ultimately be tied to popular sovereignty. But they were at pains to prevent too much direct popular influence over government decisionmaking. See generally Rakove, supra note 84, at 203–43; see also Michael J. Klarman, The Framers’ Coup 244 (Jul. 28, 2016) (unpublished manuscript) (on file with the Harvard Law Review) (emphasizing the Federalists’ antidemocratic ambitions).
92 Gordon S. Wood, The Creation of the American Republic, 1776–1787 545 (1969) (first quoting Samuel Stillman, Address to the Massachusetts Convention, Jan. 9, 1788) in 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 162, 167 [Jonathan Elliot ed., 1888] [hereinafter 2 Debates]; then quoting J.C. Jones, id. at 28, 29; and then quoting Samuel Stillman, id. at 162, 167).
that new forms of governmental action . . . . Third, these new forms of action generate anxieties about the direction and control of public power. Means are thus sought to make the new initiative . . . accountable . . . .” 95 In other words, expansions in administrative state capacity go hand in hand with efforts to secure control over how that greater capacity will be deployed. The more powerful the administrative state becomes, the greater the stakes of who controls it.

These stakes have grown enormously over the course of American political and constitutional development. In the early Republic and antebellum America, the national government truly was “a midget institution in a giant land.” 96 At the start of the Jefferson Administration, the total federal workforce in Washington numbered 153. 97 As of 1840, the national government employed approximately 20,000 people, 14,000 of whom worked for the Post Office. 98 In place of the centralized bureaucratic capacity that defined European states, America operated with a decentralized administrative framework constructed loosely through the locally grounded institutions of courts and political parties. 99 Fast forward to today, when the federal government employs over two million civilians and 1.4 million active duty military personnel. 100 The government is not just visibly larger but — along countless dimensions in the military, economic, and social spheres — vastly more capable.

One reaction to the expansive modern regulatory state is to conclude, simply, that it has become too big and too dangerous, suggesting that the only solution is to shrink or dismantle it. 101 The Antifederalist

98 Ira Katznelson, Flexible Capacity: The Military and Early American Statebuilding, in SHAPED BY WAR AND TRADE: INTERNATIONAL INFLUENCES ON AMERICAN POLITICAL DEVELOPMENT 82, 89 (Ira Katznelson & Martin Shefter eds., 2002).
99 SKOWRONEK, supra note 82, at 19–35.
101 See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004) (arguing that policies that cannot overcome a “Presumption of Liberty” are unlawful, id. at 259); CHARLES MURRAY, BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION (2013) (describing how libertarian freedom has been eroded by the growth of government and urging resistance); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (arguing
ist reaction to state power has lived on as a pronounced libertarian strain in American political and constitutional thought, suspicious of the power of “big government” and ever vigilant about protecting the liberty of citizens against the ubiquitous threat of government tyranny. But Federalist responses have lived on as well. Proponents of a powerful presidency starting with Hamilton have emphasized the incapacity of government to regulate a modern industrial economy and the need for a state capable of matching and managing the “concentrations of [corporate] power on a scale that beggars the ambitions of the Stuarts.”

For those who accept the necessity and desirability of the formidable power of the administrative state, the crucial question is who will control it. From this perspective, “[t]he history of the American administrative state is the history of competition among different entities for control of its policies” — the President, Congress, expert bureaucrats, interest groups, and democratic majorities.

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

against the lawfulness of an administrative state that “increasingly imposes profound restrictions on [Americans’] liberty,” id. at 1; LIBERTY’S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE (Dean Reuter & John Yoo eds., 2016) (cataloging recent exercises of administrative power that threaten individual liberty).

102 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 46 (1938).


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

106 See, e.g., William P. Marshall, Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters, 88 B.U. L. REV. 505 (2008). Some of the variables to which Marshall attributes the expansion of presidential power, such as the growth of the federal bureaucracy and the military and intelligence capabilities of the U.S. government, speak to capacity. See
As the language of “imperialism” suggests, that combination of power poses great risk. Americans have long feared that the presidency would grow from a “foetus of monarchy”\textsuperscript{107} into a full-blown dictatorship, and the vast capabilities of the executive branch suggest that a presidential dictatorship would be more totalitarian than tin pot. On the other hand, as proponents of presidential power starting with Hamilton have emphasized, presidential power can also be a force for good. For those who look to the presidency for “energy”\textsuperscript{108} and efficacy in government and on the world stage, imperial power is cause for celebration. For example, Professors Eric Posner and Adrian Vermeule approvingly describe how modern presidents have unshackled themselves from outdated constraints on executive capacity, such as constitutional rights and congressional limitations, and seized nearly complete control over the national state.\textsuperscript{110} This perspective in part reflects what Posner and Vermeule portray as the indispensable benefits of presidential power: “[t]he complexity of policy problems . . . the need for secrecy in many matters of security and foreign affairs, and the sheer speed of policy response necessary in crises” play to the executive’s distinctive institutional strengths.\textsuperscript{111} If efficacious governance is going to come from anywhere, it will be the White House.

At the same time, Posner and Vermeule emphasize that the risks of presidential power are mitigated by the President’s tightly reined accountability to public opinion. For Posner and Vermeule, “tyrannophobi[c]” fears of unbounded presidential power founder on the plebiscitary accountability of presidents to the American public.\textsuperscript{112} Other theorists take a similar view of “the presidency’s rise as not just the most dangerous branch, but the most accountable branch as well.”\textsuperscript{113} Thus, Professor Jack Goldsmith describes how the menacing

\textsuperscript{107} This was Edmund Randolph’s description of the presidency at the Philadelphia Convention. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 66 (Max Farrand ed., 1911).

\textsuperscript{108} See THE FEDERALIST NO. 70, supra note 1, at 421 (Alexander Hamilton) (“Energy in the executive is a leading character in the definition of good government.”).


\textsuperscript{110} See POSNER & VERMEULE, supra note 4.

\textsuperscript{111} Id. at 9.

\textsuperscript{112} See id. at 176 (describing “the fear of unbridled executive power” in American political and constitutional culture as “tyrannophobia”). On the plebiscitary accountability of the modern presidency, see supra note 11 and accompanying text. To avoid confusion, note that “plebiscitary” is sometimes used in a different and nearly opposite sense to mean accountable only at election time but unaccountable to Congress, the press, or the public while actually governing. See, e.g., SCHLESINGER, supra note 6, at 255.

\textsuperscript{113} Flaherty, supra note 3, at 1731.
power of the post-9/11 presidency has given rise to a “synopticon” of “watcher[s]” — Congress, journalists, human rights advocates, lawyers, and judges — who monitor, publicize, and check the President’s every move.114 In Goldsmith’s view, expansive executive power begets intensive accountability, which in turn legitimizes presidential power and even strengthens it.115 Capacity and control — or in Goldsmith’s synonymous title, Power and Constraint — go hand in hand.116

Skeptics of the imperial presidency, like the Antifederalists at the Founding, are less sanguine about the possibility of democratic control. Professor Bruce Ackerman’s alarmist view of the modern presidency, for instance, is premised on democratic breakdown resulting in a “runaway presidency.”117 Responsive to this concern, Ackerman proposes a set of reforms designed to bring the President back under democratic and legal control by “Enlightening Politics”118 and “Restoring the Rule of Law.”119 But Ackerman goes further, urging not just that the presidency be controlled but also that it be incapacitated — by limiting authority to engage in sustained military actions,120 fragmenting the unitary and hierarchical structure of the executive branch,121 or even eliminating the presidency altogether.122 As Ackerman recognizes, draining the presidency of power would come at a high cost to proponents of “activist government — dedicated to the on-going pursuit of economic welfare, social justice, and environmental integrity.”123 Nonetheless, in light of the grave downside risks, Ackerman is prepared to make this “tragic choice[].”124

114 GOLDSMITH, supra note 12, at xi–xiii, 206.
115 Id. at xv–xvi.
116 Stephen Skowronek sees a similar complementarity between capacity and control in the broad sweep of American political development with respect to the presidency, with each major historical expansion of presidential power accompanied by a corresponding effort to increase democratic accountability and control. Stephen Skowronek, The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive, 122 HARV. L. REV. 2070 (2009).
117 ACKERMAN, supra note 2, at 6. Ackerman argues that the democratic accountability of the President is being undermined by the diminishing influence of party elites and the professional press as gatekeepers, id. at 18–29, and by a resulting “politics of unreason” that fogs democratic decisionmaking, id. at 9.
118 Id. at 119–40.
119 Id. at 141–79.
120 See id. at 168.
121 See id. at 152–59.
122 See Bruce Ackerman, The New Separation of Powers, 113 HARV. L. REV. 633, 727–28 (proposing that the United States switch to a modified parliamentary system of government).
123 ACKERMAN, supra note 2, at 124.
124 Id. The original critic of the imperial presidency, Arthur Schlesinger, struggled with the same dilemma but came out in a different place. Schlesinger argued that we should seek a “means of reconciling a strong and purposeful Presidency with equally strong and purpose-
Longstanding debates about the separation of powers track the same dilemma of state power and dialectic between capacity and control. In one view, the primary point of separationism is to “preserve liberty by disabling government.” Dividing the government into separate branches and chambers that must act in concert serves to multiply veto points, increase transaction costs, and make it generally more difficult for the national government to impose tyranny, threaten liberty, or do anything else. For those who believe that the “facility and excess of lawmaking seem to be the diseases to which our governments are most liable,” any “additional impediment” against legislation will be welcome. As Hamilton summarized the argument, “[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.” Contemporary libertarians make much the same calculation.

A competing strain of thought is that the separation of powers might actually foster government efficiency, in the manner of a Fordist assembly line. See Akhil Reed Amar, America’s Constitution 64 (2005) (“Separation of powers also facilitate[s] a certain degree of specialization of labor, enabling each branch to . . . operate more efficiently.”); Louis Fisher, The Efficiency Side of Separated Powers, 5 J. AM. STUD. 113, 115 (1972) (“[F]or the Framers, efficiency was a fundamental goal and a separate executive the necessary means.”); see also Magill, supra note

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

The Federalist No. 62, supra note 1, at 376 (James Madison).

The Federalist No. 73, supra note 1, at 442 (Alexander Hamilton).

See, e.g., Richard A. Epstein, The Classical Liberal Constitution 5–6 (2014) (“[T]he classical view of American constitutionalism examined all legal interventions under a presumption of error. The structural protections of the separation of powers, checks and balances, and the individual rights guarantees built into the basic constitutional structure were all part of combined efforts to slow down the political process that, left to its own devices, could easily overheat.”); see also Stephen Gardbaum, Political Parties, Voting Systems, and the Separation of Powers, 65 AM. J. COMPARATIVE L. (forthcoming 2017) (draft at 43) (attributing “the Madisonian focus on divided government and political competition among institutions” in the U.S. political system to “[t]he risk-averse strain in American political culture
other proponents of powerful government have long lamented a constitutional design that created a government “divided against itself” and thereby “deliberately and effectively weakened.” Exacerbated by polarized political parties and divided government, separation of powers-induced gridlock is now more than ever a source of frustration for those who look to government in Washington for solutions to pressing social problems.

Here again, whether gridlocked and inefficient government is a bug or a feature will depend on predictions of what an unfettered national state might use its power to accomplish. These predictions, in turn, will depend on who is likely to control the direction of the federal government. One dark possibility, salient at the Founding, was that control over one or more branches of government would fall into the hands of venal officials or dominant and dangerous factions. In his Federalist No. 51, Madison famously defended the incapacitating potential of the separation of powers as an “auxiliary precaution” in case the right kind of democratic control over the government — whether stemming from its democratic “dependence on the people” or the hope that “enlightened statesmen will . . . be at the helm” — failed. From this perspective, the incapacitating potential of separation of powers was supposed to be a substitute for reliably well-functioning democratic accountability.

But separation of powers has also been viewed as a complement to democratic accountability. From this perspective, legislative-

that is deeply skeptical and fearful of government,” and has therefore prioritized “dispersing and slicing up political power”).

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

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


See Levinson & Pildes, supra note 29, at 2343–44.
executive separationism is supposed to facilitate broad-based interest representation and work together with elections to better reflect democratic will: “different branches chosen at different times through different voting rules might together produce a more accurate and more stable composite sketch of deliberate public opinion.” Moreover, the branches are supposed to monitor and check one another on an ongoing basis, providing information to voters about the doings and misdoings of their representatives and thereby facilitating electoral control. To the extent the system of separation of powers succeeds in fostering democratic accountability, it will no longer be needed as an incapacitation device. The complementary relationship between power over the state and the power of the state might make the separation of powers self-defeating.

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

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138 Ambar, supra note 125, at 64.
139 See Nzelibe & Stephenson, supra note 136, at 626. Nzelibe and Stephenson advance the further argument that separation of powers can facilitate electoral control by informing the retrospective voting strategies of rational voters. Id. at 620–21.
140 It is not at all clear that the separation of powers improves democratic accountability in comparison to plausible alternatives. A long line of thought compares the U.S. system of separation of powers unfavorably along this dimension to the British system of parliamentary government, unified by single party control of an omnipotent legislature. From this perspective, the American diffusion of power among the branches and chambers of Congress, especially when they are under divided party control, undermines the ability of voters to apportion responsibility. See Levinson & Pildes, supra note 29, at 2325–26, 2342–43. Other approaches to dividing power might do a better job of facilitating electoral accountability. See, e.g., Jacob E. Gersen, Unbundled Powers, 96 VA. L. REV. 301 (2010) (exploring the possibility of dividing government into branches not by function but by policy topic and suggesting that approach might enhance electoral control).
142 See, e.g., Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 HARV. L. REV. 915, 917 n.3 (2005) (viewing government institutions as exercising power whenever they make policy by legislating, regulating, or adjudicating).
II. From Institutions to Interests

Structural constitutional law is focused on how power is distributed among government institutions — Congress, the President, agencies, and the like. The previous Part described a number of challenges in this regard. But the difficulty of locating power goes deeper. The ultimate holders of power in American democracy are not government institutions but democratic interests: the coalitions of policy-seeking political actors — voters, parties, officials, interest groups — that compete for control of these institutions and direct their decisionmaking. Locating policymaking power therefore requires not only identifying the relevant institutional decisionmakers but also “passing through” the power of each institution to the underlying interests that control its decisionmaking.\(^2\)

The gap between the power of institutions and the power of interests provides a parsimonious explanation for some familiar features of political behavior and constitutional disputation. Because power-seeking political actors are intrinsically indifferent to the distribution of power at the institutional level, government institutions will have no hard-wired or consistent tendency to aggrandize their own power or compete with one another for power. And policy-minded actors will tend to derive their views about how power should be distributed at the institution level based on politically contingent observations or predictions about how that power will be passed through to interests.

— causing their institutional level judgments to shift with the political winds (or “flip-flop”).

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

A. Institutional Indifference

There is a striking discrepancy between constitutional law’s intense concern with how power is distributed among government institutions and the indifference to institutional power that is on daily display among power-seeking political actors — including the officials who populate these institutions. That indifference is telling of where meaningful power is located: not at the level of institutions but at the level of interests.

1. Passing Through Power

Let us return to the distinction between “doing” and “deciding.”

Government acts through institutions — Congress (subdivided into the House and Senate, committees, etc.), the executive branch (similarly subdivided into the White House, various agencies, etc.), and courts most prominently. But these institutions do not decide what government does. The actual deciders, and hence holders of power, are the political actors who control the relevant institutions. These actors include, most proximately, the government officials who populate the branches and units of government and direct their decisionmaking — the President, members of Congress, heads of agencies, and and other high-level public employees. Government officials, in turn, represent and are influenced in varying degrees by electoral majorities, political parties, interest groups, and other “democratic” constituencies.


292 See supra note 164 and accompanying text.

293 But cf. Howell & Moe, supra note 7, at 47–62 (arguing that the parochial outlook of individual members of Congress results in cobbled together collections of special interest provisions rather than coherent and effective policy programs).
Officials and their democratic constituencies form coalitions based on shared policy goals and compete for control over government institutions in order to advance those goals. These policy-based coalitions, or *interests*, are the ultimate deciders in government.

That, in a nutshell, is how democracy works. Of course, there are many complications embedded in this caricature. Among these is the relationship between government officials and the democratic-level constituencies that influence their decisionmaking. How decisional power is, and should be, divided between democratic principals and their representative agents are among the most well-worn topics in political science and theory.294 This is another level at which it is important to distinguish between the visible “doers” — government officials — and the democratic actors — voters, interest groups, political parties, and the like — who are, to a considerable extent, the actual “deciders.”

For present purposes, however, the important point is that government decisionmaking is driven by the policy preferences of the officials and democratic-level constituents — in whatever combination — that comprise interest-based political coalitions. As a result, parsing political decisionmaking power requires a two-level analysis. The first step is to identify the relevant institutional decisionmakers — Congress, the President, agencies, and the like — and weigh their relative influence. The second, and crucial, step is to “pass through” the power of each institution, allocating it among the controlling interests.

Because structural constitutional analysis typically begins and ends at the first level, the distribution-of-power consequences of structural controversies are left obscure. We might wonder, for instance, how decisional power is redistributed when Congress creates independent agencies, insulated from presidential control by for-cause limitations on removal. Confronted with the dual for-cause buffer between the President and the Public Company Accounting Oversight Board (PCAOB) created by the Sarbanes-Oxley Act, the Supreme Court concluded that this arrangement impermissibly diminished presidential power over agency decisionmaking, leaving PCAOB decisionmaking to unelected “functionaries” while also “provid[ing] a blueprint for extensive expansion of the legislative power.”295 Even if this assessment of institution-level power is correct, however, it tells us nothing about resulting pow-

294 At the level of normative theory, see, for example, Hannah Fenichel Pitkin, *The Concept of Representation* (1967). At the level of descriptive political science, see, for example, *Democracy, Accountability, and Representation* (Adam Przeworski et al. eds., 1999).

er of interests or policy consequences. For all we know, the same interest-based constituencies will exercise the same relative influence over PCAOB policymaking regardless of whether that influence is channeled through the President, Congress, or the SEC and the PCAOB more directly.

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

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

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

For those who take a longer view, the interest-level consequences of institutional power very quickly become unpredictable. This is one of the important points of Elizabeth Magill’s pioneering work on separation of powers. Magill asks: Suppose we simply got rid of the Senate’s advice and consent on treaties and the nominations of judges and executive officials, making the President sole decider and thus (let us assume) increasing the power of the President relative to the Senate. Would there be any predictable effects on the power of democratic-level actors that would shift substantive policy in any particular direction? In the short run, surely; but in the longer run, perhaps not. As Magill explains, the groups:

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

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300 See Posner & Sunstein, supra note 291.
301 See Magill, supra note 30, at 640–41.
302 Id.
303 Id. at 641. Aziz Huq draws a similar conclusion about the effect of expanding or contracting presidential power on individual liberty: Given the lack of “strong correlations between branch power and the preservation of individual liberties,” Huq argues, the most we can say is that “[e]xpansions of presidential power . . . can either enlarge or contract regard for individual
Something similar might be said about any structural reallocation of power that is meant to endure beyond the next election cycle. When decisions about institutional power have no effect, or no predictable effect, on the relative power of competing interests, policy-minded political actors will view structural controversies as a matter of indifference. Behind a veil of ignorance as to the constellation of interests that will control the relevant institutions and consequently the policy consequences of institutional choice, there may be little reason to do more than shrug.  

Veils of ignorance with respect to the power of interests over institutions come in varying degrees of opacity. Over long time horizons, it really is hard to come up with reliable generalizations about differences at the highest levels of constitutional structure. In the domain of separation of powers, conventional wisdom once held that the President, elected by a national majority, tends to be more responsive to the median voter, whereas members of Congress are more accountable to the geographically localized constituencies and interest groups they depend upon for reelection. Upon closer inspection, however, that institutional caricature turned out to be theoretically and empirically dubious. Comparable hypotheses about the states and the national government advanced in the context of federalism have proven similarly suspect.  

Liberties depending upon whether the executive is displacing a Congress with either more authoritarian or more libertarian preferences.” Aziz Z. Huq, Libertarian Separation of Powers, 8 N.Y.U. J.L. & LIBERTY 1006, 1037 (2014).

See Posner & Sunstein, supra note 291, at 495–96, 527–28. On the use and operation of “veil of ignorance” mechanisms generally in public law, see generally ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY 31–71 (2007). Again, however, political actors can cast off the veil by deciding institutional questions one case at a time, on the basis of predictable policy outcomes — flip-flopping. Alternatively, political actors can try to gerrymander the dimensions of institutional power. For example, conservatives will tend to support constraints on the President’s treaty-making authority that apply predominantly in the context of human rights and do not interfere with negotiating free-trade agreements. See Jide Nzelibe, Our Partisan Foreign Affairs Constitution, 97 MINN. L. REV. 838, 842 (2013); Jide Nzelibe, Partisan Conflicts over Presidential Authority, 53 WM. & MARY L. REV. 389, 392 (2011).


See Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. REV. 1217 (2006); see also STEPHENSON, Statutory Interpretation by Agencies, supra note 164, at 303–04 (collecting and discussing the theoretical and empirical literature on this point).

Federalism may implicate a predictable policy slant for reasons other than differences in interest-level power. Decentralization of governance reliably impedes some forms of regulation and economic redistribution by making it more difficult to deal with externalities and by creating a race to the bottom with respect to wealth transfers. Not surprisingly, then, while views on the allocation of decisionmaking authority between the national government and the states are often driven by case-specific policy consequences and flip politically depending on the issue, see Ed-
al environmental regulation would be predictably more stringent than state regulation because state regulators would be hindered by disproportionate industry influence and because interstate competition that would create a “race to the bottom.” Neither turns out to be reliably true.308

On the other hand, even over the long term, some lower-level government institutions might well be systematically more susceptible to influence by certain kinds of interests, resulting in predictable policy slants. Agencies, for example, can be structured to “stack the deck” in favor of certain interests.309 The Supreme Court, for its own part, seems to display a reliable, modestly countermajoritarian tendency to give effect to elite preferences on social issues like free speech, gay rights, and school prayer.310 Moreover, as will be discussed further below, there have been periods of decades in American history when, owing to the vagaries of politics, certain interests have had sufficiently stable control over institutions such that they could be reliably empowered or disempowered through shifts in the separation of powers or federalism.311 For participants in antebellum contests over slavery or the race-related controversies of the civil rights era, the interest-level stakes of federalism were crystal clear. So, too, were the consequences of activist judicial review, whether by the Taney or Warren Courts. During the forty-year period when Democrats controlled the House of Representatives or the twenty-year period when Presidents Roosevelt and Truman sat in the White House, the partisan stakes of separation of powers were similarly transparent. The same has been true of the Supreme Court for periods as long as a generation when the ideological leanings of the justices have been predictably to one side or the other of the political branches.312


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

309 See infra notes 424–26 and accompanying text.


311 See infra notes 366–86 and accompanying text.

312 See Barry Friedman, The Cycles of Constitutional Theory, 67 L. & CONTEMP. PROBS. 149 (2004) (describing how theoretical defenses and criticisms of judicial review have coincided with the political slant of the Supreme Court as compared to the political branches). Friedman writes:
And then, of course, there is the short-term and the present, when it has become transparent which interests influence which institutions. At that point, the policy consequences of structural power will be visible to all, and political actors will form institutional preferences accordingly — even if this requires them to flip-flop. But let us not lose sight of the general point, from which the flip-flopping and all the rest follows. The policy consequences of how power is distributed at the level of government institutions depend on how that power is passed through to interests. A myopic focus on power at the level of constitutional structure misses most of the action.

2. Power-Hungry Institutions?

The failure to pass through power from institutions to interests also accounts for an entrenched set of misunderstandings about the dynamics of power in the structural constitution. Broad swathes of the law and theory of the structural constitution are based on a “Madisonian” model that features perpetually power-seeking government institutions seeking to expand their policymaking turf at the expense of rivals.313 In the domain of separation of powers, the perpetual risk is that the self-aggrandizing branches of the national government will encroach on the power of their rivals, while the optimistic hope is that the interbranch competition for power will result in a balanced equilibrium of “[a]mbition . . . counteract[ing] ambition.”314 Much of the law and theory of constitutional federalism similarly supposes that an imperialistic national government intent on consolidating all government pow-

“[F]rom 1890 until 1937 it was possible to know what side one was on. The courts were conservative. The political branches were (more) progressive. . . . All of that changed in the period between 1937 and 1968. Things flipped. The Court became the progressive force for change, and the ‘political’ branches . . . were decidedly more conservative.” Id. at 157.

Indeed, such extended patterns of partisan or coalitional control seem to shape perceptions of institutional policy slants even after the patterns of control have changed. More than half a century after Brown v. Board of Education, many remain attached to a view of the Supreme Court as a heroic protector of minorities and leader of progressive social change. See Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 VA. L. REV. 1–2, 6–7, 18–23 (1996) (attributing the popular “myth of the heroically countermajoritarian Court,” id. at 6, largely to Brown); James L. Gibson & Gregory A. Caldeira, Blacks and the United States Supreme Court: Models of Diffuse Support, 54 J. POL. 1120, 1134 (1992) (describing how an increasingly conservative Court has maintained the support of a cohort of African Americans who continue to see Warren Court decisions like Brown as salient); see also Laura Kalman, Border Patrol: Reflections on the Turn to History in Legal Scholarship, 66 FORDHAM L. REV. 87, 90 (1997) (“Because of the nation’s experience with the Warren Court, legal liberalism has been linked to political liberalism since mid-century.”). Federalism, conversely, remains tarnished by its historical association with slavery, Jim Crow, and the empowerment of Southern racists. See Gerken, Foreword, supra note 20, at 48 (observing that many continue to understand federalism as a “code-word for letting racists be racist”).

313 Although this model is based on some sentences of Madison’s Federalist 51, it is in other ways inconsistent with what Madison himself seems to have thought and in other places said. See Levinson, supra note 142, at 943–44, 959–60.

314 The Federalist No. 51, supra note 1, at 319 (James Madison).
er will make every effort to usurp the power of the states, while states will fight back to protect and enlarge the scope of their policymaking domain.

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

The institutional indifference of policy-seeking political interests helps explain a familiar set of real-world political dynamics that seem entirely mysterious on the Madisonian model of power-seeking institutions. Prominent among these is the “separation of parties” observation that competition and conflict between the branches of government is driven primarily by patterns of partisan control. When Republicans control Congress and a Democratic President sits in the White House, no one is surprised to see Democrats in the House and Senate encouraging the President to take unilateral action with respect to environmental regulation, immigration reform, or humanitarian interventions abroad. Nor is anyone surprised when Congress delegates extensively to an executive branch controlled by the same party in order to better advance a shared policy agenda. Indeed, during periods like the present, when the two major parties are ideologically coherent and highly polarized, it is only slightly an exaggeration to say that the American system of government has not one separation of powers system but two. When control over the branches of the national government is divided by political party and party lines therefore track branch lines, partisan competition is channeled through the branches, generating a simulacrum of Madisonian rivalry, competitive ambition, and checks and balances. When government is unified by political party, however, intraparty cooperation tends to trump interbranch

315 See generally Levinson, supra note 142.
316 THE FEDERALIST NO. 51, supra note 1, at 318 (James Madison).
317 See Levinson & Pildes, supra note 29, at 2315.
competition. This is simply because party affiliation will often — though certainly not always\(^\text{318}\) — serve as a strong predictor of interest-based policy agreement and disagreement at the institutional level.

Something similar is true in the domain of federalism. As Professor Jessica Bulman-Pozen has elaborated, in the American system of federalism, states serve as sites of partisan mobilization and political contestation that cut across and bear no consistent relationship to the division of power between the states and the national government.\(^\text{319}\) Thus, “[p]ut in only slightly caricatured terms, Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans.”\(^\text{320}\) Not surprisingly, therefore, the constitutional challenge to the power of Congress to enact the Patient Protection and Affordable Care Act — enacted by a Democratic President and a Democratic-controlled Congress without a single Republican vote — was brought by Republican officials in twenty-seven states without a single Democratic state official signing on.\(^\text{321}\) Likewise, of the twenty-four states that have joined the pending legal challenge to the EPA’s Clean Power Plan, all but a handful are red.\(^\text{322}\) For federal officials, as well, partisan policy goals typically take precedence over the power of the national government. While the EPA during the G. W. Bush Administration was taking no action on climate change, Democratic members of Congress threw their support behind the regulatory efforts of California, attempting to protect the state’s policies against federal preemption.\(^\text{323}\)

Partisan-driven dynamics like this undermine the Madisonian premises of process federalism. The “political safeguards” perspective on state-federal relations presumes that states will have some intrinsic motive to protect and expand their own power by pushing back against national regulatory incursions — “preserv[ing] the regulatory authority of state and local institutions to legislate policy choices.”\(^\text{324}\) But the ability of state officials to influence national decisionmaking will not lead to less federal regulation if state officials and their constituents do not want less federal regulation and may in fact prefer more of it.\(^\text{325}\) By the same token, in the absence of any consistent im-

\(^{318}\) On some issues, cleavages based on geography, economic interests, or other variables will cut across party lines. See id. at 2324.


\(^{320}\) Id.

\(^{321}\) Id. at 1078–79.


\(^{323}\) See Bulman-Pozen, supra note 319, at 1101–02.

\(^{324}\) Kramer, supra note 153, at 222.

\(^{325}\) See Levinson, supra note 147, at 941.
perial motivation on the part of federal officials, the problem of federal aggrandizement that the political safeguards were supposed to solve also disappears. 326

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

B. The Interest-Level Stakes of Constitutional Structure

The central organizing principle of the structural constitution is that power should be divided, diffused, or balanced to prevent the “accumulation of all powers . . . in the same hands” and hence “tyranny.” 327

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

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

1. Separation of Powers Minus Mixed Government

A time-honored strategy of constitutional design is to balance the power of competing social and political interests in the structure of

326 Id. at 942–43.
327 The Federalist No. 47, supra note 1, at 298 (James Madison).
government. This is the theory of mixed government, based on the idea that “the major interests in society must be allowed to take part jointly in the functions of government, so preventing any one interest from being able to impose its will upon the others.”328 Historically, the major social interests have been most commonly identified in terms of economic status or class: nobles and commons in the British tradition, occupational guilds in the Florentine Republic, and the like. But the essential feature of mixed, or “balanced,” government is that the major social and political interests, however defined, are represented in the institutional structure of government. The idea is to give each of these interests sufficient influence over government decisionmaking so that no one can consistently prevail over the others.329

The mixed government tradition has been carried through to the modern world in the form of “consociational” democratic design.330 Conceived as a strategy for bringing peace and stability to societies deeply divided along ethnic or religious lines, the consociational approach institutionalizes power sharing among the major groups in society through a set of structural arrangements that includes grand coalition cabinets, proportional representation in the legislature, and mutual veto power over important government decisions.331 Like mixed government, consociationalism is supposed to prevent political domination by a single group, guaranteeing all groups a voice in, and typically an effective veto over, government actions that affect their vital interests. As the leading theorist of consociationalism puts it, the overarching goal “is to share, diffuse, separate, divide, decentralise, and limit power.”332

The intellectual tradition of mixed government was deeply influential in shaping the system of separation of powers that became part of the U.S. constitutional design, but was also a source of great ambivalence for the Framers. Many admired the British system of representation, which had been conceived on the mixed government principle to empower and balance the three major social orders, or estates of the realm: the monarchy, the nobility, and the people, who were represented in government, respectively, by the King, the House of Lords, and

329 On the intellectual and political history and theory of mixed government, see generally SCOTT GORDON, CONTROLLING THE STATE (1999).
332 Arend Lijphart, Consociation: The Model and Its Applications in Divided Societies, in POLITICAL CO-OPERATION IN DIVIDED SOCIETIES 166, 168 (Desmond Rea ed., 1982).
the House of Commons.333 Yet by the time of the Founding, most Americans had rejected the division of society into stable classes or interests. The hope was that the American republic would level over hereditary class distinctions and replace them with cross-cutting distinctions that were “‘various and unavoidable,’ so much so that they could not be embodied in the government.”334 This would make mixed government both impossible and unnecessary.

Nonetheless, the idea that power ought to be divided and balanced among different components of government did not disappear. Some Federalists, believing that the country should be run by “the rich and well born,”335 and appalled by the prospect of populist democracy controlling the entirety of government,336 retained an attraction to the idea of a bicameral legislature with an upper house that represented property owners or the wealthy.337

At the same time, Founding-era political thought had fixated on a very different, and more recent, set of ideas relating to separation of powers growing out of conflicts between the Crown and Parliament in seventeenth-century England and theorized by the great “oracle” Montesquieu.338 Here, the notion was that three qualitatively different types of government power — legislative, executive, and judicial — should be assigned to separate government departments, administered by different personnel. The idea of separating qualitatively different powers is entirely different from the mixed government idea of creating concurrent or shared powers among competing groups as a barrier to unilateral decisionmaking or domination. As the British system exemplified, mixed government could be accomplished by representing the major interests in a single, omnipotent branch, with no need for separating governmental powers into multiple branches.339 And presumably, from a mixed government perspective, if important governmental powers were institutionally divided, the relevant interests would need to be represented in each branch.

333 Wood, supra note 92, at 199.
334 Id. at 506–07.
336 See Klarmann, supra note 91; see also Wood, supra note 92, at 506 – 15.
337 There were some in the Convention who would have preferred to preserve this role for the Senate. See John Hart Ely, The Apparent Inevitability of Mixed Government, 16 Const. Comment. 283, 284 (1999); see also Akhil Reed Amar, America’s Constitution: A Biography 66 (2005) (describing Gouverneur Morris’s arguments for a Senate comprised only of men with “great personal property” and possessing “the aristocratic spirit”).
338 See The Federalist No. 47, supra note 1, at 298–301 (James Madison).
339 See Rakove, supra note 84, at 245.
The U.S. constitutional scheme of separation of powers combines these two design strategies in a different way.340 Following Montesquieu’s suggestion, the Constitution assigns each of the three types of government power to a different branch of government, differentiated by function and personnel. At the same time, the Constitution sacrifices the supposed benefits of functional separation and differentiation by giving the branches a set of “checks and balances” over one another, preventing unilateral action and requiring mutual cooperation to accomplish the tasks of governance. This is the legacy of mixed government, except now substituting functionally differentiated branches for social and political interests — and thereby sacrificing the entire point. Indeed, a naïve observer might view this creation as combining the worst of each constitutional design strategy and missing the point of both.

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

If government [is] in the hands of the few, they will tyrannize over the many. If (in) the hands of the many, they will tyrannize over the few. It ought to be in the hands of both; and they should be separated. . . . Gentlemen say we need to be rescued from the democracy. But what the means proposed? A democratic assembly is to be checked by a democratic senate, and both these by a democratic chief magistrate. The end will not be answered — the means will not be equal to the object.341

Antifederalist critics of the Constitution concurred. As Patrick Henry put it, “To me it appears that there is no check in that government. The President, senators, and representatives, all, immediately or mediately, are the choice of the people.”342 And the Federal Farmer dismissed “the partitions” between House and Senate as “merely those of the building in which they sit: there will not be found in them any of those genuine balances and checks, among the real different inter-

340 On the fusion of mixed government and separation of functions in the U.S. constitutional design, see W. B. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965); RAKOVE, supra note 84, at 245–56; VILE, supra note 328, at 36–40; Magill, supra note ERROR! Bookmark NOT DEFINED., at 1161–67.
ests, and efforts of the several classes of men in the community we aim at."

Unable to comprehend what the Framers had actually accomplished, John Adams charitably concluded that the constitutional design must have meant to create mixed government in accordance with the traditional model — institutionalizing a class divide between the aristocracy and the masses by providing separate legislative chambers for each, higher and lower, mediated by an independent executive power. Adams was on to something: many Federalists left Philadelphia with the hope that the Senate would play this role in a de facto way, owing to the indirect election and lengthy terms of senators, who were also likely to be chosen from among the elite. At least officially, however, the constitutional structure of government was created on the premise that all of the branches of government would be equally democratic, representing "the people." As Gordon Wood describes, "Americans had retained the forms of the Aristotelian schemes of [mixed] government but had eliminated the substance, thus divesting the various parts of the government of their social constituents. Political power was thus disembodied and became essentially homogeneous." Madison’s protracted attempt to rationalize the constitutional design just highlights how the political logic of mixed government is lost when branches are substituted for social interests. The threat of political dominance and oppression by an unchecked aristocracy or an uncontrolled mob is converted into the threat of a “legislative department . . . everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.” Rivalrous social groups whose power might be balanced in a well-designed system of mixed government are replaced by “the interior structure” of the national government, which might be “so contriv[ed] . . . as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” In the manner of class politics, these branches are to be pitted against one another in a competition for

344 See Wood, supra note 92, at 567–87.
345 See KLARMAN, supra note 91, at 394. Antifederalists, for their own part, suspected that the Senate, as well as the presidency, had been designed to ensure that the government would be controlled by the aristocracy. See id. at 363, 367; see also WOOD, supra note 92, at 516 – 18.
346 See Wood, supra note 92 at §84 (“[T]he parts of the government had lost their social roots. All had become more or less equal agents of the people.”). The Anti-Nobility Clause is a textual marker of this view. See U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States.”).
347 See WOOD, supra note 92 at 604.
348 THE FEDERALIST NO. 48, supra note 1, at 326 (James Madison).
349 THE FEDERALIST NO. 51, supra note 1, at 317–18 (James Madison).
power, creating a stable equilibrium in which “[a]mbition . . . counteract[s] ambition.” The hybrid origins of our constitutional system of separation of powers echo loudly and incoherently in Madison’s much-cited maxim: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

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

Yet the idea of interest balancing did not disappear altogether from the structural constitution. A residual attempt at interest representation and balancing at the Founding was motivated by the sectional divide over slavery. As Madison reminded his fellow delegates in Philadelphia, “the great division of interests in the United States . . . did not lie between the large and small states. It lay between the northern and southern” and this division came “principally from the effects of their having, or not having, slaves.” Invoking the basic principle

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350 Id. at 319.
351 THE FEDERALIST NO. 47, supra note 1, at 298 (James Madison).
352 THE FEDERALIST NO. 51, supra note 1, at 320 (James Madison).
353 Id. at 321; see also THE FEDERALIST NO. 10, supra note 1, at 78 (James Madison).
354 THE FEDERALIST NO. 51, supra note 1, at 321 (James Madison).
355 Id. at 322.
356 See RAKOVE, supra note 84, at 282–83.
that “every peculiar interest whether in any class of citizens, or any description of states, ought to be secured as far as possible,” Madison proposed at the Convention that the structure of government be designed to provide Northern and Southern with a mutual “defensive power” to protect their distinctive sectional interests. Specifically, Madison suggested that one branch of the national legislature be apportioned according to states’ free populations while the other was apportioned according to total population, with slaves and free persons counting equally.

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

Things did not go as planned. The founding bargain reflected the shared belief that population growth would be faster in the South than the North. In fact, however, the population and political power of the North quickly outpaced that of the South, giving the North a decisive advantage in the House and eventually the Electoral College. Politically vulnerable to Northern dominance over the national government, Southerners sought other structural safeguards. One possibility was the Senate. With the enactment of the Missouri Compromise, a political understanding developed that equal representation of Northern and Southern states in the Senate that currently prevailed would be preserved. This “sectional balance” rule became a quasi-constitutional substitute for the original constitutional bargain over slavery.

Much of Southern political thought in the antebellum period was directed toward concocting further options for institutionalizing the

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358 KLARMAN, supra note 91, at 257 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 486 (Max Farrand, ed.) (1911) (Statement of James Madison).
359 Id. at 258.
360 See GRABER, supra note 357, at 103.
361 See id. at 126–27.
power of white Southerners to defend slavery. This was the project of John C. Calhoun, who laid the groundwork for contemporary consociationalism with his proposals for “concurrent voice” or “concurren
tent majority” arrangements. As Calhoun explained:

[T]he adoption of some restriction or limitation which shall so e f-
fectually prevent any one interest or combination of interests from ob-
taining the exclusive control of the government . . . . can be accom-
plished only in one way, . . . by dividing and distributing the powers of
government [to] give to each division or interest, through its appropri-
ate organ, either a concurrent voice in making and executing the laws
or a veto on their execution.

Calhoun and other Southern politicians proposed a number of institu-
tional arrangements along these lines, including a dual executive,
with one President elected by the North and a second by the South,
and a similar sectional balance requirement for Supreme Court Justic-
es.

Without these consociational innovations, Calhoun stressed, the
constitutional separation of powers — the “division of government into
separate, and, as it regards each other, independent departments” —
was of no use to vulnerable minorities like Southern slaveholders, be-
cause it did nothing to prevent a majority from seizing control of all
the branches of government and exercising absolute power. Nor, in
Calhoun’s view, was Madison’s Federalist 10 solution of fragmented
pluralism likely to prevent the formation of a unified, stable majority
faction. Even “[i]f no one interest be strong enough, of itself, to obtain
[a majority],” Calhoun explained, “a combination will be formed be-
tween those whose interests are most alike — each conceding some-
thing to the others, until a sufficient number is obtained to make a ma-
jority.” In particular, Calhoun believed that political parties would
facilitate the organization of majority coalitions and ensure their abil-
ity to control the whole of government. The only way to create a
structural safeguard against the tyranny of an inevitable majority par-

363 See JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1789–1861: A
STUDY IN POLITICAL THOUGHT, 77–82 (Univ. of S.C. Press 1990) (1930). On the connec-
tions between Calhoun’s concurrent majority and contemporary consociationalism, see JAMES H.
READ, MAJORITY RULE VERSUS CONSENSUS: THE POLITICAL THOUGHT OF JOHN C.
CALHOUN, 199–204 (2009).

364 JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND SELECTIONS FROM
365 See CARPENTER, supra note 363, at 94–95, 98–99.
366 READ, supra note 364, at 14 (quoting CALHOUN, supra note 364, at 27).
367 CALHOUN, supra note 364, at 27.
368 See READ, supra note 363, at 49–50.
of the distinct interests or portions of the community; and to clothe each with a negative on the others.”

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

Other constitutional democracies have taken that road in recent decades, implementing a variety of consociational arrangements that provide “formal power-sharing along the major axes of social division.” An illuminating, if fleeting, example of consociationalism in practice comes from South Africa. Seeking to protect the interests of white elites against domination by a black majority in the transition from apartheid to democracy, the ruling National Party in South Africa proposed a consociational power-sharing arrangement that included rotation between white and nonwhite Presidents and a requirement of consensus among the major political parties for important government decisions. While the 1993 Interim Constitution did, in fact, provide for consociational power sharing between the national party and Nelson Mandela’s African National Congress in a “government of national unity,” an essentially majoritarian democratic system ultimately won out, giving the African National Congress effective political control over the country and leaving white elites a potentially vulnerable minority.

Even in the United States, proposals along similar lines have been made to bolster the political power of minorities and protect them against domination by cohesive majorities that fail to take their interests into account. Drawing on consociational theory, Lani Guinier has advocated a system of cumulative voting that would empower minori-

369 CALHOUN, supra note 364, at 27.
372 See READ, supra note 364, at 216.
ty groups to vote strategically to elect some of their candidates of choice who would then enact or block legislation of critical importance to their constituency.\textsuperscript{373} Guinier has further considered the alternative of vesting minorities with a veto over legislation bearing upon “critical minority issues.”\textsuperscript{374} More recently, concerns about the disproportionate influence of concentrated wealth has motivated scholars to return to the mixed government tradition to explore how the separation of powers might be used to prevent a contemporary oligarchy from dominating the rest of society.\textsuperscript{375} As these scholars recognize, the modern assumption “that there is no connection between intra-branch interaction . . . and the dominance of a particular group in society” makes it difficult to conceive of how the separation of powers could be used to ensure that power is diffused, checked, and balanced among different groups.\textsuperscript{376} The problem as these theorists conceive it is that economic elites have managed to capture all of the branches of government, as well as parties and other major political institutions, leaving no locus of countervailing power that could be used to represent majoritarian or other interests.\textsuperscript{377} This diagnosis might suggest a quite literal return to the original model of mixed government, for example, by redesigning one of the chambers of Congress to represent the interests of the nonwealthy.\textsuperscript{378}

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

[Sections II.B.2-3 omitted]

\textsuperscript{373} See Lani Guinier, The Tyranny of the Majority 107–08 (1994).
\textsuperscript{374} Id. at 108.
\textsuperscript{375} See Andrias, supra note Error! Bookmark not defined., at 429–35; Sitaraman, supra note Error! Bookmark not defined., at 61–67.
\textsuperscript{376} Andrias, supra note Error! Bookmark not defined., at 429.
\textsuperscript{377} See id. at 422 (“Wealth influences not only Congress and the President, but also the mechanisms scholars argue have replaced Madisonian checks and balances — i.e., political parties and internal executive branch checks.”).
\textsuperscript{378} See Sitaraman, supra note Error! Bookmark not defined., at 62–63 (suggesting the possibility of capping the wealth of candidates for the House of Representatives).
III. Beyond Constitutional Structure

If constitutional structure is at best a blunt, or blind, instrument for distributing power among political interests, a number of other areas of public law are more centrally concerned with that project.

[Part III.A omitted]

B. Electoral Power

Democracy comes with manyjustifications, sounding in political legitimacy, epistemic quality, and expressive equality of citizenship. But perhaps the most compelling is that democracy is a mechanism for distributing power more broadly and equally among groups in society. Under nondemocratic systems of monarchy, oligarchy, and dictatorship, government can more easily ignore the political preferences of large segments of society. Not surprisingly, then, the rise of mass democracy in many parts of the world has been spurred by disenfranchised groups whose interests were being ignored by the elites in control of state power.474

Once democracy is up and running, the ideal of equalizing political power continues to serve as a normative touchstone in debates about how electoral rules and institutional structures should be designed. Precisely what equality of political power should be understood to mean and how it should be operationalized are notoriously difficult

471 See Elhauge, supra note 467, at 48–59.
473 See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989) (plurality opinion) (citing John Hart Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 739 n.58 (1974)) (finding constitutionally suspect the city’s minority set-aside program because “blacks constitute approximately 50% of the population” and “[f]ive of the nine seats on the city council are held by blacks”); Romer v. Evans, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting) (referring to gays and lesbians as “a geographically concentrated and politically powerful minority” working to undermine “the effort by the majority of [Colorado] citizens to preserve its view of sexual morality”).
and contested questions. But many democratic theorists and ordinary citizens would sign on to the intuitive ideal “that democratic institutions should provide citizens with equal procedural opportunities to influence political decisions (or, more briefly, with equal power over outcomes).”

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

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476 *See Beitz,* supra note 475, at 4 (emphasis omitted) (describing this view of political equality as “the most widely held,” though proceeding to criticize it as too simple, id. at 4–5); *see also* Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 Yale L.J. 148, 159 (2013) (“Political equality is a core feature of democratic governance. While the definition and appropriate scope of such equality is contested, there is general agreement that citizens in a democracy ought to have an approximately equal opportunity to influence the political process.”). Not all political theorists endorse equality of political power. A competing, antidemocratic tradition, running from Plato to Schumpeter to contemporary proponents of bureaucratic expertise and judicial wisdom, calls for allocating political power to those with the most ability to make good decisions. As has been noted, many of the Framers of the U.S. Constitution were similarly committed to elite rule. *See* Klarman, *supra* note 91, at 363, 367.


479 *The Federalist No. 10,* supra note 28, at 76 (James Madison); *see also* Sunstein, *supra* note 131, at 41–42.
More broadly, electoral empowerment and consociational democracy can both be viewed as “institutional-design mechanism[s] for building in commitments to fair representation and political equality” for minority groups.\footnote{Richard H. Pildes, \textit{Foreword: The Constitutionalization of Democratic Politics}, 118 Harv. L. Rev. 28, 86 (2004).} From this perspective, the structure of government decisionmaking institutions and the design of electoral institutions are substitute tools for distributing or balancing political power among groups in society.\footnote{See Daryl J. Levinson, \textit{Rights and Votes}, 121 Yale L.J. 1286 (2012) (treating the two processes as interchangeable); see also Levinson & Pildes, supra note 29, at 2385 (emphasizing that the effects of political parties on the workings of the structural constitution create an important linkage between the law of democracy and the separation of powers).}

Of course, for many political actors in the real world, the paramount concern is not balancing or equalizing power, but getting as much of it as possible. Throughout the history of U.S. democracy, politicians, parties, and political coalitions have always sought to design or manipulate democratic institutions and electoral rules in such a way as to augment or entrench their hold on power. One straightforward strategy for doing so is to shift the composition of the electorate by enfranchising one’s own supporters or disenfranchising one’s opponents. Thus, after the Civil War, Congressional Republicans sought to enfranchise black voters in the South, in part for the purpose of ensuring the electoral dominance of the Republican Party.\footnote{See Alexander Keyssar, \textit{The Right to Vote} 86–93 (2000); Klarman, supra note 26, at 28–29.} The end of Reconstruction allowed Southern Democrats to redeem the political supremacy of their party by using poll taxes, literacy tests, force, and fraud to disenfranchise nearly all black voters (and many poor whites).\footnote{See J. Morgan Kousser, \textit{The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910} (1974).} In recent elections, voter identification laws and other procedural restrictions on voting have been supported or opposed on the basis of their predictable racial and partisan consequences.\footnote{See Nicholas O. Stephanopoulos, \textit{Elections and Alignment}, 114 Colum. L. Rev. 283, 324–30 (2014) (describing the new array of franchise restrictions and their partisan consequences); Samuel Issacharoff, \textit{Ballot Bedlam}, 64 Duke L.J. 1363, 1371–76 (2015); Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 203 (2008) (recognizing that “partisan considerations may have played a significant role” in Indiana’s decision to enact a voter identification law).}

Electoral districting is another useful device for manipulating the effective voting power of different constituencies. At-large and multi-member districting schemes, as well as gerrymandered single-member districts, were additional tools used by Southern Democrats to suppress black voting power and maintain political dominance.\footnote{See Samuel Issacharoff & Richard H. Pildes, \textit{Politics as Markets: Partisan Lockups of the Democratic Process}, 50 Stan. L. Rev. 643, 720–23 (1998).} In contemporary politics, partisan gerrymanders allow narrowly or temporar-
ily prevailing parties to establish disproportionate and durable legislative majorities. Campaign finance regulation is a further means of securing disproportionate electoral power for incumbent parties and officeholders, as well as for corporations and wealthy donors at the expense of less-capitalized constituencies.

The constitutional and statutory law of democracy has imposed some limitations on the use of all of these tactics. Courts had invalidated (or upheld Congress’s authority to invalidate) poll taxes, literacy tests, and other mechanisms of minority disenfranchisement. The judicially imposed rule of one person, one vote has done away with the malapportioned electoral districts that once inflated the political power of rural voters and protected incumbent politicians. Gerrymandering districts for the purpose of ensuring minority representation is to some extent required by the Voting Rights Act but also limited by the Equal Protection Clause. The Supreme Court has deemed partisan gerrymandering a constitutional problem, even if not one that is easily amendable to a judicial solution. And the Court has rejected most limitations on campaign spending outside of direct contributions to candidates as violations of free speech.

As election law scholars have emphasized, these and other judicial incursions into the “political thicket” have conspicuously lacked any “unified vision” or “organizing principle.” Courts have tended to focus on enforcing individual rights, marginalizing systemic concerns about how electoral rules and institutions affect the power of political interests and social groups. In at least some areas, however, courts

486 See Stephanopoulos, supra note 484, at 286, 348–49 (presenting empirical evidence on the efficacy of partisan gerrymandering).
494 Colegrove v. Green, 328 U.S. 549, 556 (1946).
495 Pildes, supra note 480, at 30; see also Issacharoff & Pildes, supra note 485, at 646 (“[T]he Court’s electoral jurisprudence lacks any underlying vision of democratic politics that is normatively robust or realistically sophisticated.”).
496 See Issacharoff & Pildes, supra note 485, at 644–46, 717. But cf. Pildes, supra note 480, at 40–41, 46 (seeing courts as “enforcing structural values concerning the democratic order as a whole, albeit erratically and not always self-consciously”).
have been attentive to the systemic distribution of democratic power. One person, one vote doctrine was motivated by the perceived need to prevent the “systematic frustration of the will of a majority of the electorate” by malapportioned districts.\textsuperscript{497} The Court has also been concerned about protecting democratic majorities against incumbent officials seeking to entrench themselves in office even after having lost majority support. Expressing skepticism of campaign finance regulation, Justice Scalia has warned that “[t]he first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”\textsuperscript{498} In the context of political gerrymandering, the Court has identified the “consistent[] degrad[ation]” of a party’s “influence on the political process” as a constitutional problem.\textsuperscript{499}

Moreover, in at least one area of election law the goal of redistributing political power has always been front and center: the disfranchisement and political empowerment of previously excluded black voters. That project began with the imperative that minority voters be permitted to register and cast ballots. Once this right to “participation” had been established,\textsuperscript{500} courts, together with Congress and the Justice Department, took up the task of ensuring that minority votes were being fairly aggregated and minority groups “effectively[ly] represent[ed].”\textsuperscript{501} This required dismantling electoral schemes, such as at-large elections that “diluted” the power of minority groups, and mandating the creation of majority-minority districts to enable these groups to elect candidates of their choice.\textsuperscript{502} Voting rights enforcement along these and other dimensions has gone a long way toward closing the gap between black and white voting rates and legislative representation.\textsuperscript{503} In the context of race, the law of democracy has served cen-

\textsuperscript{497} See Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 753–54 (1964) (Stewart, J., dissenting); see also Klarman, supra note 487, at 532.


\textsuperscript{502} See id. at 1363 – 65; Karlan, supra note 500, at 1712–16.

\textsuperscript{503} See generally Quiet Revolution in the South, supra note 501 (describing the impact of the Voting Rights Act).
trally and self-consciously as “a device for regulating, rationing, and apportioning political power among . . . groups.”

Many scholars would embrace that mission for the law of democracy more generally. Some would direct election law toward ensuring that electoral majorities hold governing power. Michael Klarman, for instance, has advanced a framework for “anti-entrenchment review” of electoral rules and arrangements to guard against incumbent officials or electoral coalitions seeking to retain their hold on power even after having lost majority support. Also focused on majority control, Nicholas Stephanopoulos would center election law on the “alignment” principle that representatives should share the partisan and policy preferences of their median constituent and that “the balance of power in the legislature [should] reflect the balance of opinion in the electorate.” Samuel Issacharoff and Richard Pildes emphasize the importance of free and fair electoral political competition and the corresponding need to guard against “lockups” by officials, parties, and other powerholders seeking to suppress challengers by exercising monopoly power. Also concerned about redistributing power among political actors, Lani Guinier has developed a pluralist, “Madisonian” model that would allow racial and other minorities to “share in power” with other groups and secure a fair share of political outcomes reflecting their interests. The least common denominator among these and other scholars is that “the right to vote is meaningful in large part because it affords groups of persons the opportunity to join their voices to exert force on the political process,” and that the focus of the law of democracy should be on “the ability of groups of voters to exercise political influence.”

Reorienting the law of democracy around the distribution of power in this way would require a major leap from where the Court currently stands in a number of respects. To the extent election law has been concerned with the empowerment of social groups in this area, the near-exclusive focus has been on racial and ethnic minorities.

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506 See Klarman, supra note 487, 497–502.

507 Stephanopoulos, supra note 484, at 310; see also id. at 288–89.


509 See Lani Guinier, The Tyranny of the Majority 4–6, 10 (1994). In Guinier’s view of political equality, neither majorities nor minorities should be permitted to exercise “disproportionate power.” Id. at 92–93.


511 At least part of the explanation, of course, is that the Voting Rights Act, the Fifteenth Amendment, and much of Equal Protection jurisprudence are focused on race.
possibility of protecting other groups or balancing power along other dimensions of interest has barely been explored. Even the highly salient problem of partisan entrenchment has presented a seemingly insurmountable challenge: despite the increasing partisan bias of congressional districting plans and the correspondingly decreasing congruence between House members’ voting records and their constituents’ policy preferences, the Court has refused to invalidate even the most blatantly partisan gerrymanders. \(^{512}\) And other salient power imbalances have been ignored altogether — or worse. Campaign spending is arguably the most flagrant source of inequality in the American political system, inasmuch as it permits business interests and wealthy individuals to exert exorbitantly disproportionate political influence. \(^{513}\) But the Court has insisted for decades that political spending is a constitutionally protected form of speech and has definitively rejected “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others.” \(^{514}\)

Even in the context of race, election law jurisprudence has been more concerned with descriptive representation — electing black or Hispanic representatives — than with bolstering the substantive representation of minority group interests. In fact, descriptive representation for racial minorities has sometimes come at the cost of substantive representation for minority interests, as when the creation of minority-controlled districts has led to the election of more Republicans. \(^{515}\) The law of democracy has been more concerned with “who is present in the legislative assemblies” than with “more urgent questions of what the representatives actually do.” \(^{516}\) This “politics of presence” speaks to a different set of concerns than empowering groups in the sense of protecting and advancing their substantive policy interests. \(^{517}\)

The distinction between descriptive and substantive representation points to a more fundamental limit on election law as a project of redistributing political power. The law of democracy’s concern with the distribution of power among groups has been limited to elections and representation, stopping short of government decisionmaking and policy influence. Guinier has criticized the myopic focus of election law on the election of minority representatives as mere “tokenism” given the

\(^{512}\) See Stephanopoulos, supra note 484, at 290–91.

\(^{513}\) See generally Lessig, supra note 36.


\(^{515}\) See Stephanopoulos, supra note 484, at 354–55.

\(^{516}\) Phillips, supra note 475, at 3.

\(^{517}\) The two projects can be linked, to the extent that minority representatives do, in fact, more effectively represent some set of policy interests shared by the minority group. See id. at 12–13.
reality that a handful of minority legislators can be routinely outvoted by legislative majorities who do not share their interests.518 Other scholars have likewise noticed that the Court has turned away from a theory of “protective democracy” that would prioritize the ability of minority groups to influence actual policy outcomes,519 and has given short shrift to the “voting as governance”520 concerns such as “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.”521 The problem is that electing some number of minority representatives is no guarantee that a group will exercise meaningful political power in the sense of influencing government decisionmaking and policy outcomes.

As Nick Stephanopoulos puts the point:

If blacks seem not to be satisfied with (mostly) uninhibited access to the polls and (close to) proportional representation, this is because they should not be content with these achievements. What really matters in a democracy is getting policies enacted that correspond to people’s views. And on this front, blacks still have a long way to go. Their opinions — on vital issues like crime, welfare, and housing — are too often ignored by elected officials when they conflict with whites’ preferences.522

The same is true of other groups, as well. As Stephanopoulos and others have documented, glaring discrepancies between formal political representation and functional policy responsiveness exist not just for African Americans, but also for Hispanics, women, and the poor.523 Most strikingly, a number of recent studies have found that “economic elites” and “business interests” are the groups with the most influence over government decisionmaking, whereas “mass-based interest groups” and “average citizens” have “little or no” actual influence over

518 Guinier, supra note 373, at 42–43. This leads her to propose cumulative voting for decisionmaking in legislative bodies as a means to empower minority groups to enact or block legislation of critical importance to them. See id. at 107–08. Guinier also considers the possibility of imposing supermajority voting requirements or a minority veto for “critical minority issues.” Id. at 108.
520 Karlan, supra note 500, at 1716.
policy outcomes.524 If that finding is correct,525 the most fundamental ambition of democracy — to ensure that government is generally responsive to the interests of most citizens — appears to be going unrealized in this country.526

Inasmuch as the point of democracy is to improve “the welfare of citizens by making policies responsive to their interests,”527 one might think the apparent failure of voting and representation to generate greater policy responsiveness for major groups of these citizens would be a matter of central concern for the law of democracy. Yet even the most far-reaching reformers in the field seem resigned to the view that a thoroughgoing concern with the distribution of policymaking power is, as Stephanopoulous elsewhere concludes, “too ambitious a goal for election law to achieve.”528 As the discussion to follow will emphasize,529 the electoral process is just one channel of political influence among many in the U.S. system of government and not always the most important in predicting which interests will ultimately prevail. As a consequence, the amount of political power that can be redistributed through electoral rules and institutions is inherently limited. If the democratic ideal is to equalize political power, the reach of the law of democracy will inevitably exceed its grasp.

C. Rights and Political Power

Constitutional rights are typically viewed as a counterpoint to power. In the classical liberal tradition, rights are supposed to delineate a private sphere beyond the reach of state power. More broadly, rights are supposed to place limits on what political power can be used to accomplish, standing in the way of majority will or democratic decisionmaking (and thus giving rise to “countermajoritarian” kinds of difficulties). And disciplinary boundaries divide political and constitutional theorists, who tend to “think in terms of rights and equality,” from political scientists and election law scholars, who are interested in “the organization of power.”530


525 For an overview of the most significant criticisms to date, see Sean McElwee, To Influence Policy, You Have to Be More than Rich, Wash. Monthly (Feb. 16, 2016, 11:25 AM), http://washingtonmonthly.com/2016/02/16/to-influence-policy-you-have-to-be-more-than-rich/.

526 See Gilens & Page, supra note 524, at 577 (concluding that “America’s claims to being a democratic society are seriously threatened”).

527 Pildes, supra note 480, at 42.

528 Stephanopoulous, supra note 484, at 312 (asserting that “policy outcome alignment” is “too ambitious” and advocating for elections that maximize “policy preference alignment” as a substitute).

529 See infra section III.D, notes 561–600 and accompanying text.

530 Pildes, supra note 480, at 40.
But rights can also be understood as of a piece with political power.531 If the point of power is to enable groups to protect and advance their interests by controlling governance outcomes, then public law might go about the project of managing power in two basic ways. One is to use rights to protect those interests directly, by blocking unfavorable outcomes or mandating favorable ones. Alternatively, public law might accomplish the same thing indirectly, by allocating influence over political decisionmaking processes in such a way as to enable groups to protect their own interests — whether through structure, voting, or other mechanisms.

The fungibility of rights and political power was a crucial premise of the U.S. constitutional design. Concerned with protecting property owners and other minorities against majoritarian oppression, but convinced that constitutional rights would create merely parchment barriers against majority will,532 Madison and his fellow Framers attempted to design a structure of government that would tilt the political playing field in favor of these vulnerable groups.533 By shifting power to a national government that would be more difficult for a unified faction to capture and by insulating senators and the President from direct democratic responsiveness to popular majorities, Madison and his colleagues hoped that constitutional structure would do the work of rights in protecting the fundamental interests of minorities.534 Viewed in this way, “the [structural] Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”535

Contemporary constitutional law has in some contexts followed Madison in looking to political power as a substitute for rights. Constitutional structure might play this role. For example, scholars have suggested that judicial enforcement of the separation of powers might be a better method of constraining executive power and protecting against abuses than direct judicial enforcement of rights.536 So might political power through voting. Thus, the Supreme Court has viewed

531 See generally Levinson, supra note 380 (viewing rights and votes as comparable tools for protecting minorities and other vulnerable groups).
532 See supra section I.D.2, notes ERROR! BOOKMARK NOT DEFINED.–280 and accompanying text.
534 See id. at 362–66.
535 The Federalist No. 84, at 514 (Alexander Hamilton) (Clinton Rossiter ed., 2003). Some decades after ratification, Madison continued to believe that “[t]he only effectual safeguard to the rights of the minority, must be laid in such a basis and structure of the Government itself, as may afford, in a certain degree, directly or indirectly, a defensive authority in behalf of a minority having right on its side.” James Madison, Speech, Virginia Convention of 1829 (Dec. 2, 1829), in Selected Writings of James Madison 355 (Ralph Ketcham ed., 2006).
536 See Issacharoff & Pildes, supra note 298, at 5–6, 43–46 (exploring an institutional process approach to rights during wartime).
voting rights as special because they are “preservative of other basic
civil and political rights.”537 Martin Luther King made the same point
more eloquently when he proclaimed, “Give us the ballot, and we will
no longer have to worry the federal government about our basic
rights.”538

The possibility of political power substituting for rights finds its
mirror image in Carolene Products (or “political process”) theory,
which calls for the judicial enforcement of rights to protect “politically
powerless” groups.539 In the first instance, the Carolene Products
approach calls for courts to rearrange the democratic process in order
to fully empower disenfranchised groups. Failing that, however, courts
are then charged with replicating the policy outcomes that would have
resulted from an idealized process in which all groups exercised their
fair share of power. Political process theory has provided a straight-
forward justification for protecting the rights of formally disenfran-
chised groups, most prominently blacks in the Jim Crow South.540 It
has also been used to justify rights protections for groups that are for-
mally enfranchised but lack adequate political power for other reasons
— including racial minorities on an ongoing basis, as well as wom-
en.541 In its equal protection cases, the Court has pointed to political
powerlessness as one of the primary criteria for determining whether a
group is a suspect class and therefore entitled to special protection
against discrimination and disadvantage.542 Pursing that line of argu-
mment, gay rights litigation has featured political scientists offering
expert testimony on the political power of gays and lesbians and de-
bates among judges and Justices about whether this group is “political-
ly powerless”543 or, quite the opposite, “possess[es] political power
much greater than their numbers.”544

Like any approach to distributing power through public law, politi-
cal process theory faces the descriptive challenge of assessing the
amount of power different groups possess, as well as the normative

538 Martin Luther King, Jr., Give Us the Ballot, Address Delivered at the Prayer Pilgrimage
for Freedom (May 17, 1957), in 4 The Papers of Martin Luther King, Jr. 268, 210 (Clayborne Car-
son et al. eds., 2000).
540 See Michael J. Klarman, The Puzzling Resistance to Political Process Theory, 77 Va. L.
541 Id. at 828–29.
542 See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (asking whether
a group is “relegated to such a position of political powerlessness as to command extraordinary
protection from the majoritarian political process”).
543 See Jane S. Schacter, Ely at the Altar: Political Process Theory Through the Lens of the
Marriage Debate, 109 Mich. L. Rev. 1363, 1383–90 (2011); see also Kenji Yoshino, Speak Now
challenge of deciding how much power these groups should possess. To this point, constitutional law has not made not made a great deal of progress on either front.

As generations of constitutional theorists have emphasized, political process presupposes a substantive conception of ideally well-functioning democracy.\(^5\) Given its focus on racial and other minority groups, political process review must operate against a background theory of democracy in which majorities are not always supposed to prevail; one in which certain minorities are supposed to exercise meaningful political power.\(^6\) The most straightforward version of such a theory is Madisonian pluralism, in which numerous interests or factions form shifting coalitions to achieve political victories, and no coherent, stable majority dominates.\(^7\) In a system of pluralist political competition, among the process failures that courts might seek to correct would be the inability of certain groups to enter into winning coalitions with other groups in order to obtain their “fair share” of political victories on account of illegitimate structural barriers.\(^8\)

Unfortunately, courts and theorists have made little headway in identifying these structural barriers and the groups they distinctively afflict. The Court’s original focus of attention on “prejudice against discrete and insular minorities,”\(^9\) such as racial and religious minorities, suggested that easily identifiable social groups segregated from the mainstream of American society would suffer distinctive political disadvantages. But upon reflection, there is little reason to believe that discreteness or insularity will tend to reduce political power. To the contrary, those characteristics may be systematically advantageous, by reducing the costs of collective action, making the most of political geography, and providing incentives to group members to choose political “voice” over “exit.”\(^10\) Psychological or sociological theories of “prejudice,” of the sort prominently advanced by John Hart Ely, have

\(^{545}\) This point is often offered as a criticism of the Court’s attempt to police the political process while avoiding the imposition of substantive value judgments. Value judgments about how democratic politics ought to work seem unavoidable. See, e.g., Paul Brest, \textit{The Substance of Process}, 42 Ohio St. L.J. 131 (1981); Laurence H. Tribe, \textit{The Puzzling Persistence of Process-Based Constitutional Theories}, 89 Yale L.J. 1063, 1073–79 (1980).

\(^{546}\) \textit{See} Bruce A. Ackerman, \textit{Beyond Caroleine Products}, 98 Harv. L. Rev. 713, 719 (1985).

\(^{547}\) \textit{See} Ely, supra note 31, at 152–53 (referring to the “pluralist’s bazaar” of politics); Ackerman, \textit{supra} note 546, at 710–20; Stephanopoulos, \textit{supra} note 523, at 1545–49.

\(^{548}\) Ackerman, \textit{supra} note 546, at 720.

\(^{549}\) \textit{See} United States v. Caroleine Pros. Co., 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); \textit{see also} Ely, \textit{supra} note 31, at 135–79 (arguing for judicial protection of minority groups whose interests are discounted by the majority on account of psychological or sociological distance).

\(^{550}\) Ackerman, \textit{supra} note 546, at 722–31.
been widely panned as theoretically and empirically unconvincing.\textsuperscript{551} Left with little theoretical direction, courts have based assessments of political power(lessness) on an inconsistent grab bag of criteria — including groups’ numerical size, financial resources, access to the ballot, levels of descriptive representation, and ability to secure antidiscrimination legislation — but without any explanation for why these are the relevant variables or how they should be weighed against one another.\textsuperscript{552}

Without some better understanding of how political power should be measured and how much of it various groups should get, it is hard to know which groups should receive special judicial solicitude. Under Equal Protection doctrine, racial minorities, women, and more recently gays and lesbians have been the primary beneficiaries of rights protection, and religious groups have also received some measure of antidiscrimination protection under the First Amendment. But it is not at all clear that these groups are distinctively being denied a fair share of political power. In a recent study empirically examining the extent to which different groups’ policy preferences influence policy outcomes on the national and state levels, and controlling for the size of the groups, Nick Stephanopoulos finds that African Americans, women, and the poor stand out as groups whose policy preferences are significantly less likely to be adopted (as compared to the preferences of whites, men, and the wealthy, respectively), but no evidence that Hispanics and religious groups are under-powered in this way.\textsuperscript{553} More generally, Kenji Yoshino has argued that judicial identification of powerless groups has been characterized by a “paradox of power,” such that only groups that have managed to build a significant measure of political power have succeeded in securing the “powerless” designation, leaving truly powerless groups out in the cold.\textsuperscript{554} Other theorists have pointed to any number of different groups that seem


\textsuperscript{552} See Stephanopoulos, \textit{supra} note 523, at 1537–42. Of the factors just listed, only the presence or absence of antidiscrimination legislation speaks directly to the power of groups to secure favorable policy outcomes. Yet courts only sometimes view the existence of antidiscrimination laws as evidence of sufficient political power; in other cases these laws are viewed as evidence of an ongoing threat of discrimination against which the group lacks adequate power to protect itself. See Schacter, \textit{supra} note 543, at 1369, 1377, 1381–83; see also Bertrall L. Ross II & Su Li, \textit{Measuring Political Power: Suspect Class Determinations and the Poor}, 104 Calif. L. Rev. 323 (2016) (arguing that the enactment of laws benefitting a group does not necessarily speak to the political power of that group, and illustrating that point with empirical evidence that legislators’ support for antipoverty legislation does not reflect the political influence of the poor).

\textsuperscript{553} Stephanopoulos, \textit{supra} note 523, at 1660–61.

\textsuperscript{554} See Kenji Yoshino, \textit{The Paradox of Political Power: Same-Sex Marriage and the Supreme Court}, 2012 Utah L. Rev. 517, 539.
plausibly powerless, including unorganized workers, middle-income Americans, and Muslims and immigrants who lack the power to defend themselves against the predations of security-obsessed majorities in the post-9/11 world.

Whether courts will be interested in searching for new groups lacking in political power or extending rights on that basis remains to be seen, but there is reason for skepticism. The high water mark of political process theory was the Warren Court’s campaign to dismantle the Jim Crow systems of segregation and criminal justice, a major contribution to making policy less hostile to the interests and welfare of disenfranchised African Americans in the South. In recent decades, however, rights jurisprudence has become largely disconnected from the project of reallocating political power to vulnerable groups or compensating for its absence. While the Court continues to point to political powerlessness as a reason for heightened equal protection scrutiny, the animating theory of equality has shifted from an antisubordination focus on protecting disadvantaged groups to an anticlassification prohibition on the use of particular group characteristics in allocating benefits and burdens. Thus, rather than protecting racial minorities against laws with disadvantageous effects, equal protection has been recast as a prohibition against all race-conscious policies, even those designed to prevent racially disparate impacts or to reallocate resources and opportunities to disadvantaged groups. Whatever might be said in favor of an anticlassification approach to equality, it is a non sequitur to political process theory or to an overaraching concern with the distribution of power among social groups.

The Court could always switch jurisprudential directions, but the potential for judicially enforced rights to substitute for political power is inevitably going to be limited. In theory, courts taking a political process approach might seek to replicate the policy outcomes that would have prevailed in a “perfected” democratic system in which power was fairly distributed among all groups and interests. Yet in

556 Sitaraman, supra note 33, at 58–59; see also Andrias, supra note 33, at 421.
557 See David Cole, Enemy Aliens, 54 Stan. L. Rev. 953, 981 (2002) (arguing that aliens shut out from political processes like voting should be considered a “discrete and insular minority”).
559 See David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935 (1989) (arguing that the discriminatory intent standard is inadequate to evaluate most kinds of discrimination).
practice, to the extent constitutional rights have been oriented toward sociopolitical subordination at all, the focus has been only on a small number of the most historically and sociologically salient groups. And courts have done little more for these groups than eliminate blatantly discriminatory laws and policies, shunning the possibility of casting rights as positive, redistributive claims to social and economic goods. To the extent political process theory mandates a more ambitious project of redistributing governance outcomes to reflect a fair distribution of political power among groups and interests in society, the political process in practice will probably cause it to fall far short of that goal.

D. Resources

The preceding discussion of electoral power suggested some of the limits of voting as a mechanism for redistributing power. In particular, mounting evidence suggests that the preferences of electoral majorities have little weight in policymaking and are usually trumped by the policy preferences of business organizations and wealthy elites. Indeed, recent studies conclude that “the views of constituents in the bottom third of the income distribution receive no weight at all in the voting decisions of their senators,” that Presidents also answer to the “narrow political and economic interests” of elites and, more generally, that “when preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor.” Re-asking Dahl’s question of “who governs?” or “who really rules?,” an influential study by Martin Gilens and Benjamin Page finds the answer is not majorities or the median voter but “powerful business organizations and a small number of affluent Americans,” leading them to conclude that “the majority does not rule — at least not in the causal sense of actually determining policy outcomes.”

How can a small minority of wealthy elites overpower the electoral majorities who are supposed to prevail in American democracy? When Dahl initially framed the “who governs?” question, he did so in reference to “a political system where nearly every adult may vote but


563 Gilens, supra note 34, at 81.

564 Gilens & Page, supra note 524, at 575–77.
where knowledge, wealth, social position, access to officials, and other resources are unequally distributed."565 As this description suggests, votes are but one type of political resource, and not necessarily the most valuable.566

In particular, another valuable political resource that economic elites have a lot of is wealth. Money can be converted into policymaking influence through any number of different channels: donating to campaigns or making independent expenditures on behalf of candidates or parties; lobbying government decisionmakers; participating in administrative rulemaking; offering “revolving door” employment opportunities for officials; funding and orchestrating social movements and “grassroots” organizations; mounting sustained campaigns to shift and shape public opinion on issues like gun control or global warming; or, in the case of businesses or very wealthy individuals, threatening to leave the jurisdiction, taking their talents and tax revenues elsewhere. Through these and other pathways of political influence, economic elites, notwithstanding their deficit of votes, may very well exercise dramatically disproportionate power in the American political system.

The problem, from this perspective, is not just that concentrated wealth becomes concentrated power, but also that the two are linked together in a mutually reinforcing dynamic. The political power purchased through wealth may allow economic elites to enact self-interested policies that increase their wealth, and hence their political power. This dynamic creates a feedback loop of increasing inequality in both domains: the rich get richer; the powerful get more powerful. Progressive Era and New Deal reformers took this view of the political economy of concentrated wealth, campaigning against the rise of a “moneyed aristocracy,” “economic royalists,” and the oligarchic concentration and combination of economic and political power in the hands of a despotic class.567 Similar diagnoses are increasingly prevalent in this “New Gilded Age” of extreme inequality.568

Those concerned about power imbalances stemming from unequal resources have considered two kinds of regulatory strategies. One is to

565 Dahl, supra note 39, at 1.
566 Dahl elsewhere elaborates:

Varying with time and place, an enormous number of aspects of human society can be converted into political resources: physical force, weapons, money, wealth, goods and services, productive resources, income, status, honor, respect, affection, charisma, prestige, information, knowledge, education, communication, communications media, organizations, position, legal standing, control over doctrine and beliefs, votes, and many others.

568 See Bartels, supra note 561, at 28; see also Elizabeth Warren, A Fighting Chance 2 (2014) (“Today the [political] game is rigged — rigged to work for those who have money and power.”).
attempt to block the conversion of resources into power. In the law-of-democracy domain, campaign finance reform is one obvious possibility for preventing economic elites from purchasing greater political power, though perhaps not a very promising one given both the difficulty of enacting effective regulation and the constitutional limitations imposed by the Supreme Court.\footnote{See Sachs, supra supra note 555, at 163–64 (2013); Michael S. Kang, The End of Campaign Finance Law, 98 Va. L. Rev. 1, 53–56 (2012).} Lobbying reform is another increasingly common proposal, though one beset by similar difficulties on both fronts.\footnote{See Sachs, supra note 555, at 164–65; Kang, supra note 560, at 59–63; Richard L. Hasen, Lobbying, Rent-Seeking, and the Constitution, 64 Stan. L. Rev. 191, 200–16 (2012).} One way around the difficulties of attempting to limit the influence of wealthy elites through spending or lobbying is to \textit{increase} the influence of “countervailing voices” through these channels — leveling up rather than leveling down.\footnote{See Bruce E. Cain, \textit{More or Less: Searching for Regulatory Balance, in Race, Reform, and Regulation of the Electoral Process} 263, 277 (Guy-Uriel E. Charles et al. eds., 2011).} That could mean public financing of elections or campaign finance vouchers that would be distributed equally among citizens,\footnote{For one proposal along these lines, see Bruce Ackerman & Ian Ayres, \textit{Voting with Dollars: A New Paradigm for Campaign Finance} (2002).} or even public subsidies that would enable currently unrepresented groups to gain access to lobbyists.\footnote{See Heath Gerken, Keynote Address, \textit{Lobbying as the New Campaign Finance}, 27 Ga. St. U. L. Rev. 1155, 1165–68 (2011).}

Whatever promise these and other proposals might hold, however, they leave many other pathways of resource-advantaged political influence unaddressed. The problem, in a nutshell, is that “the political power that comes from wealth is portable across political processes.”\footnote{Sachs, supra note 555, at 166.} Indeed, it is “[t]he sheer versatility of material power [that] makes it so significant politically.”\footnote{\textit{Id.} at 166 (first alteration in original) (quoting Jeffrey A. Winters, \textit{Oligarchy} 18 (2011)).} As a result, regulatory efforts to limit the advantages of money in politics confront a “hydraulic problem”: restricting the flow through one channel just redirects the dollars into other channels.\footnote{See Samuel Issacharoff & Pamela S. Karlan, \textit{The Hydraulics of Campaign Finance Reform}, 77 Tex. L. Rev. 1705, 1708 (1999); see also Sitaraman, supra note 33, at 44–46 (generalizing the hydraulic problem from campaign finance reform to any regulatory effort to limit the influence of money in politics).}

The difficulty of preventing inequalities of political resources from being converted into inequalities of power suggests a second and more ambitious strategy: equalizing the resources themselves.\footnote{See Sitaraman, supra note 33, at 6 (distinguishing between strategies of “safeguarding the political process” by “seek[ing] to create a firewall that will protect politics from economic influence,” and “countering economic inequality” by “seek[ing] to prevent economic inequality in the first place — prior to its having political influence” (emphasis omitted)).} If the political process cannot be quarantined from resource inequality, the only
solution may be to address the inequality itself. Deconcentrating political power may require deconcentrating economic power through the redistribution of wealth and opportunity.

Of course, such reforms are easier called for than accomplished. If political dominance by economic elites is the problem, it may be hard to hope for a political solution. Yet the nonwealthy and other disenfranchised groups might be able to draw upon a valuable political resource of their own: mobilization, in the form of mass organization, collective action, or social movements. Foremost among these is mobilization, in the form of mass organization, collective action, or social movements. At one extreme, mobilized groups that have been excluded from formal political channels can exercise power in the streets, whether through peaceful protests or violence. Groups of citizens can withdraw social and economic cooperation, by sitting in, refusing to pay taxes, dodging the draft, or going on strike. As the history of politically influential protest movements in the United States illustrates, from the Boston Tea Party and Shay’s Rebellion to the civil rights movements, pickets and pitchforks can substitute for ballots as a source of political power. But mobilization can also create influence through the standard processes of democratic politics. Successful social movements can shape political institutions by linking up with political parties and enlisting voters and politicians in support of their agendas. Well-organized political groups can effectively persuade and turn out voters, lobby government officials, and influence public opinion. Whether operating inside or outside of ordinary political channels, mobilization can enable politically disadvantaged groups and interests to compete with the wealthy and powerful.

For much of the twentieth century, for instance, labor unions were successful in mobilizing lower- and middle-class workers and enabling them to exercise effective political voice across a range of issues. In recent decades, however, as unionization rates have dropped, this voice has concomitantly weakened. The decline of labor as a political

578 Cf. Eric A. Posner & Adrian Vermeule, Inside or Outside the System?, 80 U. Chi. L. Rev. 1743, 1745 (2013) (identifying as a fallacy the hope that legal and political institutions that have been diagnosed as failing to serve the public interest will be the source of implementing a cure for the pathologies that led to that diagnosis).
579 See Kay Lehman Schlozman et al., Inequalities of Political Voice, in Inequality and American Democracy 19, 63–68 (Lawrence R. Jacobs & Theda Skocpol eds., 2005). That said, successful social movements often require the leadership and support of wealthy and educated elites, id. at 66–67, and some are predominantly middle-class or “Rich People’s Movements,” Sitaraman, supra note 33, at 34.
581 See Sachs, supra notes 569–571 and accompanying text (discussion of interest groups).
582 See Sachs, supra note 555, at 168–71.
583 Id. at 154.
force has led to the rollback of many New Deal and Great Society redistributive and regulatory programs and appears to have significantly contributed to the rise of economic inequality.\textsuperscript{584} Recognizing the importance of unions as a vehicle for mobilizing and empowering the nonwealthy and reducing political and economic inequality, commentators have suggested reforms designed to reinvigorate unions as political organizations. For example, Ben Sachs proposes "unbundling" the political function of unions from the collective bargaining function in the hope of reducing managerial opposition and expanding the membership of "political unions."\textsuperscript{585} Sachs also suggests a number of other potential organizational vehicles for the nonwealthy that might further the goal of "representational equality."\textsuperscript{586}

Abstracting from the specific set of issues surrounding economic and political inequality, it is important to recognize that every law and policy that affects the distribution of wealth or the costs of mobilizing collective action at least potentially serves to redistribute political power. Social Security and other social welfare programs create beneficiary constituencies with the resources and organization to defend these programs.\textsuperscript{587} By fragmenting the financial services industry, the Glass-Steagall Act also diminished the industry's political power, paving the way for other kinds of regulatory measures.\textsuperscript{588} Rules of corporate law relating to ownership structure increase the wealth and power of different groups of stakeholders, creating path-dependent trajectories for the further development of corporate law.\textsuperscript{589} Cap-and-trade approaches to climate regulation, in contrast to carbon taxes and other regulatory strategies, promise to empower commercial interests that will be invested in maintaining and expanding the regulatory system.\textsuperscript{590} Republican strategists pursue tort reform and restrictive labor laws for the strategic purpose of decreasing the wealth of trial lawyers and the efficacy of unions — and therefore the political prospects of

\textsuperscript{584} See Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics 127–51 (2010).

\textsuperscript{585} Sachs, supra note 555, at 155.

\textsuperscript{586} Id. at 203–06 (identifying government programs, public education, public hospitals, libraries, and public recreation centers as potential vehicles to support political organizing for the nonwealthy).

\textsuperscript{587} See, e.g., Andrea Louise Campbell, How Policies Make Citizens: Senior Political Activism and the American Welfare State 2–3 (2003) (arguing that Social Security has caused seniors to be more able and motivated to participate politically, but that the same is not true of welfare programs for the poor); Paul Pierson, Dismantling the Welfare State? 39–50 (1994).


the Democratic Party. These examples only begin to illustrate what is a pervasive phenomenon: in E. E. Schattschneider’s resonant summation, “New policies create a new politics.”

This includes the policies generated by constitutional law, which also help determine the allocation of political resources. The preceding discussion considered constitutional rights as a substitute for political power. But rights can also be a source of political power. This is straightforwardly the case for rights that directly protect avenues of participation in democratic politics — starting with voting rights, but also including the First Amendment protection of political speech. But other rights that are not self-consciously designed for the purpose of empowering groups to more effectively participate in the political process may have that effect. Rights of freedom of association and free exercise of religion may be essential in allowing some groups to organize and mobilize. Similar democracy-facilitating arguments have been made in support of rights to education and welfare. Antidiscrimination rights, as well, can protect groups against forms of social and economic disadvantage that impede their political efficacy. The same is true of rights that contribute to social and economic empowerment, for example by protecting access to birth control and abortion for women. More generally, rights can serve as focal points for political organizing: social movements in support of racial minorities, women, gays and lesbians, and other disadvantaged groups have

593 See supra note 380 and accompanying text.
594 See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 25–27 (1948) (describing the First Amendment as allowing people to voice any opinion they want in a policy debate regardless of content and the American idea of universal suffrage).
597 See Ely, supra note 31, at 135–79 (making the case that social “prejudice” against minorities undermines their political power and should be viewed as analogous to disenfranchisement).
598 See Ruth Bader Ginsburg, Sex Equality and the Constitution: The State of the Art, 4 Women’s Rts. L. Rep. 143, 143 (1978) (“Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: . . . . [a]re women to have the opportunity to participate in full partnership with men in the nation’s social, political, and economic life?”).
rallied around claims of rights. In all of these ways, constitutional rights can facilitate the redistribution of political resources and power.

But the more general moral is that constitutional law is not special in this regard. The distribution of political power is the product not just of the public law regimes explicitly concerned with the structure of government and the political process but of all law and policy. And the set of potential mechanisms for redistributing political power is correspondingly expansive. If the goal is equalizing the political power of disadvantaged groups and interests, the tax system, social welfare policy, antidiscrimination statutes, antitrust enforcement, financial services regulation, and labor law may be every bit as relevant as the law of democracy, and likely much more so than separation of powers.

This Part has attempted to show how a number of different and disconnected areas of public law might be linked by a common concern with how political power is distributed, diffused, and balanced—not at the level of government institutions but at the level of interests and social groups. One could view this as a preliminary sketch of what could be a constructive project in constitutional thought: transplanting the constitutional principle of deconcentrating power from the structural to the democratic level and calling upon courts (and legislatures) to marshal the resources of administrative law, the law of democracy, constitutional rights jurisprudence, and any number of other regulatory fields with an agenda of redistributing and equalizing political power among groups in society. At the very least, some or all of these areas of law might be pushed toward a more explicit and sustained focus on the distribution and practical efficacy of democratic-level power and on how that power is affected by a multiplicity of legal regimes.

At the same time, however, the discussion in this Part has emphasized some of the major challenges with pursuing any such project. One is the lack of any well-developed and widely-shared theory of what would count as a fair or equal distribution of power among

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600 See generally Jacob S. Hacker et al., Inequality and Public Policy, in Inequality and American Democracy, supra note 579 (surveying the evidence on the effects of a broad range of public policies on social and economic inequality and, consequently, on political inequality).
groups and interests. Another is the difficulty of assessing how much power different groups and interests in fact possess — analogous to the difficulty, described in Part I, of making such assessments at the institutional level. Following close behind is the dubious ability and legitimacy of courts to engage in these descriptive and normative assessments of the systemic distribution of power in the American political system.

Attempting to work out what a feasible or desirable program of reform might look like is beyond the scope of what is possible here. The more modest ambition of this Part (and of the Foreword more generally) has been to suggest that constitutional law and theory would benefit from greater attention to these questions. Constitutional thought might do well to redirect its focus from the power of government institutions to the power of groups in society — and correspondingly from structural constitutional law to a broader range of legal regimes that serve to redistribute democratic power.

Conclusion

"Who governs?"601 That simple question cuts to the core of how American democracy works and how the legal frameworks that constitute and regulate it, starting with constitutional law, should be designed and assessed. Unfortunately, the development of constitutional law has proceeded with very little understanding of who governs, or where power is located in the American political system.

As the foregoing discussion has attempted to demonstrate, a large part of the problem is that constitutional law has been looking for power in the wrong places. At one level, the misdirection has occurred because assessing the power of government institutions and officials is a much more difficult task than many courts and commentators seem to recognize. Power over the state is entangled with the power of the state. Power is often located elsewhere than the site of action and camouflaged by inaction. Apparent constraints on power may actually serve to augment it; and enhancements of power may turn out to have the opposite effect when viewed in dynamic perspective. Formal, legal grants of and limitations on power may have little to do with the de facto ability or inability to influence policy outcomes. Each of these observations ratchets up the difficulty of seat-of-the-pants assessments of where power is actually located in government; taken together, they cast considerable doubt on the veracity of many conventional understandings of who is wielding or accumulating power in government.

601 See Dahl, supra note 24 and accompanying text (discussing the alignment of the policy views of the Supreme Court and lawmaking majorities).
and also on the ability of courts and armchair observers to make such judgments.

More fundamentally, the right answer to the “who governs?” question cannot be Congress or the President. The ultimate governors in a democracy are the voters, political parties, interest groups, and other democratic actors who compete for control over government institutions and attempt to effectuate their policy interests. Focused on the power of institutions, constitutional analysis seldom sees how that power is passed through to the level of interests. Yet power at the level of constitutional structure is, in an important sense, merely superstructural.

Constitutional law’s normative goal(s) of checking, balancing, equalizing, or diffusing power seem similarly misplaced. Preventing one group from dominating or subjugating another is a self-evidently attractive principle of political justice as applied to the abolition of slavery or opposition to oligarchy, but the principle loses any obvious force when it is applied to government institutions like Congress and the President. The ideal of equalizing political power shines brightly when monarchies and dictatorships are replaced by democracy, and at least dimly when balanced pluralist competition among a variety of factions or interests promotes power-sharing and prevents monopolization; but when it comes to equalizing the power of government institutions it is hard to see any spark. Madison’s recourse to pluralism and countervailing power in Federalist 10 makes perfect sense, but his translation of those ideas to government institutions in Federalist 51 remains difficult to parse. The idea of balancing power as a mechanism for permitting groups with deeply divergent interests to live together peacefully holds clear promise in the context of mixed government, consociational democracy, and international relations among states. What constitutional law hopes to accomplish by way of balancing the power of government institutions that have been hollowed of interest-based constituencies and hence rivalries is much harder to say.

602 See supra notes 27–28 and accompanying text.

603 The international version of the theory is that states or coalitions of states with equal power will achieve a self-interested equilibrium of peaceful coexistence, whereas an imbalance of power will lead the stronger side to provoke war. See Eric A. Posner, Balance-of-Power Arguments and the Structural Constitution 3 (U. Chi. L. Sch., Inst. for L. & Econ., Working Paper No. 622, 2012). That idea may have influenced thinking about the U.S. constitutional design. See Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 Harv. L. Rev. 1791, 1840 (2009) (noting that domestic separation of powers theory and international balance of powers theory arose at approximately the same time and the similarities between the two); Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1496–97 & n.283 (1987) (discussing early conceptions of the balance of power between state and federal governments and a similar understanding of the American role in the European balance of power).
This Foreword has thus suggested that the constitutional impetus toward diffusing and balancing power might be better aimed at the democratic-level political actors who actually possess and compete for it. Public law has, in fact, sometimes been oriented in this direction, in the domains of administrative process, the law of democracy, and constitutional rights jurisprudence on the Carolene Products model. These and other pockets of public law might be productively linked with one another, and with the values of structural constitutionalism, by a common concern with balancing and diffusing power – not at the level of government institutions but at the level of political interests and social groups. The ambition of this Foreward has been to show how relocating power and the ideal of redistributing it in this way holds some promise to illuminate who governs and how constitutional law does and should decide.