CADENCED POWER: THE KINETIC CONSTITUTION

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TABLE OF CONTENTS

INTRODUCTION	681
I. THE TRADITION: A STATIC CONSTITUTION	686
A. <i>The Bipolar Supreme Court:</i>	
<i>A Formalist-Functionalist Swing</i>	689
1. <i>Formalism: The Comfort of Bright Lines . . .</i>	690
a. <i>A task legislative, not executive:</i>	
<i>Youngstown Sheet & Tube Co. v. Sawyer</i>	691
b. <i>A task judicial, not legislative:</i>	
<i>Plaut v. Spendthrift Farm</i>	698
2. <i>Functionalism: The Comfort of Pragmatism .</i>	702
3. <i>The Disputed Ground Between Formalism</i>	
<i>and Functionalism</i>	706
4. <i>A Newly Consistent Doctrine from the Court?</i>	712
5. <i>The Shared Ground Between</i>	
<i>Formalism and Functionalism</i>	714
B. <i>Separation of Powers Commentary</i>	717
C. <i>Considering the Traditional View</i>	723

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II. THE KINETIC CONSTITUTION	724
A. <i>Representative Democracy and the Separation of Powers</i>	725
1. <i>Government by Representation, Not by Institution</i>	725
2. <i>Replacing Mixed Government</i>	735
B. <i>Nested Constituencies: The General Idea</i>	741
C. <i>Nested Constituencies: Supporting the General Idea</i>	742
1. <i>Article I</i>	742
2. <i>Article II</i>	753
a. <i>Constructing a national constituency: the electoral college</i>	754
b. <i>Constructing a national constituency: the unitary Executive</i>	756
c. <i>Constructing a national constituency: term of office</i>	757
3. <i>Structured for Debate</i>	760
D. <i>Sequential Decisionmaking</i>	761
1. <i>The Sequence: Enforcing Argument</i>	761
2. <i>Power as Sequence</i>	766
III. THE SEPARATION OF POWERS	766
A. <i>Participation</i>	767
B. <i>Accountability</i>	767
1. <i>Accountability to Master</i>	767
2. <i>Accountability for Engagement</i>	769
3. <i>Accountability to Self</i>	770
C. <i>Cadencing Power</i>	773
D. <i>How It Might Work</i>	774
1. <i>Revisiting Youngstown</i>	774
2. <i>A Modern Steel Seizure</i>	777
CONCLUSION	779

INTRODUCTION

The Constitution of the United States breathes power in and out. It draws energy from "the People": that energy is the raw capacity to regulate, in fact, to shape the world in which the Constitution operates. And the Constitution emits authority through its national decisionmaking institutions: that authority is the license to make choices about the shape the world should take and to enforce those choices by means of coercion, even violence, against "the People" themselves. The People's energy becomes governmental authority by passing through the constitutional structure.¹

I offer this observation to promote a hypothesis. The Constitution's conversion of the People's energy into the government's authority may give us a clue, a fertile starting point, for reconsidering the Constitution's idea of *power* and the *separation* of powers. The clue is this: *power* in the Constitution is neither the People's energy nor the government's authority alone; it is neither simple ingredient nor simple product of constitutional or political process. Most significantly, "power" is not simply a word to describe the arsenals of the three national decisionmaking institutions. Instead, power in the Constitution is, like the conversion itself, a dynamic exchange. Power is kinetic.

This Article begins to explore the working hypothesis that constitutional power is kinetic, an idea that appears to be missing from most traditional and contemporary accounts of constitutional power and the separation of powers. My hypothesis resists the tradition's preoccupation with the constitutional authority of federal institutions as institutions. Instead, I suggest that much can be learned about the Constitution's idea of power from its design for converting the People's energy into the government's authority. That design, I propose, depends fundamentally on the Constitution's structuring of the People into a series of *political constitu-*

1. In this Article, "the People," appearing predominantly without quotation marks, refers to that political community connoted by the Constitution's invocation of "We the People." Just which persons have been included in that community over time, however, raises a serious and controversial problem beyond the scope of this Article. See *infra* note 181. I do not attempt to define membership in "the People" either as an historical or normative matter. Instead, I use the term in its general, descriptive sense: "the People" refers broadly to that group of persons eligible to vote or otherwise considered to be citizens at any point in the life of the Constitution.

encies having two dominant and somewhat paradoxical characteristics: they are perfectly concentric and also perfectly differentiated.

First, their concentricity. Each member of the People stands simultaneously at the political center of four nested circles of gradually increasing circumference: each citizen stands at the political center of a constituency that speaks in the House of Representatives; at the same time, she stands at the center of two larger constituencies speaking through her two Senators; she also stands at the center of a fourth, larger still, speaking in the Presidency. Thus, the Constitution's constituencies are concentric: one voting member of the People stands simultaneously at the center of them all.

At the same time, these nested constituencies are perfectly differentiated. Using three repeating mechanisms—the method of election, the means of apportionment, and the term of office—the Constitution structures each constituency so that it can embrace a differently defined community of interest operating within a differently paced time frame: the House constituency describes a relatively small and local political community encouraged to define itself and its priorities every two years; the Senate constituencies describe larger, statewide political communities encouraged to define themselves and their priorities every six years;² the Presidency describes a national community encouraged to take on the task of definition every four years.³

These nested political constituencies are thus deliberately asymmetric, and their activity is syncopated both in time and political perspective. By this syncopation, I propose, the Constitu-

2. Each member of the People has two Senators, who both speak for statewide political constituencies. See U.S. CONST. art. I, § 3. Yet, Article I staggers the terms of every state's Senators so that the two are not ordinarily elected in the same year. See *id.*; see also *id.* amend. XVII (elections for state's two Senators may occur in same year where one seat vacated mid-term; terms remain staggered). This staggering means that each Senator is chosen by and thus represents a constituency that has had time to evolve politically since it elected its other Senator. See *infra* notes 258–61 and accompanying text. Accordingly, I refer throughout to the Senate's *two* constituencies to indicate this built-in opportunity for political change.

3. Many political scientists have noted the ways in which the differently structured constituencies of the President, Senators, and Representatives may influence their behavior in office. See, e.g., ROGER H. DAVIDSON & WALTER J. OLESZEK, MEMBERS OF CONGRESS 310–12 (1996) (observing the effects of differing geographical and temporal constituencies on legislators and the President with regard to policymaking). I have discovered no commentator, however, who has pursued the implications of these observations for the Constitution's separation of powers principle.

tion maximizes the potential for debate and disagreement within and among its political constituencies, not only at election time but continuing as well into the constitutional sequence, where national policy decisions are formally made by the institutions in which these constituencies speak. Given this structural predisposition to debate, the nested constituencies suggest that the Constitution's idea of power is fundamentally an idea about argument pursued over time. And, like argument, constitutional power is dynamic.

Proceeding from this observation, I propose that the Constitution's care in building its nested political constituencies may reveal a *separation of powers* principle that is less about the institutional authority of any federal decisionmaker than it is about preserving certain constitutional qualities in the dynamic political argument within and among these nested constituencies over time. By resisting the preoccupation with the constitutional authority of federal institutions *as institutions* that characterizes most legal separation of powers theory, and by shifting focus to the Constitution's structure for political debate, my kinetic hypothesis may offer several benefits for our understanding of the separation of powers itself.

First, the hypothesis attempts to account for constitutional provisions that are virtually ignored in more traditional separation of powers theories: namely, how the Constitution structures its citizens into political constituencies and how the Constitution structures the sequence of debate through which national policy is made. By incorporating more of the Constitution's structural facts into a legal theory of power, the kinetic hypothesis may not only offer a more inclusive reading of the text; it may also relieve the weight that much traditional doctrine places on those isolated textual and structural elements—like the Constitution's vesting clauses—that are typically asked to carry the burden of separation of powers theory alone.⁴

Second, by attempting to understand the Constitution's idea of power through its structures for the practice of politics—its nested constituencies and its sequenced decisionmaking—the kinetic hypothesis may offer a way to connect the law's separation of pow-

4. See, e.g., Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1377 n.1 (1994) (citing ten law review articles that emphasize the Constitution's vesting clauses in the development of separation of powers accounts).

ers doctrine to the principle of democratic representation, upon which, after all, America's constitutional government was "wholly" founded.⁵ It makes sense to explore this connection: the Constitution's decisionmaking institutions were designed, simply, to accomplish the politically driven *representation* of a politically active "People." These institutions were not designed as constitutional ends, despite the tendency of traditional separation of powers theories to treat them as if they were. Indeed, if *representation*, and thus constituent-based politics, is the Constitution's core structural principle, any theory of constitutional power, including the separation of powers, will benefit from taking seriously the Constitution's structures for the practice of politics.⁶

The kinetic hypothesis might ultimately offer a third benefit. Understanding power as kinetic may make possible a theory of constitutional power that can speak more lucidly to the workings of practical national politics than does much traditional separation of powers doctrine. That is, the kinetic hypothesis may eventually permit the Constitution, and the separation of powers principle in particular, to be understood and enforced as explaining and shaping national politics over time, not as standing outside of and

5. See THE FEDERALIST NO. 14, at 84 (James Madison) (Jacob E. Cooke ed., 1961). Madison himself emphasized the Constitution's dependence on what he called "the great principle of representation." *Id.* In its proposed Constitution, Madison argued, America offered the world the first "example . . . of a government wholly popular, and founded at the same time wholly on that principle [of representation]." *Id.*

6. I discuss the constitutional link between the principle of representation and the separation of powers more fully *infra* Section II.A. In beginning to explore a kinetic hypothesis of the separation of powers, this Article considers only the Constitution's elected—and thus overtly representative—institutions: the Presidency, the Senate, and the House of Representatives. I leave aside, for the moment, the federal Judiciary. It is apparent that prominent Framers did consider "every branch of the constitution and government to be popular" and regarded the president, Senate, and even the judiciary as well as the House of Representatives as somehow *all equal agents of the people's will*." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 549 (1969) (citation omitted) (emphasis added). Yet, while the Constitution itself firmly ties the Judiciary to electoral politics by making judges political appointees, at the same time Article III carefully insulates the Judiciary from ongoing electoral influence by granting its judges life tenure and guaranteed salary. See U.S. CONST. art. III, § 1; see also *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60 (1982) (discussing independence of federal Judiciary stemming from Article III). Thus, while the Judiciary may "somehow" embody the Constitution's principle of representation, it does so in a way that profoundly distinguishes it from its overtly representative coequals. In light of these differences, I save for later consideration the questions of whether and to what extent the Judiciary can fairly be considered, within my separation of powers hypothesis, as a representative institution with a discernible constituency among "We the People."

against politics. The kinetic hypothesis might in this way increase the relevance of politics to constitutional law, and vice versa, by beginning to close the gap between the legal ideal and the political real that can make much traditional legal separation of powers doctrine seem extraneous to the way public policy is debated and made.⁷

7. In exploring my working hypothesis in this Article, I have relied on ideas from many sources, but I have exhausted none. Thus, I cannot claim a seat in a particular school of constitutional interpretation (and none would have me, either). I begin with the Constitution's text, but I do not stop there, and so I do not belong to the literalists or textualists, strict or otherwise. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1129-30 (1995) (describing literalist, or textualist, methodology as recognizing legitimate constitutional meaning only in the "plain meaning" of the "letter of the law"). Similarly, I rely on the writings of historical figures involved in negotiating, drafting, debating, and advocating the Constitution during the framing era, but I do not stop there, either, and so I do not belong to the originalists or the intentionalists. See Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 853-65 (1985) (discussing checks and balances, relying on the text of the Constitution and the Framers' intent); Stephen L. Carter, *From Sick Chicken to Synar: The Evolution and De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 765-66 (asserting that interpretation of structural provisions of the Constitution should begin with consideration of the text and historical background); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 382-83 (1981) (contending that original intent is the proper mode of determining constitutional meaning); see also Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 597 (1985) ("[T]he constitutional text is the verbal or linguistic embodiment of various beliefs about how the polity ought to live various aspects of its life. . . . [The Constitution's] proposers and ratifiers . . . were, on this view, according authoritative status to particular beliefs about how the polity ought to live its life." (footnote omitted)); Rubenfeld, *supra*, at 1128-29 (describing originalist, or intentionalist, methodology as recognizing legitimate constitutional meaning only in what can be deemed "the sense in which the Constitution was accepted and ratified by the Nation" (citation omitted)). I consider examples from the political life of the Republic, but I do not insist that history or practice is or necessarily should be deemed law, constitutional or otherwise, purely because of its tenacity. Compare, for example, *Burnham v. Superior Court*, 495 U.S. 604 (1990), in which Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justice Kennedy, reasoned that the due process principle incorporated in the Fourteenth Amendment permits a state to exercise personal jurisdiction over a nonresident defendant lacking even minimum contacts with that state so long as the defendant was personally served with process while physically present within state lines. See *id.* at 619. Rejecting arguments that this so-called "transient jurisdiction" was fundamentally unfair and thus unconstitutional under the Court's due process jurisprudence, Justice Scalia concluded that because transient jurisdiction had remained a widespread practice since the Fourteenth Amendment's ratification in 1868, the practice must, by definition, remain constitutional, notwithstanding what Justice Scalia himself describes as its obvious potential for serious unfairness were it measured by the Court's own minimum contacts requirements. See *id.* To Justice Scalia, transient jurisdiction was legitimated by the simple fact of its historical tenacity: "its validation is its pedigree." *Id.* at 621. For other examples of history- and practice-based constitutionalism, see

I. THE TRADITION: A STATIC CONSTITUTION

It may at first appear oxymoronic to speak of a separation of powers "tradition." Even a brief review of the literature on this issue uncovers an abiding controversy among those who have attempted to interpret and to enforce the Constitution's idea of power. In fact, the puzzle of constitutional power, and of its course through American national government, has generated a bewildering array of conflicting judicial doctrine and legal theory, along with a sturdy field of factions: there is formalist separation of powers,⁸ and also pragmatic formalism,⁹ functionalism,¹⁰ uni-

BRUCE A. ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* (1991); Bruce A. Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

I derive much, moreover, from the Constitution's structure for political debate and national policymaking, and I argue that constitutional structure communicates constitutional meaning. But traditional structuralism primarily emphasizes the relationships between and among the Constitution's institutional seats of authority; inasmuch as I go further to read meaning from the Constitution's kinetic elements—its political moving parts—I cannot claim to be a traditional structuralist. For the classic, and original, statement of structural constitutionalism, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

Likewise, I concentrate in this Article on indications that the Constitution's ideas of power are in fact ideas about argument and exchange, and so I have gained a good deal from the insights of scholars reviving a modernized civic republican tradition that advocates a dialogic standard by which to measure the quality of the political process and its outcomes. The literature on the republican revival is vast. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1049-70 (1984); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); see also H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM* 201-08 (1993) (summarizing the neorepublican movement, primarily through an analysis of Michelman's and Sunstein's works); Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243, 2245 (1993) (criticizing the movement).

But I do not here derive from the Constitution's architecture of exchange any prescription for a true constitutional politics that can measure whether national policy decisions are substantively good or just—that is, whether they reflect the right voices, or the right values, or the right vision of what constitutes the true "public interest." See, e.g., Michelman, *supra*, at 1502-08 (arguing that civic republican politics can generate valid law only if it embodies a "process in which private-regarding 'men' become public-regarding citizens and thus members of a people"). And so, for this reason, among others, I do not belong to the civic republicans either. Instead, this Article draws on all of these traditions to explore an alternative account of the separation of powers based on the Constitution's structures for constituent-based politics—the hypothesis of a kinetic Constitution.

8. See *infra* Sections I.A.1, 3-5.

9. See generally Martin H. Redish & Elizabeth J. Cisar, "If Angels Were To Govern": *The Need For Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J.

tarianism,¹¹ trinitarianism,¹² and Holmesianism,¹³ to name only a sample. Some contemporary historians, moreover, have concluded that the search for a single, coherent, and authoritative "separation of powers" principle in the Constitution is futile. Instead, they argue, the Constitution embodies a polymorphous concept of power, describable less as a unified, coherent principle of power than as a cluster of internally inconsistent theories, reflecting both the chaos of Constitutional Convention politics and the political pragmatism of those designing a working government from scratch.¹⁴ Still others have disdained the search for any "theories"

449 (1991) (proposing an interpretive doctrine using both formalism and a "street-smart" pragmatic outlook).

10. See *infra* Section I.A.2-5.

11. See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (advocating unitary executive whose power to execute all laws cannot be diminished by Congress); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1159-71 (1992) (describing debates over unitary executive theory).

12. See, e.g., Calabresi & Prakash, *supra* note 11, at 559-68 (explaining "The Textual Case for a Trinity of Powers and of Personnel"). Trinitarians advocate a version of formalism, arguing that "the Constitution recognizes the existence of only three kinds of federal governmental power and creates only three institutions of government." *Id.* at 559. Accordingly, trinitarians conclude that the Constitution "carves up the world of government power into legislative, executive, and judicial power without remainder. Other types of governmental power may well exist, but our federal government does not possess them." *Id.* at 559 n.63. But compare A. Michael Froomkin, *The Imperial President's New Vestments*, 88 NW. U. L. REV. 1346 (1994) (using term "trinitarian" to refer to "a more holistic approach to separation of powers problems that focuses on the existence of three equal branches rather than treating each of the three branches in isolation," *id.* at 1348 n.11, as author accuses Professor Calabresi of doing), with Calabresi, *supra* note 4, at 1403 & n. 100 (responding that his own use of term "trinitarian" preceded Professor Froomkin's; arguing, moreover, that the term better represents his views than it does Professor Froomkin's).

13. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494-95 (1987) (explaining that Holmesianism considers separation of powers doctrine a political question, beyond courts' competence to interpret and apply); see also JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 263 (1980) (stating that separation of powers issues are nonjusticiable political questions that should be left to the national political process).

14. See, e.g., FORREST McDONALD, *NOVUS ORDO SECLORUM* 258 (1985) ("The doctrine of the separation of powers had clearly been abandoned in the framing of the Constitution; as Madison explained in *Federalist* numbers 47-51, mixing powers was necessary to ensure a system of checks and balances."); GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 109-116 (1981) (arguing that traditional commentators err in assuming "separation of powers" principle represents a single theory; instead, "[i]t is itself a cluster of concepts that have to be distinguished"); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211,

of power in the Constitution: as far as they are concerned, "[t]he Constitution contains no theories" about the authority of federal institutions.¹⁵

Yet despite vociferous disagreement over what the separation of powers means, the debaters largely share a preoccupation with federal institutions *as institutions*.¹⁶ This common focus tempts them, in turn, to make two basic assumptions. First, they appear to suppose that, at the Republic's founding, national power was fused as a material whole, then fragmented by the Constitution and the pieces lodged in and among the three decisionmaking branches, where the fragments of national power yet remain. That is, the tradition's focus on the authority of institutions as institutions presupposes that power is a locatable, divisible thing, rather than a force; that power is static, rather than kinetic.

Second, the tradition's preoccupation with the authority of institutions tempts it to assume that the separation of powers principle functions primarily to tell us where those static portions of national power are lodged. That is, the tradition assumes that the Constitution expresses its own idea of power primarily in the way it assigns tasks to one institutional decisionmaker or another. Under this assumption, the separation of powers principle serves mostly as a line-drawing tool to mark the boundary between one institution's constitutional tasks and those reserved to another.¹⁷

212-16 (1989) (concluding that, although Framers held general conviction that Constitution should embody some separation of powers principle, there was little consensus on just what that principle meant).

15. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 60 (1908); see also Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 2-3 nn.9-13 (1993) (discussing modern adherents to Wilson's view that the Constitution is devoid of theories).

16. This is true of the Supreme Court's separation of powers decisions, see *infra* Section I.A, and of mainstream legal commentary on the separation of powers, see *infra* Section I.B.

17. This Article concentrates on how these assumptions inform traditional separation of powers analysis when one institution undertakes a constitutional task *without* the cooperation or approval of another institution. The related question of whether one institution may perform another's constitutional task *with* the second institution's approval implicates the delegation doctrine (sometimes called the "non-delegation" doctrine), under which the Court has established standards to determine when any branch may delegate its constitutional tasks to a coordinate branch or another institutional agency. See, e.g., *Loving v. United States*, 116 S. Ct. 1737, 1743-51 (1996) (upholding delegation by Congress to President of authority to prescribe aggravating factors that permit court-martial to impose death penalty upon member of armed services convicted of murder). The delegation doctrine, for example, constitutionally prohibits the Congress from conveying to another

This Article questions both of these traditional assumptions and explores an alternative account of the Constitution's separation of powers principle.

A. *The Bipolar Supreme Court: A Formalist-Functionalist Swing*

The separation of powers puzzle appears to have stumped the Supreme Court. In a series of decisions over the last half-century, and particularly in the last twenty-five years, the Court has veered between two separation of powers doctrines that cannot easily be reconciled.¹⁸ Commentators usually label these two opposed doctrines "formalism" and "functionalism."¹⁹

branch the power "to make the law." *Id.* at 1744 (citation omitted). Nonetheless, the Congress may authorize another branch, or an independent agency, to exercise some discretion to fill in the details of a Congress-made "law," or to prescribe the details of its execution, so long as the Congress accompanies that authorization with "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.* at 1750 (alteration in original) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). *But see id.* at 1752-53 (Scalia, J., concurring in part and concurring in judgment) (observing that the Constitution never permits Congress to "delegate" any "legislative power"; that the Constitution only permits Congress to "assign responsibilities" to the President so long as the assignment is sufficiently constrained to fall short of power to legislate; and that the President is never Congress' "delegate" (and thus presumably never subordinate to Congress) but acts as direct agent of "the People" when performing such "assigned responsibilities"). The Court's delegation doctrine is considered a "strand of [its] separation-of-powers jurisprudence," *id.* at 1743, and the doctrine considers questions about institutions' actions that are related to the problems addressed here. Nonetheless, the delegation doctrine, in its particulars, is beyond the scope of this Article.

18. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (lamenting modern Court's separation of powers doctrine as "an incoherent muddle"); Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1083 (1987) (decrying formalist-functionalist poles in Court's separation of powers jurisprudence as "a paradox without a principle"); Redish & Cisar, *supra* note 9, at 450 (charging that the Court's separation of powers decisions have "evinced something of a split personality"); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 370-81 (1993) (explaining differences in political and constitutional theory underlying functionalist-formalist debate); Matthew James Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 962-65 (1995) (discussing the Court's two doctrines and critical response to the incongruity).

19. The terms "formalism" and "functionalism" are not used by the Court itself. Commentators have coined both terms to describe the Court's two basic, and basically inconsistent, approaches to separation of powers questions. See, e.g., Redish & Cisar, *supra* note 9, at 450 (using formalist and functionalist labels to characterize Court's "split personality" in separation of powers decisions). Other commentators describe the Court's two approaches differently. See, e.g., Shane, *supra* note 18, at 361 (substituting "categori-

1. *Formalism: The Comfort of Bright Lines.* Formalist separation of powers promises a straightforward solution to the separation of powers puzzle: power disputes should be approached and resolved as turf battles over constitutional tasks, fought by the Constitution's three federal institutions.²⁰ Once the puzzle is conceptualized in this way, a separation of powers issue becomes relatively easy to solve, at least at the methodological level. The solver need only determine *which* institution has been given the disputed task by the Constitution. Once that decision is made, it follows that no other institution may perform that constitutional task. Put another way, the formalist need only classify a task as belonging to one or another federal institution—that is, as “legislative,” “executive,” or “judicial”—and it follows that no other institution may perform it. Resolving a separation of powers problem becomes, in essence, an exercise in taxonomy.

The Court has taken a formalist approach in approximately half of its major separation of powers decisions this century.²¹

cal separationism” for “formalism” and “checked separationism” or “checks and balances view” for “functionalism”). By contrast to this scholarship, a recent Supreme Court opinion that addresses the separation of powers doctrine in passing may suggest that a majority of the Court considers its caselaw on this issue to be internally consistent, notwithstanding earlier dissent among the Justices on this question and notwithstanding the views of legal commentators. *See* *Loving v. United States*, 116 S. Ct. 1737, 1743–51 (1996); *see also infra* Section I.A.4 (discussing *Loving*'s treatment of Court's separation of powers case law).

20. *See, e.g.,* Redish & Cisar, *supra* note 9; *see also infra* notes 150–54.

21. In each case, formalism led the Court to strike down the challenged action as a violation of the separation of powers. *See, e.g.,* *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1463 (1995) (holding that Congress may not direct federal courts to reopen final judgments entered in particular cases or controversies); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 277 (1991) (holding that Congress may not retain supervisory power over decisions of a board created by a state to execute federal legislation); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (holding that Congress may not vest power to execute budget reduction legislation in an officer who is not entirely within the President's removal power); *INS v. Chadha*, 462 U.S. 919, 957–59 (1983) (holding that Congress may act legislatively only in accordance with bicameralism and presentment procedure, and may not attempt through legislative veto to interfere with the President's execution of immigration laws); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68, 87 (1982) (holding that Congress may not vest non-Article III federal courts with jurisdiction to decide controversies involving “private rights,” since those matters are “inherently judicial”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952) (holding that the President may not by executive order unilaterally implement policy of seizing steel mills to avoid nationwide labor strike). For a list of separation of powers decisions in which the Court applied functionalist reasoning, *see infra* note 82.

Two examples demonstrate the approach.

a. A task legislative, not executive: *Youngstown Sheet & Tube Co. v. Sawyer*. On April 8, 1952, President Harry Truman issued Executive Order No. 10,340, directing the Secretary of Commerce to seize most of the country's steel mills in order to avoid a nationwide strike threatened by the United Steelworkers of America—a strike that, in President Truman's view, would seriously compromise American military efforts in Korea and in Europe.²² President Truman claimed direct constitutional authority to issue this order unilaterally²³—that is, without the Congress' immediate participation or consent—principally from Article II's grant of "executive power" to the President²⁴ and from its direction that the President "shall be the Commander in Chief of the Army and Navy of the United States."²⁵ The Supreme Court disagreed, ruling that President Truman's order violated the Constitution's separation of powers principle.²⁶

The six Justices in the *Youngstown* majority did not agree on a single rationale explaining the holding.²⁷ Nonetheless, all six appear to have reached their decision against the President by resort to a fundamentally formalist view of the separation of powers. Simply stated, President Truman could not unilaterally seize the steel mills to avoid a strike because that task was legislative and not executive. It was a task for the Congress, and not for the President.

Justice Black's opinion, designated the opinion of the Court, offers the most exaggerated formalism of the six.²⁸ According to

22. See *Youngstown*, 343 U.S. at 589–92 (reprinting full text of the executive order).

23. See *id.* at 591 (recounting that Truman ordered seizure "by virtue of the authority vested in [him] by the Constitution and laws of the United States, and as President of the United States and Commander-in-Chief of the armed forces of the United States"); see also *id.* at 583–84 (recounting President's constitutional argument once litigation commenced).

24. See *id.* at 587–88. President Truman based his claim of sufficient "executive power" on two separate provisions of Article II. The first, the general vesting clause, states, "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. The second, colloquially called the "take care" clause, directs that the President "shall take Care that the Laws be faithfully executed." *Id.* art. II, § 3.

25. U.S. CONST. art. II, § 2.

26. See *Youngstown*, 343 U.S. at 587–89.

27. The majority ruling against President Truman included Justices Black, Jackson, Clark, Douglas, Burton, and Frankfurter (who wrote two separate opinions of his own).

28. As discussed more thoroughly *infra* notes 36–41 and accompanying text, four of

Justice Black, President Truman made two constitutionally crucial mistakes in seizing the steel mills.²⁹ First, he unilaterally selected a particular public *policy* from among available alternatives: he decided that the steel strike should be avoided "in order to assure the continued availability of steel and steel products" needed for military efforts in Korea and in Europe.³⁰ Second, President Truman unilaterally selected the *means* by which that policy should be enforced: he decided that the best way to avoid the strike was to seize the mills from owners who had proven recalcitrant in labor negotiations and to have the mills operated instead by the United States Secretary of Commerce.³¹ These two decisions—choosing public policy and choosing the means for its enforcement—together comprise what Justice Black saw as the essence of law-making, not law-executing. And so characterized, those decisions belong "exclusive[ly]" to the Congress under the Constitution.³²

The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy.³³

the six Justices voting against President Truman—Justices Frankfurter, Jackson, Burton, and Clark—delivered opinions that offered a less stark formalism than Justice Black's. Nonetheless, Justice Black's opinion was designated the opinion of the Court. See *Youngstown*, 343 U.S. at 582. Moreover, his opinion was explicitly joined by Justice Jackson, see *id.* at 634, Justice Burton, see *id.* at 655, and Justice Douglas, see *id.* at 629, notwithstanding their own separate opinions. Justice Frankfurter also asserted that he "join[ed]" Justice Black's opinion, although he criticized the inflexibility of what "Mr. Justice Black has written," *id.* at 589, and delivered a separate opinion offering a rationale with a different emphasis than Justice Black's, see *id.* at 593. Justice Clark alone expressly limited his concurrence to only the judgment of the Court. See *id.* at 660. Given this ambivalence, the *Youngstown* majority cannot be said to have wholeheartedly adopted Justice Black's formalist separation of powers account, and his version of formalism cannot, alone, explain the *Youngstown* outcome. Nonetheless, Justice Black's *Youngstown* opinion is an example of strict formalist reasoning. It is as such an example that I discuss Justice Black's opinion here.

29. See *Youngstown*, 343 U.S. at 588–91.

30. Exec. Order No. 10,340, 3 C.F.R. 861 (1949–1953), reprinted in 1952 U.S.C.C.A.N. (66 Stat.) 1043.

31. See *id.*

32. See *Youngstown*, 343 U.S. at 588 (Black, J.).

33. *Id.* at 588. Justice Douglas' concurrence relied on a formalism almost as stark as Justice Black's. See *id.* at 629–34 (Douglas, J., concurring). Asserting that the "answer" to the steel seizure controversy "must depend on the allocation of powers under the Constitution," Justice Douglas concluded that the seizure is "an exercise of legislative power"

Once the actions President Truman took in responding to the threat of a steel strike are deemed "legislative," it follows automatically that the President may not perform them.

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first Article says that "All legislative Powers herein granted shall be vested in a Congress of the United States."³⁴

The President, by contrast, may only "direct that a congressional *policy* be executed in a manner prescribed by Congress."³⁵ This reasoning reads into the Constitution a zero-sum power game, in

that the Constitution has allocated exclusively to the Congress. *Id.* at 630. Justice Douglas defined the seizure as a "legislative" act, in turn, for two related reasons. First, a government seizure of property to avert a strike is a kind of "sanction" for "irresponsible" industry conduct in labor-management relations that endangers the national economy; to Justice Douglas, generally speaking, the "determination that sanctions should be applied, that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them, is an exercise of legislative power." *Id.* Second, and more specifically, even a temporary seizure by the federal authorities of an industrial plant to settle a labor controversy is, to Justice Douglas, "a taking in the constitutional sense" for which the Fifth Amendment requires compensation. *Id.* at 631. Since only the Congress may raise revenues to fund such compensation, then the seizure constituting the taking must also be a legislative task that only the Congress may perform. *See id.* at 631-32 ("The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected.").

34. *Youngstown*, 343 U.S. at 587-88 (Black, J.); *see also id.* at 630 (Douglas, J., concurring) (stating that Article I's vesting clause "is not ambiguous" in that it "places not *some* legislative power in the Congress; . . . [it] says 'All legislative Powers'"). Justice Black made even quicker work of President Truman's claim that he could issue the order as an exercise of his authority as Commander in Chief of the armed forces. Suggesting that the hostilities in Korea and the NATO operations in Europe did not qualify those regions as "theaters of war" constitutionally justifying the exercise of Commander in Chief authority at all, Justice Black concluded that Article II does not, in any event, give the President "the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." *Id.* at 587 (Black, J.). Justice Black concluded, "This is a job for the Nation's lawmakers, not for its military authorities." *Id.*; *see also id.* at 588 (stating that the Constitution does not subject Congress' lawmaking power over labor policy "to presidential *or military* supervision or control" (emphasis added)).

35. *Id.* at 588 (emphasis added).

which one and only one institution may claim license to perform any particular constitutional task (such as formulating public policy in response to the immediate threat of a crippling steel strike). This makes it easy for Justice Black to solve any separation of powers problem: he need only define what makes a task "legislative" and then try that label on the task in dispute. If the label fits, then it follows simply that the Constitution prohibits the President from performing that task unilaterally. This is formalist separation of powers doctrine in its purest state.

Four other Justices in the *Youngstown* majority offered separation of powers accounts that do not turn so sharply on an abstract classification of tasks as "legislative" or "executive," and so they did not explicitly adopt Justice Black's rigid brand of formalism.³⁶ Instead, all four emphasized legislation in which Congress had in fact exercised policymaking authority within the field of labor-management relations involving defense industries, and had established several procedures under which private property could be seized in the event that production was interrupted.³⁷ Al-

36. *But see supra* note 28 (identifying four Justices who explicitly joined Justice Black's opinion, even as they delivered separate opinions offering more moderate reasoning).

37. At the time President Truman faced the impending steel strike, two acts of Congress offered him a legislatively sanctioned response to the crisis and allowed him to seize real and personal property if certain strict conditions were met. *See Youngstown*, 343 U.S. at 586 & nn.2-4 (Black, J.). First, the Selective Service Act of 1948, ch. 625, 62 Stat. 604 (1948) (codified as amended at 10 U.S.C. § 2535 et seq. (1994)), authorized the President to seize industrial plants that "refuse[d] or fail[ed]" to produce military goods necessary for national security, but only where a particular producer had failed to comply with a specific order for goods placed by the President and the seizure was necessary to ensure production for that specific order. *See Youngstown*, 343 U.S. at 586 (Black, J.); *see also id.* at 664-65 (Clark, J., concurring in judgment) (describing provisions of the Selective Service Act). Second, the Defense Production Act of 1950, ch. 932, 64 Stat. 798 (codified as amended at 50 App. U.S.C. § 2061 et seq. (1994)), authorized the President to order federal mediation of labor disputes affecting national defense, like the steel dispute itself, through what became known as the Wage Stabilization Board; this legislation also permitted the President to seize real property, but only through ordinary condemnation procedures set forth in the statute. *See Youngstown*, 343 U.S. at 663 (Clark, J., concurring in judgment) (describing the remedies under the Defense Production Act). Significantly, the Defense Production Act did not arm the President with any other sanctions for settling labor disputes. *See id.* While President Truman did shepherd the steel dispute into the Wage Stabilization Board for mediation earlier in the crisis, that effort had produced no resolution. *See id.* at 582-83; *see also* DAVID MCCULLOUGH, *TRUMAN* 896-98 (1992) (recounting year-long escalation of steel crisis prompting seizure order). The President had not pursued the Defense Production Act's property condemnation procedures against the steel mill operators because, in the government's view, the statutory process was "much too cumbersome, involved, and time-consuming for the crisis which

though President Truman did not rely on this or any other statutory authority for the steel seizure,³⁸ and although the seizure did not violate any express legislative provision,³⁹ these four Justices concluded that the Congress' earlier legislation precluded the President from taking action not specifically authorized under those statutes.⁴⁰ Simply stated, the Congress had, in effect, preempted the field of action altogether by legislating within it.⁴¹

was at hand." *Youngstown*, 343 U.S. at 586 (Black, J.) (quoting government lawyers who defended the executive order before Court). A third piece of legislation emphasized by the *Youngstown* majority was the Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 141-88 (1994)), familiarly known as the Taft-Hartley Act. See *infra* notes 42-55 and accompanying text.

38. See *Youngstown*, 343 U.S. at 589-92 (reprinting the full text of the executive order, which contains no reference to any legislative authority); see also *id.* at 585 (Black, J.) (noting that President Truman did not "rely on statutory authorization for this seizure").

39. See *infra* notes 42-55 and accompanying text.

40. See *Youngstown*, 343 U.S. at 585-87. Two Justices suggested that a President may be constitutionally permitted to make and implement policy unilaterally even within a field of action belonging to the Congress, but only so long as the Congress has not yet begun to occupy that field. In articulating his famous tripartite vision of constitutional powers "fluctuat[ing]" between the President and the Congress, Justice Jackson describes an intermediate "zone of twilight" in which the two institutions may share "concurrent authority, or in which its distribution is uncertain." *Id.* at 637 (Jackson, J., concurring). Within that twilight zone, a President acting "in absence of either a congressional grant or denial of authority" may claim "independent presidential responsibility" from "congressional inertia, indifference or quiescence." *Id.* By contrast, where the Congress has expressed or implied its will within a field, the President may follow an alternative path only upon proving that the field belongs to the Executive, not the Congress: "Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject." *Id.* at 637-38. Justice Clark, in turn, was even more explicit:

I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation.

Id. at 662 (Clark, J., concurring in judgment). In contrast to Justices Jackson and Clark, Justice Frankfurter carefully declined to address the question of "what authority belongs to [the President] until Congress acts." *Id.* at 597 (Frankfurter, J., concurring).

41. As Justice Jackson explained:

Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. . . . In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

Id. at 639 (Jackson, J., concurring); see also *id.* at 658-59 (Burton, J., concurring) (stating that Congress has reserved seizure of industrial properties "for its own consideration"); *id.* at 662 (Clark, J., concurring in judgment) (stating that where Congress has "laid down specific procedures" to deal with a similar "type of crisis," the President may not pursue

In this, *Youngstown's* four more flexible concurring Justices shared an important assumption with Justice Black: the Constitution gives Congress alone the power to formulate a response to a threatened nationwide strike in a defense-related industry, particularly a response that involves seizing private property. For only if the Congress possesses that prerogative absolutely could it so block the President from pursuing an alternative path not specifically prohibited by statute. One must own the field in order to preempt it.

This shared formalist instinct is perhaps most pronounced in the majority's reliance on the Labor Management Relations Act of 1947, familiarly known as the Taft-Hartley Act,⁴² to reach the conclusion that the steel seizure violated the separation of powers.⁴³ Passed over President Truman's veto by a hostile Republican Congress,⁴⁴ this legislation authorized certain federal actions to be taken in response to nationwide labor strikes that affected an entire industry and thus "imperil[ed] the national health or safety."⁴⁵ In the face of such a strike, the Act authorized (but did not require) the President to refer the dispute to an appointed "board of inquiry and thereafter, in proper cases, seek injunctive relief for an eighty-day period against a threatened work stoppage."⁴⁶ President Truman declined the remedy offered him by the Taft-Hartley Act,⁴⁷ not least because the mandated procedure,

an alternative response); *id.* at 597 (Frankfurter, J., concurring) (distinguishing the constitutional issue here from a case where Congress had enacted "no legislation whatever bearing on the authority asserted by the seizure"). Justice Black cited the same legislation to undergird his more abstract constitutional categorization. *See id.* at 586 (Black, J.). Indeed, only Justice Douglas did not directly cite these statutes, announcing more obliquely, "[T]he power to execute the laws starts and ends with the laws Congress has enacted." *Id.* at 633 (Douglas, J., concurring).

Compare Congress' ability to preempt the President under separation of powers principles with Congress' ability to preempt state legislatures under the Supremacy Clause of Article VI. *See, e.g.,* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-20 (1992) (discussing standard for measuring when Congress will be deemed to have preempted a regulatory field, thus precluding all regulation by the states regardless of particular conflict with federal regulation).

42. Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-88 (1994)).

43. *See Youngstown*, 343 U.S. at 586.

44. *See McCULLOUGH*, *supra* note 37, at 565-66.

45. *Youngstown*, 343 U.S. at 663 (Clark, J., concurring in judgment).

46. *Id.* (Clark, J., concurring in judgment).

47. Truman also declined the avenues open to him under the Selective Service Act and the Defense Production Act. *See supra* note 37.

with its eighty-day strike moratorium, would have required the steelworkers to continue working at wages they had been protesting for nearly a year already, while the producers resisted efforts at compromise.⁴⁸

A majority of Justices invoked the Taft-Hartley Act provisions as offering a legislative remedy that President Truman improperly ignored in responding to the steel crisis.⁴⁹ Even more interesting than their emphasis on the enacted provisions of that statute, however, is the weight they gave to what was *not* included in the Taft-Hartley Act. While Congress was debating that legislation, a proposal was made to authorize the President to seize private industrial property to solve labor disputes in an emergency.⁵⁰ The proposal failed.⁵¹

So profoundly did the *Youngstown* majority believe that they had correctly labeled the strike-response task as "legislative," and so profoundly did they believe that this label was necessarily exclusive, that they accorded the same weight to the Congress' *failure* to enact legislation granting the President the seizure power as they did to the strike-response legislation that was actually passed.⁵² Indeed, they gave Congress' failure to grant the President a seizure power the same weight they would have given to a

48. See McCULLOUGH, *supra* note 37, at 896-98.

49. See *Youngstown*, 343 U.S. at 586 (Black, J.); *id.* at 639 (Jackson, J., concurring); *id.* at 656 (Burton, J., concurring); *id.* at 663-64 (Clark, J., concurring in judgment); *id.* at 598-606 (Frankfurter, J., concurring).

50. See *id.* at 586 (Black, J.) (citing 93 CONG. REC. 3637-45 (1947)).

51. Justice Frankfurter provides the fullest account of the legislative history, reporting that "the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress." *Id.* at 599-600 (footnote omitted). Justice Frankfurter placed particular emphasis on a report to the Senate by the chairman of the Senate Labor Committee, which declared "that a general grant of seizure powers had been considered and rejected in favor of reliance on *ad hoc* legislation, as a particular emergency might call for it." *Id.* at 600 (Frankfurter, J., concurring) (footnote omitted). Justice Frankfurter stressed:

An amendment presented in the House providing that where necessary "to preserve and protect the public health and security" the President might seize any industry in which there is an impending curtailment of production, was voted down after debate, by a vote of more than three to one.

Id. at 600-01 (footnote omitted).

52. *But cf.* *INS v. Chadha*, 462 U.S. 919, 951 (1983) (holding that Congress may exercise its legislative power only in accord with the Constitution's "single, finely wrought, and exhaustively considered, procedure" for lawmaking, including passage by majority of both houses of Congress, either with the signature of the President or with a veto override by Congress).

statute *prohibiting* the President from seizing private property to avert a strike. Justice Black reasoned that

the use of the seizure technique to solve labor disputes was not only unauthorized by any congressional enactment; prior to this controversy, Congress had *refused to adopt* that method of settling labor disputes. . . . Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently, it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress enacted did not provide for seizure under any circumstances.⁵³

Justice Jackson too equated Congress' failure to enact seizure authorization with an enacted prohibition of that remedy:⁵⁴

[I]f Congress sees fit to rely on free private enterprise collectively bargaining with free labor for support and maintenance of our armed forces, can the Executive, because of lawful disagreement incidental to that process, seize the facility for operation upon Government-imposed terms?⁵⁵

The Executive, the *Youngstown* court held, may not. Where the field is marked as belonging to Congress, the separation of powers bars the President's way.

b. A task judicial, not legislative: *Plaut v. Spendthrift Farm*. A majority of the current Supreme Court sustains the formalist tradition. In *Plaut v. Spendthrift Farm, Inc.*,⁵⁶ decided during the 1994 Term, the Court ruled that the Congress violated the Constitution's separation of powers principle by enacting legislation directing federal courts to reinstate certain private federal lawsuits earlier dismissed,⁵⁷ with final judgment entered against the plain-

53. *Youngstown*, 343 U.S. at 586 (Black, J.) (internal citations to legislative history of Taft Hartley Act omitted) (emphasis supplied).

54. Justices Burton and Clark also equated the failure to enact seizure authorization with an enacted prohibition, as did Justice Frankfurter, whose analysis of the legislative history is discussed *supra* note 51. See *Youngstown*, 343 U.S. at 657 (Burton, J., concurring); *id.* at 663 (Clark, J., concurring in judgment).

55. *Youngstown*, 343 U.S. at 643 (Jackson, J., concurring).

56. 115 S. Ct. 1447 (1995).

57. Securities Exchange Act of 1934 § 27A(b), Pub. L. No. 102-242, 105 Stat. 2387 (codified as amended at 15 U.S.C. § 78aa-1(b) (1994)).

tiffs, on order of the Supreme Court.⁵⁸ Because the Court deemed the task of entering final judgments in private civil actions to be "judicial,"⁵⁹ formalism's taxonomy of institutions meant that the task belonged exclusively to the Judiciary. Thus, it followed that the legislature had no power to interfere in determining the continuing viability of the particular lawsuits, even though the lawsuits themselves were brought pursuant to federal legislation.⁶⁰

The turf battle that ended in *Plaut* began in 1991, when, in *Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson*,⁶¹ the Supreme Court imposed a limitations period for private securities fraud actions brought under federal law: all such actions must be commenced "within one year after the discovery of the facts constituting the violation and within three years after such violation."⁶² A second Supreme Court decision, announced on the same day, established a new standard for the retroactivity of Court decisions: any new rule of federal law that the Supreme Court applies to the parties in the case announcing the rule must be applied as well to all pending lawsuits.⁶³ Enforced together, the Court's two pronouncements meant that its new securities fraud limitations period must be applied by all federal courts to dismiss with prejudice all private securities fraud actions then pending, if those actions had been filed later than one year after discovery of the fraud or three years after the fraud itself, even if those lawsuits had been timely under the limitations period applicable when they were actually commenced.⁶⁴

58. See *Plaut*, 115 S. Ct. at 1449-50.

59. *Id.* at 1453.

60. See *id.* at 1456-58.

61. 501 U.S. 350 (1991).

62. *Id.* at 364. The federal law in question was Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5.

63. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); see also *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (adopting the rule in *Beam*, and extending it such that "[w]hen this Court applies a rule of federal law . . . [it] must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule").

64. See *Plaut*, 115 S. Ct. at 1450-51 (citing *Harper*, 509 U.S. at 92) (explaining "joint effect" of *Lampf* and *Beam* in retroactively applying new securities fraud limitations period to petitioner's suit and all other federal securities actions pending when *Lampf* was announced).

The Congress disagreed. In late 1991, with the approval of President Bush, it passed legislation denying retroactive effect to the Court's limitations ruling.⁶⁵ This legislation, incorporated as Section 27A(a) of the Securities Exchange Act of 1934,⁶⁶ provided that the timeliness of any private securities fraud action commenced up to the day before *Lampf* was decided would be governed by the pre-*Lampf* rules of the jurisdiction in which the action had been pending.⁶⁷ The Congress further declared that any private securities fraud action that had been dismissed as untimely because of *Lampf*'s retroactive application must be reinstated on a plaintiff's motion if that action had been timely when commenced, according to the applicable pre-*Lampf* limitations rule.⁶⁸

But this meant re-opening judgments entered as final by a federal court and, the Supreme Court ruled, that power belongs to the Judiciary alone. Writing for the majority, Justice Scafia explained that section 27A(b) "prescribes what the law *was* at an earlier time,"⁶⁹ that is, it establishes the governing limitations period at the time a particular securities fraud complaint had been commenced in federal court. The Constitution denies the Congress that job.

65. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) (codified at 15 U.S.C. § 78aa-1 (1994)).

66. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ll (1994).

67. Section 27A(a) provides, in pertinent part:

(a) Effect on pending causes of action

The limitation period for any private civil action implied under [§ 10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

15 U.S.C. § 78aa-1(a). *Lampf* was decided on June 20, 1991. See *Lampf*, 501 U.S. at 350.

68. Section 27A(b) states:

(b) Effect on dismissed causes of action

Any private civil action implied under [§ 10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991 [the day on which the legislation was to take effect].

15 U.S.C. § 78aa-1(b).

69. *Plaut*, 115 S. Ct. at 1456.

Article III establishes a “judicial department” with the “province and duty . . . to say what the law is” in particular cases and controversies. . . . The Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding . . . that “a judgment conclusively resolves the case” because “a ‘judicial Power’ is one to render dispositive judgments.”⁷⁰

Once labeled “judicial,” the power to re-open final judgments is automatically off-limits to Congress.⁷¹ Indeed, Congress’ constitutional authority ends once it has “prescrib[ed] the rules by which the duties and rights of every citizen are to be regulated’ . . . [t]he interpretation of the laws [beyond that point is] the proper and peculiar province of the courts.”⁷² The separation of powers principle protects the Judiciary from any congressional interference with its exclusive constitutional tasks.

Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.⁷³

Justice Scalia spent considerable time supporting the Court’s taxonomic decision here with historical evidence that the Constitution’s Framers intended so “to separate the legislative from the judicial power,”⁷⁴ since the Framers themselves “lived among the ruins of a system of intermingled legislative and judicial powers” in which legislatures routinely functioned as equity courts of last resort, thus threatening—and delivering—“factional strife and partisan oppression.”⁷⁵ All the same, the Court’s basic methodology in *Plaut* differs little from Justice Black’s in *Youngstown*, which fol-

70. *Id.* at 1453 (citations omitted).

71. “We conclude that . . . Congress has exceeded its authority by requiring the federal courts to exercise ‘the judicial Power of the United States’ . . . in a manner repugnant to the text, structure and traditions of Article III.” *Id.* at 1452.

72. *Id.* at 1455 (quoting THE FEDERALIST NO. 78, at 523, 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)) (alteration in original).

73. *Id.* at 1457.

74. *Id.* at 1454.

75. *Id.* at 1453.

lowed the same formalist approach to the separation of powers without resort to history:⁷⁶ here, too, taxonomy rules.

2. *Functionalism: The Comfort of Pragmatism.* Where formalism promises clean taxonomy, functionalist separation of powers doctrine offers messy practicality. As developed by the Supreme Court, functionalism⁷⁷ supposes that the Constitution is not necessarily offended when one of its national decisionmaking institutions undertakes a task that the Constitution appears to have assigned to another institution. Instead, the separation of powers is violated only when such task-napping goes too far, either by "impinging"⁷⁸ on the vested branch's ability to accomplish its core constitutional functions or by "aggrandizing"⁷⁹ the task-napper's own authority. Functionalism thus attempts to protect each institution's fundamental "institutional integrity,"⁸⁰ while tolerating "needed and innovative"⁸¹ task-sharing that advances the "effective working of the National Government as a whole."⁸²

The Court took the functionalist approach in *Morrison v. Olson*⁸³ to uphold Title VI of the Ethics in Government Act of

76. For further discussion of the use of framing and ratification history by both formalists and functionalists, see *infra* text accompanying notes 118-28.

77. The term "functionalism," like "formalism," is not used by the Court itself. See *supra* note 19.

78. See *United States v. Nixon*, 418 U.S. 683, 711-12 (1974).

79. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986).

80. *Id.* at 851.

81. *Id.*

82. *INS v. Chadha*, 462 U.S. 919, 999 (1983) (White, J., dissenting). The Court has adopted what is called the functionalist approach in just under half of its separation of powers rulings; in nearly every case functionalism has led the Court to reject the separation of powers challenge to task-sharing among the federal branches. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding legislation instituting United States Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding legislation instituting independent counsel to investigate wrongdoing among Executive Branch officials); *Schor*, 478 U.S. at 833 (upholding legislation permitting non-Executive Branch administrative agency to hear and decide common law counterclaims); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977) (upholding law granting custody of Presidential papers to non-Executive Branch official); *United States v. Nixon*, 418 U.S. 683 (1974) (allowing subpoena of Presidential communications in federal criminal proceeding). But see *Buckley v. Valeo*, 424 U.S. 1, 120-21, 135, 138-39 (1976) (per curiam) (adopting functionalist reading of separation of powers to strike down legislation vesting in Congress the power to appoint members of the Federal Election Commission, so long as the Commission is given executive-like powers to enforce the law).

83. 487 U.S. 654 (1988).

1978,⁸⁴ which authorized the appointment of an independent counsel to investigate and prosecute criminal wrongdoing by executive branch officials. The Act's opponents argued that it violated the separation of powers by vesting the traditional executive power to make prosecutorial decisions in an official outside of the executive branch: Congress had authorized a panel of federal judges to appoint and supervise the independent counsel.⁸⁵ The independent counsel could, moreover, be removed from office only for "good cause."⁸⁶

The Court rejected the separation of powers challenge, even while acknowledging that the Act did in fact divest the President of an executive task and then vest that task, at least in part, in the Congress and the Judiciary. "It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity."⁸⁷ But that divestiture was constitutionally tolerable. "[T]he Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."⁸⁸ Because the Act did not "interfere impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws,"⁸⁹ and because it did not aggrandize the Congress' power at the President's expense,⁹⁰

84. 28 U.S.C. §§ 591-99 (1994).

85. See *id.* §§ 49, 593(b)(1).

86. See *Morrison*, 487 U.S. at 685-93 (discussing constitutionality of act provisions limiting independent counsel's removal only to those instances where Attorney General can show "good cause"); *id.* at 692 (Court declining to define "good cause" standard beyond noting that legislative history "makes clear" that it authorizes removal for "misconduct").

87. *Id.* at 695.

88. *Id.* at 696 (observing that the Act "gives the Executive a degree of control" over the independent counsel's actions).

89. *Id.* at 693.

90. See, e.g., *id.* at 694 (stating that "this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch"). The Court in *Morrison* cited *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), for comparison. *Schor* held that permitting the Commission to assert jurisdiction over common law counterclaims during reparations proceedings held pursuant to Section 14 of the Commodities Exchange Act did not violate the separation of powers doctrine. Such an intrusion on the judicial branch's authority was *de minimis* and disallowing such limited jurisdiction over common law claims would "defeat the obvious purpose of the legislation." *Id.* at 856 (quoting *Cromwell v. Benson*, 285 U.S. 22, 46 (1932)); see also *Morrison*, 487 U.S. at 686 (noting that the power to remove independent counsel rests in the

the Act satisfied the requirements of functionalist separation of powers doctrine.⁹¹

In *Commodity Futures Trading Commission v. Schor*,⁹² the Court followed similar reasoning to uphold a provision of the Commodity Exchange Act and accompanying regulations, which together permitted the Commodity Futures Trading Commission to hear reparation claims from victims of violations of futures trading regulations and to adjudicate common law counterclaims.⁹³ Opponents of these jurisdictional provisions argued that the separation of powers was violated by vesting the task of deciding individual claims to relief—which Article III assigned to the judicial branch—in a non-Article III administrative agency.⁹⁴

The Court disagreed, although not on the basic taxonomy. Indeed, the Court acknowledged, the task of deciding a common law counterclaim—"a 'private' right for which state law provides the rule of decision"—lies at the "core" of matters ordinarily reserved to Article III courts.⁹⁵ Moreover, the Court reasoned, the separation of powers principle is concerned with safeguarding the Judiciary's particular role within "our tripartite system."⁹⁶ Yet that principle operates not by enforcing strict compliance with formal constitutional task assignments, but, more broadly, "by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."⁹⁷ That is to say, the separation of powers serves not to protect each branch's allotment of constitutional tasks against

executive branch and distinguishing *Morrison* from earlier decisions that rejected attempts by Congress to gain for itself "a role in the removal of executive officials other than its established powers of impeachment and conviction").

91. See *Morrison*, 487 U.S. at 697. Likewise, in *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court followed the same flexible approach to uphold legislation establishing the United States Sentencing Commission, a creation of Congress that was placed within the judicial branch yet vested with the apparently legislative task of promulgating mandatory sentencing guidelines for federal crimes. See *id.* at 384-85.

92. 478 U.S. 833 (1986).

93. *Id.* at 851-57. Oddly, *Schor*, with its functionalist approach, was announced on the same day as *Bowsher v. Synar*, 478 U.S. 714 (1986), in which a differently composed majority of the Court followed a formalist separation of powers analysis to invalidate part of the Gramm-Rudman-Hollings Act, Pub. L. No. 99-177, 99 Stat. 1038 (1985).

94. See *Schor*, 478 U.S. at 851-57.

95. *Id.* at 853; see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68-70 (1982) (Congress may not vest jurisdiction over private-right claim traditionally deemed "inherently judicial" in a non-Article III tribunal).

96. *Schor*, 478 U.S. at 850.

97. *Id.* (alteration in original) (emphasis added).

trespass by the others, but to ensure each branch's "institutional integrity" by preventing "the encroachment or aggrandizement of one branch at the expense of the other."⁹⁸

Accordingly, the challenged jurisdictional provisions would violate the separation of powers only if they "impermissibly threaten[ed] the institutional integrity of the Judicial Branch"⁹⁹ by removing "essential attributes of judicial power" from Article III courts or by giving the Commission "[too much of] the range of jurisdiction and powers normally vested only in Article III courts."¹⁰⁰ The jurisdictional provisions at issue did not cross this constitutional line. First, they left intact other core Article III powers, including the right to decide common law counterclaims that parties did not voluntarily submit to the Commission and the right to review Commission rulings *de novo*.¹⁰¹ Second, the Commission was denied other powers ordinarily vested in Article III courts, inasmuch as the Commission could not conduct jury trials or issue writs of habeas corpus.¹⁰² As with the independent counsel provisions upheld in *Morrison v. Olson*, the Commission's counterclaim jurisdiction breached the constitutional taxonomy—but not too much.¹⁰³

The functionalism deciding both *Morrison* and *Schor*, however, is not simply a doctrine of constitutional lenience; it is a doctrine of constitutional practicality. In these cases, the Court winked at task commingling among institutions not because task divisions do not constitutionally exist, or do not constitutionally matter, but because the Court concluded that the commingling serves the goal of good government more than it undermines the goal of precise task-assignment. That is, in its functionalist mode, the Court evaluates a task-napping "initiative of one branch that potentially impede[s] the performance of another"¹⁰⁴ branch by weighing that intrusion against any "'overriding need to promote objectives within the constitutional authority of' the challenged branch."¹⁰⁵ So,

98. *Id.*

99. *Id.* at 851.

100. *Id.* (internal quotation marks omitted).

101. *See id.* at 853.

102. *See id.*

103. The Court suggests that the separation of powers might have been violated, by contrast, had the Congress created a non-Article III "phalanx" equipped to handle the "entire business" of Article III courts without their supervision and control. *Id.* at 855.

104. Shane, *supra* note 18, at 371.

105. *Id.* (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443

in *Schor*, the Court permitted the Congress to vest a non-Article III administrative agency with an admittedly Article III task because that deviation was a "needed and innovative action"¹⁰⁶ that increased administrative efficiency without completely "emasculating" the federal Judiciary.¹⁰⁷ And in *Morrison*, the Court permitted the Congress to vest a non-executive official¹⁰⁸ with an admittedly executive task because that deviation did more to advance executive branch integrity—and public faith in that integrity¹⁰⁹—than "to impede the President's ability to perform his constitutional duty."¹¹⁰

3. *The Disputed Ground Between Formalism and Functionalism.* As even this brief sketch demonstrates, the Court's two separation of powers doctrines differ profoundly both in methodology and in result.¹¹¹ Their differences, moreover, extend to the

(1977)).

106. *Schor*, 478 U.S. at 851.

107. *Id.* at 850.

108. Specifically, an official whom the President cannot remove at will. See *Morrison v. Olson*, 487 U.S. 654, 690–91 (1988).

109. "Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers." *Id.* at 677.

110. *Id.* at 695. The majority here admits that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Id.* at 691. Moreover, the majority does "not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant" where the Congress constrains the President's power to remove an official performing arguably executive tasks. *Id.* Yet, while relevant, this taxonomy is neither dispositive nor particularly persuasive to the *Morrison* majority:

Although the [independent] counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Id. at 691–92 (footnote omitted). This intrusion looks even more tolerable to the Court given the fact that "the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the [independent counsel] office." *Id.* at 693.

111. In every case in which a majority of the Court took a formalist approach, the separation of powers challenge succeeded. See *supra* note 21. Where a majority adopted functionalism, by contrast, the Court nearly always rejected the separation of powers challenge. See *supra* note 82.

Formalism has produced biting dissents to functionalist majority decisions. See, for example, Justice Scalia's dissent in *Morrison v. Olson*, in which he parodies the majority's

level of constitutional theory. Formalism stakes its claim, as a textual matter, in an exclusive reading of the vesting clauses of the Constitution's three institution-building Articles.¹¹² In the words of the formalist majority in *INS v. Chadha*:

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

....

Although not "hermetically" sealed from one another, . . . the powers delegated to the three Branches are functionally identifiable.¹¹³

functionalist ruling with particular sarcasm:

Taking all things into account, we conclude that the power taken away from the President here is not really *too* much. The next time executive power is assigned to someone other than the President we may conclude, taking all things into account, that it *is* too much.

Morrison, 487 U.S. at 733 (Scalia, J., dissenting); see also *Mistretta v. United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting) (remarking that the majority's functionalist decision to uphold the U.S. Sentencing Commission "makes *Morrison* seem, by comparison, rigorously logical"). Likewise, functionalism has produced equally strong dissents where the Court's majority invokes formalism. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1472 n.10, 1473 (1995) (Stevens, J., dissenting) (criticizing majority reasoning for failing to "comport" with "Madison's flexible approach to separation of powers" (internal quotations omitted)); see also *INS v. Chadha*, 462 U.S. 919, 998-1002 (1983) (White, J., dissenting) (arguing that majority failed to recognize that "history of the separation-of-powers doctrine is also a history of accommodation and practicality," *id.* at 999); *Bowsher v. Synar*, 478 U.S. 714, 759-60 (1986) (White, J., dissenting) (criticizing majority's "distressingly formalistic view of separation of powers" as used to invalidate "novel" legislation).

112. Article I begins, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. Article II begins, "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Article III begins, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

113. *INS v. Chadha*, 462 U.S. 919, 951 (1983) (citation omitted); see also *Plaut*, 115 S. Ct. at 1454-55 (emphasizing Article III's vesting clause as basis for formalist separation of powers ruling); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (Black, J.) (emphasizing vesting clauses as the basis for a formalist division of constitutional tasks between President and Congress).

Formalism thus posits perfect identity between the three "categories" of "powers" and the Constitution's three decisionmaking institutions: the "legislative Power" belongs to the Congress; the "executive Power" to the President; and the "judicial Power" to the Judiciary. Each paired category and institution mutually define and mutually exhaust one another,¹¹⁴ and the separation of powers principle is satisfied only by a vigilant policing of the bright lines between these three task-identified institutions: the Constitution tolerates *no* task-sharing among them beyond the text's explicit and formal mechanisms for interbranch checking,¹¹⁵ like the President's qualified veto over legislation passed by Congress¹¹⁶ or Congress' power to impeach the President.¹¹⁷

Formalism's textual interpretation rests, in turn, on a Framing narrative that emphasizes the new Nation's "virtual[] obsess[ion] with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power."¹¹⁸ Indeed,

114. As one commentator has described formalist separation of powers:

Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories [legislative, executive, or judicial] . . . or find explicit constitutional authorization for such deviation. The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.

Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 858 (1990) (footnote omitted); see also Redish & Cisar, *supra* note 9, at 453 (advocating a "type of 'formalistic' approach to the interpretation and enforcement of separation of powers—one grounded on the deceptively simple principle that no branch may be permitted to exercise any authority definitionally found to fall outside its constitutionally delineated powers").

115. Explaining this aspect of formalism, which he labels "categorical separation," Professor Shane writes:

Categorical separationists . . . start from the premise that separation of powers is necessary for liberty. Second, they contend that the express constitutional exceptions to complete separation are justified only by the contribution they ultimately make to keeping the separation of powers intact. Therefore, proper implementation . . . requires categorical implementation of the separation of powers principle, leaving any breaches or exceptions to be narrowly construed and permitted only as they serve the ultimate cause of separation. This approach does not deny the existence of constitutional checks, but rather insists on their narrow construction.

Shane, *supra* note 18, at 374; see also Lawson, *supra* note 114, at 858 (explaining formalism in the same terms).

116. See U.S. CONST. art. I, § 7.

117. See *id.* art. I, §§ 2, 3; *id.* art. II, § 4.

118. Redish & Cisar, *supra* note 9, at 451. These commentators endorse a variant of formalism, which they call pragmatic formalism, largely because it offers the best prophylactic against this feared "creeping tyranny," as justified today as it was at ratification. See *id.* at 453. "For as the old adage goes, 'even paranoids have enemies.'" *Id.*; see also

the formalist contends, no less an authority than James Madison endorsed the view that the concentration of power, in itself and without more, intolerably threatens the Republic: "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."¹¹⁹ Formalist separation of powers wards off this threat: "The declared purpose of separating and dividing the powers of government, of course, was to 'diffuse power the better to secure liberty.'"¹²⁰

Plaut, 115 S. Ct. at 1453–55 (citing framing and ratification history to support formalist methodology).

119. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) (citation omitted); see Redish & Cisar, *supra* note 9, at 464 ("Note that under [Madison's] definitional structure, 'tyranny' is not limited to the misuse of this power, or even to its exercise. Rather, it is the very fact of its accumulation that Madison equated with tyranny."). The Court tends to cite this and like statements from Madison when deciding cases on formalist reasoning. See, for example, Justice Stevens' opinion for the Court in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*:

"It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it The founders of our republics . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."

501 U.S. at 273–74 (1991) (quoting THE FEDERALIST NO. 48, at 332–33 (James Madison) (Jacob E. Cooke ed., 1961); see also *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) (opening discussion of delegation doctrine, "[a] strand of our separation-of-powers jurisprudence," by citing Madison's "precept" that "freedom is imperiled if the whole of legislative, executive, and judicial power is in the same hands"); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." (quoting THE FEDERALIST NO. 47, *supra*, at 325 (Madison))).

120. *Bowsher*, 478 U.S. at 721 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Academic formalists have argued from this and like statements that the separation of powers can only work if enforced rigidly and prophylactically.

As Jefferson recognized, once the power is accreted it will, as a practical matter, be virtually impossible to remove it: "The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered." The far wiser method, then, would be to focus on the means to prevent the accretion in the first place. It is this reasoning that renders the prophylactic nature of the separation of powers protections so essential an element of that concept.

But functionalists claim James Madison as their intellectual forebear too. According to Madison, they argue, the Constitution safeguarded liberty against tyranny not by rigidly separating the three federal institutions, but by rigorously enforcing a sharing of power among them. "[U]nless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation . . . require[d] as essential to a free government, can never in practice, be duly maintained."¹²¹ Thus, operating in its functionalist mode, the Court in *Mistretta* declared that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct."¹²² The Court continued:

Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which "would preclude the establishment of a Nation capable of governing itself effectively."

. . . .

In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch. . . .

. . . .

It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power."¹²³

Redish & Cisar, *supra* note 9, at 464 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121 (William Peden ed., 1955)).

121. THE FEDERALIST NO. 48, *supra* note 119, at 332 (Madison).

122. *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (citations omitted).

123. *Id.* at 381–82 (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam), and *INS v. Chadha*, 462 U.S. 919, 951 (1983)); see also *id.* at 380 (parenthetically describing Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974), as "affirming Madison's flexible approach to separation of powers"); *Chadha*, 462 U.S. at 999 n.25 (White, J., dissenting) (advocating functionalist approach by quoting Madison's assertion that separation of powers "did not mean 'that these departments ought to have no *partial* agency in, or control over the acts of each other'" (quoting THE FEDERALIST NO. 47, *supra* note 119, at 325–26 (Madison))); Shane, *supra* note 18, at 373–76 (analyzing "both tendencies in separation of powers thought" and their "claim[s] to a Madisonian pedi-

Given this emphasis, functionalism looks beyond the formalists' vesting clauses to the Constitution's explicit provisions for interbranch checking.¹²⁴ Extrapolating from this broader view of the Constitution's institutional structure, the functionalist argues that the Framers were, after all, trying to erect a "workable government."¹²⁵

[T]he history of the separation-of-powers doctrine is also a history of accommodation and practicality. Apprehensions of an overly powerful branch have not led to undue prophylactic measures that handicap the effective working of the National Government as a whole. The Constitution does not contemplate total separation of the three branches of Government. "[A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."¹²⁶

As a result, functionalists do not fear all concentrations of power, without more, but only the "unnecessary and dangerous concentration of power in one branch."¹²⁷ Accordingly, the functionalist

gree" (footnote omitted).

124. See *Buckley*, 424 U.S. at 121 (describing how the branches are constitutionally assigned to "participate" in each other's tasks); see also Shane, *supra* note 18, at 375 (describing functionalist use of checking and balancing provisions to argue that "the separation of the three branches is but part of a larger scheme of checks and balances through which government is rendered both sage and efficacious"). Operating in its functionalist mode, the Court in *Morrison v. Olson* observed, "[W]e have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'" *Morrison v. Olson*, 487 U.S. at 693-94 (quoting *United States v. Nixon*, 418 U.S. at 707); see also *Mistretta*, 488 U.S. at 380-81 (emphasizing that the Constitution does not require branches to be "entirely separate and distinct," citing, *inter alia*, *United States v. Nixon* and *Nixon v. Administrator of General Services*); *Buckley*, 424 U.S. at 121 (observing that the Constitution "by no means contemplates total separation of these three essential branches of Government").

125. Operating in its functionalist mode in *Mistretta*, the Court described itself as the "heir" to "the pragmatic, flexible view of differentiated governmental power" articulated by Justice Jackson in his *Youngstown* concurrence, quoting Jackson's assertion that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Mistretta*, 488 U.S. at 381 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

126. *Chadha*, 462 U.S. at 998 (White, J., dissenting) (quoting *per curiam* opinion in *Buckley*, 424 U.S. at 121) (citations omitted).

127. *Id.* (White, J., dissenting). Justice White articulated the modern functionalist framework in his *Chadha* dissent and in his dissent to *Bowsher v. Synar*, 478 U.S. 714, 759 (1986), among other opinions. Although he wrote none of the majority opinions in

separation of powers principle is elastic enough to tolerate needed innovations in the arrangements of governance,¹²⁸ even if they involve a sharing—or swiping—of tasks among the branches. So long as no branch is fatally undermined in performing its essential constitutional functions, and no branch fundamentally aggrandizes itself, such innovations are tolerable.

4. *A Newly Consistent Doctrine from the Court?* In its most recent statement on the separation of powers, the Supreme Court blurred somewhat the distinction between decisions that I and other commentators distinguish as “formalist” or “functionalist.”¹²⁹ In *Loving v. United States*,¹³⁰ the Court rejected a delegation doctrine challenge to an executive order, promulgated under direction from the Congress, that prescribed aggravating factors permitting a court-martial to impose the death penalty upon a member of the armed forces convicted of murder.¹³¹ Although the Court examined in depth only the delegation doctrine, which it described as a “strand of our separation-of-powers jurisprudence,”¹³² it also offered a brief preliminary sketch of a more

which the Court itself adopted a functionalist approach, Justice White is nonetheless credited with its essential definition. See, e.g., Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 428 (1993); Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L.J. 19, 22 (1993); see generally Tanielian, *supra* note 18, at 984-993 (analyzing all of Justice White's opinions addressing separation of powers).

128. It is common for functionalist opinions to emphasize the practical value of the challenged innovation. For example, dissenting in *INS v. Chadha*, Justice White asserted:

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. . . . Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.

Chadha, 462 U.S. at 967-68 (White, J., dissenting); see also *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 277 (1991) (White, J., dissenting) (“Today the Court strikes down yet another innovative and otherwise lawful governmental experiment in the name of separation of powers.”); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986) (rejecting separation of powers challenge after determining that task-sharing was “necessary” to make otherwise constitutional congressional measure “workable”).

129. Again, “formalism” and “functionalism” are terms used by commentators, and not by the Court itself. See *supra* note 19.

130. 116 S. Ct. 1737 (1996).

131. See *id.* at 1751; *supra* note 17 (describing delegation doctrine).

132. *Loving*, 116 S. Ct. at 1743.

general separation of powers principle in which it treats formalist and functionalist precedent as though both types of cases comprise one consistent separation of powers jurisprudence.

The Court's opening premise is familiar: "the Framers understood that a 'hermetic sealing off' of the three branches from one another would inappropriately deprive the Nation of a workable government."¹³³ Accordingly, separation of powers "[does] not mean that these . . . departments ought to have no partial agency in, or no controul over the acts of each other," for which the Court cites *Mistretta*.¹³⁴ All the same, the Court continued, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the *central* prerogatives of another," citing *Plaut*, *Chadha*, and *Bowsher v. Synar*.¹³⁵ Moreover, the separation of powers doctrine "requires that a branch not impair another in the performance of its constitutional duties," for which the Court cites *Mistretta*, among other cases.¹³⁶

The *Loving* court did not explain why it considers these decisions to be consistent with each other. Indeed, it did not acknowledge at all that these decisions reflect a dispute about the separation of powers doctrine's meaning, even among members of the Court itself. The *Loving* opinion does not, for example, note that many have disagreed about whether the Constitution's explicit interbranch checks and balances ought to exhaust the permissible mechanisms for one branch's "partial agency in . . . [or] controul over the acts of" another.¹³⁷ It does not acknowledge, moreover, that some seriously dispute whether the Court may draw a constitutional distinction between a branch's "*central* prerogatives" that may not be trespassed and peripheral prerogatives that may be, or

133. See *id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 120-21 (1976) (per curiam)). This portion of Justice Kennedy's opinion was joined by five other Justices, including Chief Justice Burger. Justices Scalia and O'Connor concurred in the majority's judgment, but not in this particular section of Justice Kennedy's opinion for the Court. See *id.* at 1752-53. Justice Thomas wrote a separate opinion concurring only in the judgment. *Id.* at 1753-54. No Justice contested the majority's summary treatment of the Court's separation of powers caselaw as offering one consistent doctrine.

134. *Id.* at 1743 (quoting *Mistretta*, 488 U.S. at 380-81 (quoting THE FEDERALIST NO. 47, at 325-26 (James Madison) (Jacob E. Cooke ed. 1961))).

135. *Id.* (emphasis added).

136. *Id.*

137. See, e.g., *Mistretta*, 488 U.S. at 381 (quoting THE FEDERALIST NO. 47, *supra* note 134, at 325-26 (Madison)).

between a trespass that "impairs" a branch's ability to perform its constitutional duties and any trespass at all.¹³⁸ Thus, although *Loving* perhaps signals that the Court considers its formalist and functionalist decisions to comprise one consistent separation of powers doctrine, this case does not in itself provide an account of what that one doctrine may be.

5. *The Shared Ground Between Formalism and Functionalism.* Despite their apparent differences, however controversial, the Court's formalist and functionalist decisions share important assumptions. Both approach the Constitution's separation of powers principle as though it relates exclusively to the distribution of constitutional tasks among the three national decisionmaking institutions. Both identify a separation of powers conflict where they see that one of those institutions has undertaken to perform a task the Constitution has assigned to another. Both address that perceived conflict by resolving, first and foremost, where the Constitution has located the disputed task.¹³⁹

138. See, for example, Justice Scalia's dissent in *Morrison v. Olson*, in which he insists that Article II's vesting clause means that not "some of the executive power, but all of the executive power" is constitutionally settled on the President alone; Justice Scalia argues that "it is ultimately irrelevant *how much* the [independent counsel] statute reduces Presidential control" over one exercising executive functions. See *Morrison*, 487 U.S. at 705, 708 (Scalia, J., dissenting). According to Justice Scalia, once the Court determines that a branch has been denied *any* of its vested powers, it is inappropriate for the Court to "proceed further to sit in judgment of whether 'the President's need to control the exercise of [the independent counsel's] discretion is *so central* to the functioning of the Executive Branch' as to require complete control." *Id.* at 708-09 (Scalia, J., dissenting) (citations omitted). Perhaps not surprisingly, Justice Scalia in *Loving* does not join that part of the majority opinion purporting to articulate the Court's basic separation of powers principle; he concurs only with the Court's reasons for finding that the executive order at issue does not violate the delegation doctrine. See *Loving*, 116 S. Ct. at 1752-53 (Scalia, J., concurring in part and concurring in judgment). Moreover, Justice Scalia's silence on the majority's brief separation of powers survey may indicate that discussion is not essential to the Court's holding, which stands on a straightforward application of standard delegation doctrine. See *id.* at 1743-51.

139. For example, Justice Black's formalist opinion for the Court in *Youngstown* rests on the logical premise that seizing the steel mills to avert a strike was a "legislative" task because it initiated a new public policy. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952). Likewise, the majority's functionalist opinion in *Morrison v. Olson* observed, as a logical premise, that the independent counsel's functions were "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Morrison*, 487 U.S. at 691, 696. In fact, enormous energy on all sides of the separation of powers tradition has been expended to articulate this basic constitutional taxonomy. Chief Justice Marshall in *Marbury v. Madison*, for example, distinguished executive power from judicial power by declaring

This shared approach suggests that the formalists and functionalists alike envision "power" under the Constitution as though it were some static matter, fused by a founding "People" into a material whole, then fragmented and its pieces lodged in and among the three decisionmaking institutions, where the fragments of national power yet remain. Both formalists and functionalists, in turn, view the separation of powers principle primarily as a line-drawing tool for marking these institutional boundaries. Indeed, company is parted only when deciding how vigilantly the boundaries must be policed. The fact that this divergence has produced sharply different opinions on particular separation of powers questions should not obscure the fact that the Court's two doctrines share these fundamental—and unquestioned—premises. Functionalism may tolerate more task-swapping among the branches, but it does not fundamentally contradict the formalist premise that each task represents a "power" that the Constitution has separately located in one institution or another. Thus, not only do both camps take as a given the discernible, task-specific existence of these constitutional boundaries, but they both also presume that the separation of powers principle must be as preoccupied with those institutions as the two camps are.

More significantly, in my view, formalism and functionalism alike exclude politics from their accounts of the separation of powers. This assertion may seem peculiar, for, while formalism ignores politics altogether,¹⁴⁰ certainly the rhetoric of function-

the former to be "political," that is, "respect[ing] the nation, not individual rights." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803); see also *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (defining "legislative" acts as those that establish policy priorities).

140. In *INS v. Chadha*, for example, a formalist majority struck down the one-house legislative veto on separation of powers grounds (as well as for violating the Constitution's bicameralism and presentment clauses), explicitly repudiating Justice White's dissenting protest that the veto was a "useful 'political invention.'" 462 U.S. 919, 944-45 (1983). Indeed, the veto's popularity with the political branches only made it more suspicious to the Court. Chief Justice Burger observed:

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is *sharpened* rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.

Id. (emphasis added). For the formalist majority, the Constitution made no allowances for politics:

alism celebrates "political invention,"¹⁴¹ at least as practiced by national institutions.¹⁴² Indeed, by its very terms, functionalism demands that the separation of powers not be so rigidly enforced as to squelch "innovative . . . government experiment[s],"¹⁴³ particularly where the political branches have agreed that the innovation serves the national good.¹⁴⁴ Moreover, functionalism's emphasis on the Constitution's interbranch checks and balances¹⁴⁵ also introduces the element of politics into its account of the separation of powers, inasmuch as mechanisms like advice and consent, impeachment, and the veto operate between the political branches and are (or at least can be) fueled by political interest.

Yet, for all this, functionalism, no less than formalism, treats representative politics fundamentally as a force that lies outside of and apart from the separation of powers principle; a force that the separation of powers rule should not interrupt or frustrate unless "political inventions" trespass too far across the institutional boundaries that the rule polices. Likewise, the functionalist relies on the Constitution's political checks and balances largely as textual proof that such forbearance is appropriate: if "overlapping [institutional] responsibility" was okay with James Madison,¹⁴⁶ it ought to be okay with the modern Supreme Court, too. Functionalism's effort so to accommodate politics and political decision-

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President.

Id. at 959 (citing *Youngstown*); see also *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (formalist majority strikes down budget-balancing legislation, while acknowledging, "[n]o one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude").

141. *Chadha*, 462 U.S. at 972-973 (White, J., dissenting).

142. Even functionalism, however, altogether ignores the Constitution's structures for constituent-based politics, consistent with its overall preoccupation with the power of institutions.

143. *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 277 (1991) (White, J., dissenting).

144. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 856 (1986) (functionalist majority finding no separation of powers violation where "needed and innovative" institutional task-sharing deemed "necessary to make [legislative scheme] workable"). See generally *supra* notes 104-10 and accompanying text (discussing functionalism's pragmatism).

145. See *supra* notes 121-25 and accompanying text.

146. See *supra* text accompanying notes 121-23.

making—to stay out of politics' way—is not the same thing as *integrating* politics into the separation of powers principle itself. It is not the same thing as making that principle reflect the structures for electoral, constituent-based politics this Article calls the Constitution's "moving parts." Functionalism, like formalism, leaves out constitutional politics.

B. *Separation of Powers Commentary*

The Constitution's separation of powers principle has fascinated legal scholars; it has been the subject of particular attention over the past two decades.¹⁴⁷ Even a brief sketch of this literature may illustrate that, for all its rich variation, the legal commentary has not strayed very far from the basic assumptions that underlie the Supreme Court's separation of powers jurisprudence.¹⁴⁸

The legal scholarship on this issue can be roughly organized into four categories. First, there is the literature that predominantly considers and critiques Supreme Court decisions in separation of powers cases. These commentaries emphasize the Court's own analytic framework, and focus their analysis—critical or not—on the Court's formalist-functionalist swing, without challenging the fundamental institutional premises underlying both approaches.¹⁴⁹

147. In the last decade, at least four American law schools have held scholarly symposia on some aspect of the separation of powers debate. See Symposium, *The Law of the Presidency*, 48 ARK. L. REV. 1 (1995); Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM. & MARY L. REV. 209 (1989); Symposium, *Separation of Powers*, 57 GEO. WASH. L. REV. 500 (1989); Symposium, *A Symposium on Administrative Law: "The Uneasy Status of the Administrative Agencies,"* 36 AM. U. L. REV. 277 (1987).

148. It is not my purpose to analyze or even to recount this rich and varied literature in anything approaching detail; nor do this Article's ideas depend on proving true or false any other scholar's ideas. In fact, as references throughout should make clear, I have benefited a great deal from those who have mined this ground before me. The discussion that follows in the text is thus deliberately abbreviated. For a detailed critique of no less than six "alternative analytic models" that scholars have proposed for resolving separation of powers conflicts, see Redish & Cisar, *supra* note 9, at 490–505. There, in addition to the "pragmatic formalism" advocated by the authors, five other models are discussed: the functionalist model; the "judicial abdication" model; the "originalist" model; the "conflict of interest" model; and the "ordered liberty" model. *Id.*

149. See, e.g., Chemerinsky, *supra* note 18, at 1083–86 (discussing the Burger Court's "paradoxical" approach to separation of powers questions and the different methods and standards of review utilized by the Court in ruling on the constitutionality of executive, as opposed to legislative, actions); Redish & Cisar, *supra* note 9, at 450 (charging that the Court's formalist-functionalist poles in separation of powers decisions "evinces some-

A second, loose category of scholarship concentrates on the specific constitutional powers of one or more of the national decisionmaking institutions. These commentators debate which branch may exercise a particular power, and they discuss the circumstances under which one branch may interfere with another branch's autonomous exercise of its own vested powers.¹⁵⁰ Likewise, commentators in this group debate the circumstances under which one branch may voluntarily decline to wield one of its vested powers, delegating its exercise instead to another branch.¹⁵¹

thing of a split personality"); Shane, *supra* note 18, at 370-81 (explaining differences in political and constitutional theory underlying functionalist-formalist debate); Peter L. Strauss, Bowsher v. Synar: *Formal and Functional Approaches to Separation-Of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (evaluating the Court's two approaches as "inconsistent reasoning styles"); Tanielian, *supra* note 18, at 962-965 (discussing the modern Court's fluctuation between the two doctrines and the critical response of many commentators to the apparent inconsistencies of recent cases).

150. One prominent example of this kind of separation of powers scholarship is the current lively debate over the idea of the "unitary Executive," in which scholars argue about whether the Constitution empowers the President to control the administration of federal law without interference from Congress, or whether Congress may limit the President's power, for example through statutory limitations on the President's prerogative to remove administrative officials. Compare Calabresi & Prakash, *supra* 11 (arguing in favor of a unitary Executive), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994) (arguing that the theory of a unitary Executive, "with President in charge of all administration of the laws . . . is just myth"). See also Calabresi & Rhodes, *supra* note 11 (offering theory based on institutional structure to support a unitary Executive); Froomkin, *supra* note 12, at 1347 (offering "truly structural" constitutional interpretation to prove that Congress may exercise some control over administration of laws).

151. For example, Professor Redish invokes his "pragmatic formalist" separation of powers principle to criticize the post-New Deal Supreme Court's "dramatic relaxation" of the "so-called nondelegation doctrine," which, in theory, prohibits the Congress from delegating its legislative power "to other branches of the federal government." MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 135, 135-161 (1995); see also *United States v. Loving*, 116 S. Ct. 1737 (1996) (rejecting nondelegation doctrine challenge to executive order setting conditions for the death penalty under military justice system). Professor Redish argues that the nondelegation principle is a constitutional mandate resting on the "simple directive of Article I, Section 1, that the legislative power shall be vested in Congress. No other branch of government is given power to 'legislate.'" REDISH, *supra*, at 135. Professor Redish admits that his formalist insistence on nondelegation poses a preliminary taxonomic puzzle:

The most difficult challenge for a modern defender of the nondelegation doctrine is to devise a method for determining exactly which investments of authority in the executive branch by Congress are constitutionally permissible and which are not. If one begins the analysis with the assumption that only Congress may exercise "legislative" power, one is then faced with the burden of providing a coherent and workable definition of that concept. The line between legislation and execution will often be a difficult one to draw.

Id. at 136.

I include in this category scholarship that considers whether the modern administrative state, with its heavy reliance on independent agencies to implement federal law, demands a separation of powers doctrine recognizing a fourth coordinate branch of constitutional government.¹⁵²

This second body of literature offers highly developed theories of constitutional interpretation and constitutional history. Nonetheless, like the Court, the scholarship does not look beyond the Constitution's formal institutions in crafting an account of the separation of powers;¹⁵³ it does not develop the possibility that the principle might benefit from consideration of the Constitution's structures for the practice of constituent-based politics.¹⁵⁴ Nor

152. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (discussing problems that administrative agencies pose to traditional separation of powers doctrine). The serious question of how the Constitution's separation of powers principle should account for the particular needs of the modern administrative state is beyond the scope of this Article.

153. Those who debate the concept of a unitary Executive pay particular attention to the Constitution's vesting and enumeration clauses to support their arguments. As one commentator described this preoccupation:

Anyone who sits down to read the U.S. Constitution from beginning to end must immediately be struck by two things: the majesty of the Preamble's ringing declaration of popular sovereignty and the stark division of the government of "We the People" into three apparently coequal departments. That division leaps out at the reader because of the first three Articles of the Constitution each of which begins with a Vesting Clause that empowers a particular actor (or actors), and no one else, to act. Nonetheless, much recent academic scholarship about the Vesting Clauses has been devoted to proving that these Clauses are meaningless and nonjusticiable.

Calabresi, *supra* note 4, at 1377 (citing as examples ten law review articles debating the Constitution's vesting clauses); see also Calabresi & Prakash, *supra* note 11, at 570-99 (proposing interpretation that Article II's vesting clause grants exclusive power to President to control execution of all federal laws); Calabresi & Rhodes, *supra* note 11, at 1186-1206 (summarizing theories of broad and limited congressional power based on Articles II and III); Froomkin, *supra* note 12, at 1350-66 (rejecting the theory that the vesting clause of Article III is a significant grant of power and, by analogy to Article II, supports the unitary Executive theory).

154. At least one article that I have placed in this second loose category intimates that politics should have a place in the debate over institutional power. See Froomkin, *supra* note 12, at 1374-76 (concluding with a section entitled "Structure and Politics in Constitutional Law"). Professor Froomkin suggests that the "unitary Executive" debate might be better resolved according to a "semistructural value" of "balance" between the branches," with the separation of powers principle determined to avoid both an imperial Presidency and an imperial Congress. *Id.* at 1374-75. Although he criticizes those who advocate the unitary Executive for, among other things, failing to consider an undefined "structural value of the democratic process and of democratic accountability," *id.*, Professor Froomkin does not further elaborate what a "structural" or "semistructural" value looks like, or what either might add to an understanding of the separation of powers.

does it imagine the separation of powers principle as anything other than an institutional line-drawing tool, however sophisticated a tool it is argued to be.

A third broad category of literature manages to shift the framework by elevating separation of power values other than the well-policed distribution of institutional tasks. Professor Paul Verkuil, for example, has argued that the Court's two standard approaches to separation of powers conflicts reflect a deadlock between two diametrically opposed goals.¹⁵⁵ The goal of "counter-efficiency" seeks to prevent the concentration of power in any one government actor, even at the cost of inefficient governance; the "efficiency" goal distributes the tasks of government to the institution intrinsically best-suited to perform them efficiently.¹⁵⁶ So long as it traps itself between these two "offsetting" theoretical goals—efficiency and counterefficiency—the Court will remain at an "intellectual impasse."¹⁵⁷

To break the tie, Professor Verkuil proposes a "rule of law" approach, which posits that the Constitution's separation of tasks and institutions also serves the goal of preventing conflicts of

Professor Redish similarly incorporates politics into his structural account of constitutional power without questioning the tradition's preoccupation with the institutions that politics create and maintain. He argues for a disciplined return to the nondelegation doctrine because it preserves a *political* accountability in the Congress that is demanded by the Constitution's principle of representative democracy: a vision of accountability that Professor Redish pursues through what he calls the "political commitment principle." REDISH, *supra* note 151, at 154. He explains:

In order to insure that social policy choices—at least in their most basic form—are made by those who are representative of and accountable to the electorate, every piece of legislation adopted by Congress must make some recognizable normative commitment that will provides [sic] information to the voters about the views of their elected representatives. Under this standard, a reviewing court [deciding a nondelegation challenge] would ask itself whether the voters would be placed in a substantially better position to judge their representatives by learning whether they had voted for or against the challenged legislation. If the answer is no, then the law has failed to facilitate or preserve performance of the representative democratic function and therefore constitutes an unconstitutional delegation of legislative power.

Id. at 154–55.

155. See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–04 (1989).

156. See *id.* Professor Verkuil observes that both of these goals are "correct" inasmuch as both reflect separation of powers rationales with support in constitutional history. See *id.*

157. *Id.* at 304; see also *id.* at 311–12 (critiquing formalist Supreme Court decisions as "relying more on almost tautological expressions of branch purpose than on the practical reasons behind the need for separation," while also "[c]lash[ing] with the political accommodations of the modern state" at an "increasingly uncomfortable rate").

interest, and should be enforced so as to vindicate that principle of institutional independence.¹⁵⁸ Three types of conflicts of interest threaten institutional integrity: those “between the branches”;¹⁵⁹ those “within a particular branch”;¹⁶⁰ and those “involving an individual’s personal stake in the outcome of a proceeding.”¹⁶¹ Wherever such conflict is present or possible, the separation of powers principle should be interpreted to require “branch separation or, at the individual public official level, [a] separation of functions within the particular branch.”¹⁶² So, for example, had the Court used this approach when considering the independent counsel conflict in *Morrison v. Olson*,¹⁶³ it might have concluded that the statute satisfied the separation of powers because it “prevent[ed] conflicts arising from executive oversight of executive wrongdoing,”¹⁶⁴ not just because the Congress had denied the President only a small portion of “executive” power.¹⁶⁵ Similarly, the conflict of interest model condemns legislative vetoes that permit congressional committees to “second guess” administrative rulemaking, bypassing the full Congress, because:

The interests who failed in the agency, and in the courts on review, approach the congressional committee responsible for oversight of the agency involved for what amounts to a final appeal. Only this appeal is not as much on the merits as it is on the basis of financial influence and pressure through political contributions.¹⁶⁶

This “rule of law” or “conflict of interest” account of the separation of powers has drawn substantial scholarly attention,¹⁶⁷

158. See *id.* at 306–07.

159. *Id.* at 307.

160. *Id.*

161. *Id.*

162. *Id.*

163. 487 U.S. 654 (1988).

164. Verkuil, *supra* note 155, at 326; see also *id.* at 326–27 (observing, however, that a court following the rule of law approach would still need to consider whether intrusion on executive prerogatives to cure intrabranch conflict of interest “goes too far” and interferes impermissibly with executive power under interbranch separation of powers principle).

165. See *supra* text accompanying notes 83–91 (describing the Court’s functionalist reasoning in *Morrison v. Olson*).

166. See Verkuil, *supra* note 155, at 313 (citations omitted).

167. See, for example, responses that were published alongside Professor Verkuil’s proposal as part of a symposium, *The American Constitutional Tradition of Shared and*

and similar ideas surface periodically in Supreme Court opinions.¹⁶⁸ This approach does helpfully shift perspective away from a strict focus on institutional line-drawing. Yet, even though Professor Verkuil sees the need for an alternative model in part *because* existing models only clumsily grasp political realities,¹⁶⁹ he nonetheless leaves out of his separation of powers theory any integrating account of the Constitution's own structures for constituent-based politics. Thus, the conflict of interest model again leaves politics outside of the law, a stranger to the Constitution: the model marks where law may interfere with politics, but it brings the two no closer as integral parts of one Constitution.

A fourth category of scholarship wholeheartedly embraces the view that the separation of powers idea contains a significant political dimension. But these scholars conclude, as a result, that *law*—or at least the *Judiciary*—has no place in the midst of a political separation of powers dispute. Under this view, the federal courts should refuse to adjudicate conflicts over power between the political branches, relying instead on those branches to protect their own constitutional prerogatives.¹⁷⁰

The ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legisla-

Separated Powers, 30 WM. & MARY L. REV. 209, 343-86 (1989); Paul Gewirtz, *Realism in Separation of Powers Thinkings*, 30 WM. & MARY L. REV. 343 (1989); Robert F. Nagel, *A Comment on the Rule of Law Model of Separation of Power*, 30 WM. & MARY L. REV. 355 (1989); Richard J. Pierce, Jr., *Separation of Powers and the Limits of Independence*, 30 WM. & MARY L. REV. 365 (1989); Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees"*, 30 WM. & MARY L. REV. 375 (1989). See also Redish & Cisar, *supra* note 9, at 500 ("It is not incorrect to see the concern over biased decisionmaking as an important theme in separation of powers theory. . . . But surely it is incorrect to assume that separation of powers concerns are exhausted when the independence interest is satisfied.").

168. See, e.g., *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447, 1464 (1996) (Breyer, J., concurring) (stating that "the authoritative application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms," and calling this assurance "one purpose of separation of powers" (citing W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 42-43, 104-06 (1965))).

169. Professor Verkuil observes that before the Court, separation of powers conflicts raise the question of "how closely [the Judiciary] should . . . umpire the activities of the policymaking branches. Should separation of powers remain a proposition of positive law or should it return to the realm of politics?" Verkuil, *supra* note 155, at 302; see also *id.* at 312 ("Clashes with the political accommodations of the modern state accumulate at an increasingly uncomfortable rate in a formalist world.").

170. See, e.g., CHOPER, *supra* note 13, at 263 (advancing a "Separation Proposal").

tive action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.¹⁷¹

Quite apart from the merits of this proposal on its own terms, already well debated elsewhere,¹⁷² it does not fundamentally challenge—in fact, it makes central—the assumption that politics cannot be integrated into the separation of powers as a matter of constitutional law.¹⁷³ In this respect, the fourth approach also follows the traditional view.

C. *Considering the Traditional View*

The traditional view of constitutional power has impressive roots. James Madison himself explained the proposed Constitution's separation of powers principle in institutional terms: "Having reviewed the general form of the proposed government, and the general mass of power allotted to it: I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts."¹⁷⁴ Moreover, the traditional static assumption finds considerable support in the Constitution's structure. The Constitution's first three Articles do, after all, create three discrete, formal decisionmaking institutions, each one textually "vested" with a "Power"¹⁷⁵ or "Powers"¹⁷⁶ differentiated through three broad (although undefined) labels. And all three Articles follow this broad investiture with an enumeration of some specific tasks or roles that the individual institution may perform.

171. *Id.*; see also Sunstein, *supra* note 13, at 493–500 (discussing a similar view that separation of powers conflicts raise political questions beyond a court's competence to adjudicate).

172. See, e.g., Redish & Cisar, *supra* note 9, at 492–94 (summarizing criticisms of the proposal).

173. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the judicial power to review the constitutionality of federal statutes).

174. THE FEDERALIST NO. 51, at 323 (James Madison) (Jacob E. Cooke ed., 1961).

175. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.")

176. *Id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

Accordingly, I could not suggest, and this Article emphatically does not argue, that the separation of powers principle is unconcerned with the Nation's decisionmaking institutions *as* institutions, or with those institutions' constitutional tasks. Certainly, the three coordinate branches are central to the Constitution, and they deeply concerned its Framers.¹⁷⁷ I mean, rather, to suggest that in exploring the Constitution's idea of power by considering those institutions *alone*, the legal tradition has ignored a potentially rich source of meaning for that idea in the Constitution's structure for constituent-based politics. As a result, the tradition has produced theories of power and of the separation of powers that aggrandize the decisionmaking branches as constitutional ends-in-themselves.¹⁷⁸ This aggrandizement has in turn left little room in the law for a constitutional politics.

II. THE KINETIC CONSTITUTION

This Article proposes that the Constitution's structures for the practice of politics—its nested constituencies and its sequenced decisionmaking—may offer insight into the Constitution's idea of power and its separation of powers principle. From this perspective, constitutional power is not static and located *somewhere* in a national institution; power is instead a dynamic argument over time between and among the People themselves. The separation of

177. See, e.g., THE FEDERALIST NO. 48, at 332–33 (James Madison) (Jacob E. Cooke ed., 1961) (noting agreement “on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments” and observing the need “to provide some practical security for each [department] against the invasion of the others.”).

178. That the three branches were not viewed this way by the Framers is undeniable. Madison makes the point in an analogous discussion of the constitutional relationship between state and federal governments. Addressing anxiety over whether the Constitution would give the federal government “the advantage” over state governments “with regard to the predilection and support of the people,” Madison observed:

The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes. *The adversaries of the Constitution seem to have lost sight of the people altogether in the reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrouled by any common superior in their efforts to usurp the authorities of each other.* These gentlemen . . . must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . . Truth no less than decency requires, that the event in every case, should be supposed to depend on the sentiments and sanction of their *common constituents*.”

THE FEDERALIST NO. 46, at 315–16 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis supplied).

powers principle, in turn, dictates a *rhythm* for that national debate. Power becomes cadenced, and the Constitution kinetic.

A. *Representative Democracy and the Separation of Powers*

This Article's working hypothesis rests on the premise that the Constitution's provisions for electoral, constituent-based politics can help explain its idea of power. Put another way, there are good reasons to consider the Constitution's politics—and not just its institutions—when exploring the separation of powers principle.

1. *Government by Representation, Not by Institution.* The best of these reasons is also the most basic. The Constitution creates a government that is, at bottom, "wholly" devoted to the political representation¹⁷⁹ of a politically active People who are themselves the single "absolute and perpetual sovereign" within their political universe.¹⁸⁰ To those who drafted and debated the Constitution, this principle of representation signified something particular and, they believed, unique to the American constitutional effort: here, representation is not an institutional alternative to, or substitute for, democracy. It is democracy itself.

Recognizing the centrality of representation to the constitutional structure means that any query into constitutional power must begin at a level both textually and organizationally prior to the institution-building work of Articles I, II, and III. Indeed, the Constitution's most revealing statement about power may be the one in its very first sentence: "We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America."¹⁸¹

179. THE FEDERALIST NO. 14, *supra* note 5, at 84 (Madison).

180. WOOD, *supra* note 6, at 599.

181. U.S. CONST. preamble; *see also id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Yet, although the Constitution so founds itself on this principle of popular sovereignty, it does not identify which persons belong within the sovereign "People": it offers no definition of "citizenship," nor any criteria for membership in "We the People," apart from Article I's blunt exclusion of those who are not "free Persons" from representation in the House of Representatives. *See id.* art. I, § 2 (excluding also "Indians not taxed."); Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 370 (1973); *see also* Randall Kennedy, *Dred Scott and African American Citizenship*, in DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD 101, 103 (Gary J. Jacobson & Susan Dunn eds., 1996) (criticizing historical arguments, notably Chief Justice Taney's opinion in *Dred Scott*, that Blacks

The Preamble demonstrates that the Constitution's idea of power resides not in its decisionmaking institutions, but in the single decision by a political group to consider itself a national community,¹⁸² and in this configuration to be bound significantly in life

were not included within the sovereign "People" in the Constitution and hence were ineligible for U.S. citizenship). Moreover, as one commentator has observed, the Framers' faith in the People, and thus in representative democracy itself, may have stemmed in part from the belief that the People should be narrowly defined to exclude women, children, servants, and those without property, along with slaves and Native Americans. *See* McDONALD, *supra* note 14, at 161-62 (citations omitted). *But see* Kennedy, *supra*, at 110-16 (arguing that ratifying states differed substantially in citizenship rights granted to Blacks and emphasizing the fact, as did dissenting Justice Curtis in *Dred Scott*, that Blacks were eligible to vote on the Constitution's ratification in at least five states). Indeed, before ratification, "though widespread ownership of land resulted in the broadest-based electorate in the world, only about one American in six was eligible to participate in the political process, and far fewer were eligible to hold public office." McDONALD, *supra* note 14, at 161-62 (citations omitted); *see also* U.S. Term Limits, Inc., v. Thornton, 115 S. Ct. 1842, 1865 (1995) (contrasting widespread property and religion requirements for state elective office with the Constitution's minimum age, citizenship, and residency criteria for service in Congress).

The Constitution's own textual evolution shows how radically the Nation's self-definition as a People can and does change over time. *Compare* U.S. CONST. art. I, § 2 (including only three-fifths of all non-"free Persons" in constituencies for House of Representatives), *with id.* amend. XIV, §§ 1, 2 (deeming "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof" to be citizens of the United States and requiring Representatives to be apportioned according to state population, "counting the whole number of persons in each State," although still excluding from representation "Indians not taxed"), *and id.* amend. XIX (granting women citizens right to vote in state and federal elections). *See also id.* amend. XXVI (granting eighteen-year-old citizens right to vote in state and federal elections). Indeed, the problem of identifying "the People" has divided even the current Supreme Court. *Compare* U.S. Term Limits, Inc., 115 S. Ct. at 1855 (holding that the Constitution reflects power delegated by "the people of the nation"), *with id.* at 1875 (Thomas, J., dissenting) (arguing that the Constitution reflects the power delegated by the people of the several states).

I do not here enter this serious debate; nor do I attempt to define membership in "the People" either as an historical or a normative matter. Notwithstanding its definitional instability, however, the constitutional term "the People" does retain at least one broad, descriptive meaning: it can be used to refer to that group of persons eligible to vote or otherwise considered citizens at any point in the life of the Constitution. I use the term in that broad sense here, and defer for now the difficult task of analyzing who has been included in that group over time, and why.

182. This decision was controversial, and the controversy itself often centered on the Preamble's literal declaration of a new national political community. "I confess, as I enter the Building . . . I stumble at the threshold. I meet with a National Government, instead of a Federal Union of Sovereign States," lamented Samuel Adams. WOOD, *supra* note 6, at 526 (quoting Letter from Samuel Adams to R.H. Lee (Dec. 3, 1787), in 4 WRITINGS OF SAMUEL ADAMS, at 324 (Cushing ed. 1908)). "The question turns, sir . . . on that poor little thing—the expression, We, the *people*, instead of the *states*, of America," argued antifederalist Patrick Henry at the opening of the Virginia ratifying convention. "States . . . are the characteristics and the soul of a confederation. If the states be not

and fortune by public policy determined at a national level.¹⁸³

In fact, Madison named representation as the central defining characteristic of the Constitution's Republic.¹⁸⁴ Representation, in turn, involved "the delegation of the Government . . . to a small number of citizens elected by the rest."¹⁸⁵ Madison was not talking about divesting the People of power and placing it into the hands of formal decisionmaking institutions. Instead, he described a political delegation of authority to representatives that leaves the People's sovereignty intact: not an episodic, election-year sovereignty only, but an ongoing, everyday sovereignty. Thus, Madison advocated representation as "this great mechanical power in government, by the simple agency of which, the will of the largest political body may be concentrated, and its force directed to any object, which the public good requires."¹⁸⁶ Far from converting the

the agents of this compact, it must be one great, consolidated, national government, of the people of all the states." WOOD, *supra* note 6, at 526 (quoting Patrick Henry, in 3 DEBATES 22, 44 (Elliot ed.)). A Massachusetts Antifederalist was even more blunt: "If the phrase, 'We, the people . . . does not go to an annihilation of the state governments, and to a perfect consolidation of the whole Union, I do not know what does.'" WOOD, *supra* note 6, at 526 (quoting Samuel Nasson, in 2 DEBATES, at 134 (Elliot ed.)). Anxiety over the Constitution's commitment to national community dominated the framing and ratification debates. See, e.g., THE FEDERALIST NO. 14, *supra* note 5 (Madison) (urging advantages of national Union over confederation of sovereign States); WOOD, *supra* note 6, at 524-36 (describing the debate between the Federalist goal of consolidation and the Antifederalist goal of confederation). Thus, ratification in spite of this explicit Antifederalist critique reflected a deliberate choice of national community: "[T]he Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States." *U.S. Term Limits, Inc.*, 115 S. Ct. at 1855 (citation omitted). But see *id.* at 1877 (Thomas, J., dissenting) (resurrecting Antifederalist sentiment by arguing that "the Constitution does not contemplate that [the undifferentiated] people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.").

183. That the source of this constitutional raw energy lies in the People is a fixed and steady feature of American founding mythologies. It is also an historical and a political, or at least rhetorical, fact that continues to influence national politics and constitutional interpretation. See, e.g., Michelman, *supra* note 7, at 1508-09 (describing the "centrality and constancy in American constitutional practice of the remembrance of its origins in public acts of deliberate creation" by "We the People"); see also Rubinfeld, *supra* note 7, at 1129-30 (describing the "basic claim" of "originalist" constitutional interpreters as being that "'original intent' is or may be deemed to be 'the sense in which the Constitution was accepted and ratified by the Nation.'" (citations omitted)).

184. See THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1961) (describing "[a] Republic, by which I mean a Government in which the scheme of representation takes place").

185. *Id.*

186. THE FEDERALIST NO. 14, *supra* note 5, at 84 (Madison).

new Republic into an empowered bureaucracy, Madison's principle of representation produced a "wholly popular" government.¹⁸⁷

Of course, Madison argued that the principle of representation made the proposed Republic different from and better than democracy, at least the forms of democracy familiar to his audience. "[P]ure Democracy," by which Madison meant "a Society, consisting of a small number of citizens, who assemble and administer the Government in person,"¹⁸⁸ had two faults making it inappropriate for America. First, a form of government depending on the direct participation of all citizens was inherently unsuited to a political community large in geography or population, as the Nation already was; representative government was obviously the better choice because of "the greater number of citizens and extent of territory which may be brought within [its] compass."¹⁸⁹

Second, Madison argued, pure democracy was wrong for America because of its vulnerability to wasting faction,¹⁹⁰ which he famously defined to mean "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."¹⁹¹ Pure democracies had proven themselves extremely susceptible to faction because:

A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious [that is, "vulnerable"¹⁹²] individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.¹⁹³

187. *See id.*

188. THE FEDERALIST NO. 10, *supra* note 184, at 61 (Madison).

189. *Id.* at 63.

190. *See id.* at 61-62.

191. *Id.* at 57.

192. WILLS, *supra* note 14, at 281 (defining "obnoxious" in its eighteenth century context).

193. THE FEDERALIST NO. 10, *supra* note 184, at 61 (Madison).

Madison argued that the proposed representative Republic would promise "the cure for which we are seeking."¹⁹⁴ But that cure was not to work by exchanging pure democracy's passions for government by institution. Indeed, Madison claimed, the self-interested opinion that produced faction was not only inevitable—being "sown in the nature of man"¹⁹⁵—but it was also intrinsic to the enterprise of a free political democracy, because self-interested passion flowed ineluctably from liberty itself:

Liberty is to faction, what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.¹⁹⁶

Far from seeking a form of government that could squelch political faction, Madison equated faction's malignant self-interest with other powerful sources of controversy, including religion and economic status, that were of bedrock value to the Republic: all were equally divisive of the community, and all were equally inevitable.¹⁹⁷

194. *Id.* at 62.

195. *Id.* at 58. Madison explained:

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.

Id.

196. *Id.*

197. Thus, like political self-interest,

[t]he diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interest. . . . From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

Id. Indeed, "the most common and durable source of factions, has been the various and unequal distribution of property" acquired by the exercise of naturally "different and unequal faculties" by men. *Id.* at 58–59. And yet, "[t]he protection of these [unequal] faculties is the first object of Government." *Id.* at 58; see also *id.* at 58–59 (listing "[a] zeal for different opinions concerning religion" alongside "an attachment to different leaders ambitiously contending for pre-eminence and power" as forces that have "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good").

Madison believed, moreover, that faction is not only an inevitable "disease[],"¹⁹⁸ it is, paradoxically, a generative one. Faction and its parent, self-interested passion, galvanize public policy-making in the first place:

Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest . . . with many lesser interests, grow[s] up *of necessity* in civilized nations, and divide them into different classes, actuated by different sentiments and views. *The regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government.*¹⁹⁹

From this generic description of legislatures (significantly, not excepting the new American Congress), it appears that Madison did not propose to treat the disease of faction by divesting power from a passion-blinded citizenry and locating it in dispassionate governing institutions. In fact, Madison expressed grave skepticism that such institutions could ever really exist. A legislature, as a governing institution, was little more than a clustering of self-interested individual politicians representing the self-interest—the factional interests—of their constituents:

[W]hat are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?²⁰⁰

To be sure, Madison does suggest, in a much-cited flicker of optimism, that the principle of representation could make the new Constitution's institutions more apt to seek and to find the true public interest, as opposed to the majority faction's selfish preferences. By "delegat[ing] . . . the Government . . . to a small number of citizens elected by the rest," the representative Republic would perhaps be able

198. *Id.* at 65. Madison admitted that "the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*." *Id.* at 60.

199. *Id.* at 59 (emphasis added).

200. *See id.* at 59.

to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose.²⁰¹

But Madison's very next sentences strongly suggest that, whatever faith he might have wished to place in this brand of elitism,²⁰² he

201. *Id.* at 62. Wills has analyzed several alternative readings of Madison's intent in this passage. See WILLS, *supra* note 14, at 193–215. For example, there is what Wills calls the “conservative” theory, which argues that Madison's system deliberately sought delay and inertia, with the consequent preservation of the status quo, as positive goods in themselves. See *id.* at 195–200 (critiquing Willmoore Kendall's theory that Madison attempted to create a “machinery” to “guarantee that any decision registered in law should represent ‘the deliberate sense of the community,’” and thus, that structural delays were intended, since “[t]he governmental powers of coercion are so great that they should come into play only” through a process slow enough to bespeak “a sincere attempt at persuasion,” and an effort to reach unanimous agreement (citing WILLMOORE KENDALL, *CONTRA MUNDUM* 500–01 (1971))). A second theory, which Wills associates alternatively with “pluralists” and “liberals,” contends that Madison's built-in delay deliberately sought not a particular, substantive public interest, but instead the competition of ideas for its own sake. “Interest should strive with interest, in a ‘free market’ of debate and maneuver; be tested by conflict and prove its worth (or lack of it).” *Id.* at 201. A third theory is described as “polyarchal”; it argues that “[a]s many groups of people should have as much say as possible on as many things as possible,” and thus rejects the “pluralists” assumption that one group should and will always “win.” *Id.* at 208 (citing ROBERT DAHL, *PREFACE TO DEMOCRATIC THEORY* (1956)). This Article takes no position in this debate, focusing instead on the principle of accountability that Madison appears to pursue, quite apart from his commitment to the public interest in itself.

202. One classic reading of Madison's representation principle emphasizes the Federalists' desire to reinstate and then preserve the political power of the young nation's social elite, after a decade under the Confederation in which upstart social climbers—“men without reading, experience, or principle,” and “respectable neither for their property, their virtue, nor their abilities”—had usurped the places of political authority to which the elite felt entitled. WOOD, *supra* note 6, at 477 (internal quotations omitted). See generally *id.* at 485, 475, 471–518 (describing the Federalists' preference for aristocracy in the “quarrel . . . between aristocracy and democracy” so as to protect “the worthy against the licentious”) (citations omitted). Yet, the Federalists' elitism aimed to protect an aristocracy not of title or family, and not even of wealth or property; but instead it pursued a “natural” aristocracy of virtue, education, and experience that potentially cut across socioeconomic caste lines. See *id.* at 509, 517. Anyone with merit would have the opportunity to join the ruling elite, and social mobility through merit was welcomed. See *id.* at 508. Aside from the Constitution's minimum qualifications of age, citizenship, and residency, the doors to the Congress are, in Madison's words, “open to merit of every

was not willing to stake on it the success of the American experiment: "On the other hand, the effect [of representative government] may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption or by other means, first obtain the suffrages, and then betray the interests of the people."²⁰³

Representative institutions, as institutions, could not be relied on to preserve the Republic from the worst effects of faction, and so, Madison argued, the Constitution resorts to faction—that is to say, politics—itself. By proliferating the number and variety of interests and political parties, "you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other."²⁰⁴ The Constitution pur-

description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." THE FEDERALIST NO. 52, at 355 (James Madison) (Jacob E. Cooke, ed., 1961); *see also* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1857, 1869 (1995) (quoting Madison to support holding that states may not impose additional qualifications on House or Senate candidates). Even the Senate, the body most often labeled "elite," is not reserved to those having property or any other attribute correlating to social class. *See* WOOD, *supra* note 6, at 556 (noting that many Federalists were convinced that the Senate "could not and should not represent any sort of social interest distinct from that of the lower house and was therefore not to play the social role the House of Lords did in the English constitution"). Indeed, as Madison himself emphasized in THE FEDERALIST NO. 10, *supra* note 184, the Constitution's hopes of a "naturally aristocratic" national leadership depended primarily, and rather mechanically, on the relatively large size of the Senate constituency. While undeserving demagogues could win election in a small, local district,

an entire state could not be so deluded. "No momentary glare of deceptive qualities, no intrigues, no exertions will be sufficient to make a whole people lose sight of those points of character which alone can entitle one to their universal confidence." With a large electorate the advance toward public honors was slow and gradual. . . . Only established social leaders would thus be elected by a broad constituency.

WOOD, *supra* note 6, at 512 (citations omitted).

203. THE FEDERALIST NO. 10, *supra* note 184, at 62. Even more wistfully, Madison observed:

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests [represented in decisionmaking institutions], and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: Nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.

Id. at 60.

204. *Id.* at 64.

sues this end vigorously; therein, according to Madison, lies its genius.

Whilst all authority in [the federal republic of the United States] will be derived from and dependent on the society, the 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. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects²⁰⁵

This inoculation against faction, by faction—and not government by dispassionate institution—was the single most important advantage that representative government offered over pure democracy. Indeed, to Madison, this advantage stemmed at least as much, if not more, from the practical fact that a republic could embrace a large population and a large territory, as it did from the interpolation of elite decisionmaking institutions filled with virtuous, public-minded statesmen between the People and their own public policy.²⁰⁶

[T]he greater number of citizens and extent of territory which may be brought within the compass of Republican, than of Democratic Government . . . [is the] circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it

205. THE FEDERALIST NO. 51, *supra* note 174, at 351–52 (Madison).

206. Madison touts the “advantage” a republic enjoys “in the substitution of Representatives, whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice.” THE FEDERALIST NO. 10, *supra* note 184, at 64. Nonetheless he finds a republic’s advantage to lie at least “[i]n an equal degree” in “the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest.” *Id.*

less probable that a majority of the whole will have a common motive to invade the rights of other citizens²⁰⁷

Thus, far from trading unruly democracy for government by dispassionate institutions, the Constitution embraces the People's political passion and self-interest as inevitable—even generative—forces in the new Republic.²⁰⁸ The representation principle, in turn, offered a structure for *ordering* democracy's passions, and for rationalizing their expression; for minimizing cabal and, I argue below, for maximizing deliberation.²⁰⁹ So understood, representation does not mean that the sovereign People have ceded their power to governing institutions, which are thereafter charged to make policy decisions for the People, on the People's behalf, in the People's best "interest." If that were so, it would indeed make more sense to concentrate any inquiry into the Constitution's idea of power, and the separation of powers, exclusively on those institutions, because that would be where real power really rests. But, instead, the representation principle suggests that the Constitution's institutions exist principally as a mechanism for the People to speak for themselves, and to argue with themselves, using the Constitution's structures for politics to do so. Under this view, the representation principle makes constituent-based politics intrinsic to structural questions of constitutional power and the separation of powers.

207. *Id.* at 63–64. Likewise, the representative institutions themselves were designed to fight faction with faction: "[H]owever small the Republic may be, the Representatives must be raised to a certain number, in order to guard against the cabals of a few," without being so numerous as to risk "the confusion of a multitude." *Id.* at 62–63.

208. Gordon Wood describes Madison's use of faction to fight faction as "a kinetic theory of politics." WOOD, *supra* note 6, at 605. According to Wood, this "imposing conception" represented

such a crumbling of political and social interests, such an atomization of authority, such a parceling of power, not only in the governmental institutions but in the extended sphere of the society itself, creating such a multiplicity and a scattering of designs and passions, so many checks, that no combination of parts could hold, no group of evil interests could long cohere.

Id. Yet from the clashing of faction against faction, "Madison believed that the public good, the true perfection of the whole, would somehow arise. The impulses and passions would so counteract each other, so neutralize their potencies . . . that reason adhering in the natural aristocracy would be able to assert itself and dominate." *Id.* at 605–06.

209. See *infra* text accompanying notes 294–96 (proposing that structure of representative institutions encourages political debate among the People over time).

2. *Replacing Mixed Government.* The Constitution's representation principle offers the first reason to look beyond institutions to constituent-based politics when thinking about the separation of powers. A second comes from the recognition of what the representation principle replaced: the Aristotelian model of mixed government.²¹⁰

Mixed government, simply defined, is government based on inherent class differences, and class-based competition, among the governed. Founded on "the ancient categorization of forms of government into three ideal types, monarchy, aristocracy, and democracy—a classical scheme derived from the number and character"²¹¹ of the social classes eligible for power—mixed government worked by giving each of those social classes a governing institution of its own to advance that class' particular interests and to protect those interests from political harm at the hands of the other, competing classes.²¹²

[M]en being what they were, experience had tragically taught that none of these simple forms of government [monarchy, aristocracy, or democracy] by itself could remain stable. Left alone each ran headlong into perversion in the eager search by the rulers, whether one, few, or many, for more power. . . . The mixed or balanced polity was designed to prevent these perversions. By including each of the classic simple forms of government in the same constitution, political fluctuations would cease. The forces pulling in one direction would be counterbalanced by opposing forces.²¹³

The example of mixed government nearest to those who drafted and debated the Constitution was, of course, England. With its monarchic Crown representing "the one," its aristocratic House of Lords representing "the few," and its democratic House of Com-

210. See WOOD, *supra* note 6, at 604. "The theory of mixed government was as old as the Greeks and had dominated Western political thinking for centuries." *Id.* at 197.

211. *Id.*

212. See Redish & Cisar, *supra* note 9, at 458 (describing the "ancient Greek and Roman theory of mixed government" as flowing from a "frank recognition of the class basis of society," (quoting M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 23, 35-37 (1967))).

213. WOOD, *supra* note 6, at 198 (citations omitted). Under this view, "politics was still described in terms of these medieval social categories, as a kind of negotiating and maneuvering for political domination among the three estates of the realm." *Id.* at 20.

mons representing "the many," England offered a familiar mixed-government model for the new Constitution.²¹⁴ Indeed, the theory of mixed government, particularly as embodied in the English constitution,²¹⁵ was extremely influential, some suggest second nature, to those who drafted and debated the American Constitution.²¹⁶

And yet, the new Republic could not be constitutionally organized on the classic mixed government model for one simple reason: there were to be no inherent class distinctions built into the American polity.²¹⁷ Where there were no class distinctions, there

214. The Framers' closest constitutional models—the English parliamentary monarchy and colonial governments patterned on that archetype—all offered examples of mixed government: They all integrated democratic elements with monarchic and aristocratic ones, "manifested in their governors, councils, and legislatures." Casper, *supra* note 14, at 215–16.

215. The English constitutional system revived the mixed government theory to "a vitality and prominence it had not had since antiquity." WOOD, *supra* note 6, at 199. This was possible, moreover, because of a "marvelous coincidence" between the three social orders in English society—the Crown, the nobility, and the people—with the classic forms of government, monarchy, aristocracy, and democracy. *See id.* "Together these three orders constituted all of English society, and 'the meeting of these three estates in Parliament is what we call our government.'" *Id.*; *see also* McDONALD, *supra* note 14, at 81 (noting that after 1642, England recognized three estates in its system of mixed government: King, Lords Spiritual and Temporal, and Commons).

216. At least, the basic mixed government form was accepted as a constitutional starting point.

[M]ost Americans set about the building of their new states in 1776 within the confines of this theory of mixed government, for independence and the abolition of monarchy had not altered the basic postulates of the science of politics [inherited from the Greeks] In fact, in most of the states the theory of mixed government was so axiomatic, so much a part of the Whig science of politics, that it went largely unquestioned, particularly since the colonists' debate with England had not compelled them to explore it comprehensively.

WOOD, *supra* note 6, at 202.

217. *See id.* at 602.

The American governments . . . "do not admit of sovereignty, nobility, or any kind of hereditary powers; but only of powers granted by the people, ascertained by written constitutions, and exercised by *representation* for a given time." Hence such governments "do not admit of monarchy, or aristocracy; nor do they admit of what was called democracy by the ancients."

Id. (emphasis added) (quoting SAMUEL WILLIAMS, NATURAL AND CIVIL HISTORY OF VERMONT 342, 343 (1794)). Madison, likewise, described the new Republic by emphasizing this profound difference from the classic mixed government model. He boasted, "Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility." THE FEDERALIST No. 39, at 253 (James Madison) (Jacob E. Cooke ed., 1961).

To say that the Constitution created a *form of government* structured without reference to class distinctions, of course, is not to say that the Constitution prescribed or even valued a truly classless *society*. To the contrary, the unamended Constitution expresses the

could be no distinct class interests requiring separate institutions for their advancement and protection against class competitors.²¹⁸ Instead, there was only one governing class, the absolutely sovereign People, from which all power flowed. Aristotelian mixed government gave way to American representation.

The difference was profound. To be sure, the Constitution established three decisionmaking institutions—the Presidency, the Senate, and the House of Representatives—that resembled the components of classic mixed government,²¹⁹ but the resemblance was superficial. The members of all three institutions were chosen by the same, single People;²²⁰ all three institutions thus embodied the same political class; all three operated within the same universe of political interests.²²¹ “The old classification of politics by

Framers’ specific and exclusionary prejudices about who counted among “the People.” See *supra* note 181. While the Framers’ own prejudices regarding race, sex, and economic class prejudices may undermine the credibility of their republican rhetoric, this Article nonetheless proceeds on the premise that the Constitution’s structure for representative government can also be considered apart from those prejudices.

218. See WILLS, *supra* note 14, at 104–05 (Federalist papers demonstrate that the American “republican genius” denied a mixed government principle depending on separations of interest in class or economic sense; “[m]onarchical and aristocratic principles were not to be introduced in the American scheme, even as partial or balancing factors”).

219. I set aside, for now, consideration of the American Judiciary and its role within the Constitution’s separation of powers principle. Note, however, that the classic mixed government model did not recognize a separate institutional Judiciary. Under the English system, for example, judicial tasks were “exercised mainly by the king’s courts, but for certain purposes both the Lords and the Commons had judicial authority.” McDONALD, *supra* note 14, at 82; see also *id.* at 85 (noting that the House of Lords served as England’s supreme appellate court). Moreover, few Americans in the founding era trusted a truly independent Judiciary. See *id.*

220. Proceeding from the premise that only a “strictly republican”—that is, strictly representative—form of government would be “reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government,” Madison argued that each of these three constitutional institutions “derive[d] all its powers directly or indirectly from the great body of the people. . . . It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.” THE FEDERALIST NO. 39, *supra* note 217, at 250–51 (Madison) (emphasis in original). The proposed Constitution was “in the most rigid sense conformable” to that standard. *Id.* at 252. The House “is elected immediately by the great body of the people.” *Id.* The Senate “derives its appointment indirectly from the people.” *Id.* The President, likewise, “is indirectly derived from the choice of the people.” *Id.* “Even the judges, with all other officers of the Union, will . . . be the choice, though a remote choice, of the people themselves.” *Id.*

221. One contemporary commentator observed that, “even though in its outward form

the number and character of the rulers no longer made sense of American practice where 'all is transacted by representation' expressed in different ways."²²² Madison explained, "If Europe has the merit of discovering [representation,] this great mechanical power in government, . . . America can claim the merit of making the discovery the basis of *unmixed* and extensive republics."²²³

This profound difference between the American Republic and classic mixed government casts a revealing light on the fact that mixed government receives credit for first developing a separation of powers idea, which, once adapted by the Framers, evolved into our own.²²⁴ Mixed government developed specifically to offer an

[the American Constitution] resembled the conventional mixed government," it was, in fact, "purely democratical": "all authority of every kind is derived by REPRESENTATION from the PEOPLE and the DEMOCRATIC principle is carried into every part of the government." James Wilson, *Lectures on Law*, in I THE WORKS OF JAMES WILSON 416-17 (James Wilson ed.) (quoted in WOOD, *supra* note 6, at 603).

222. WOOD, *supra* note 6, at 602-03 (quoting WILLIAMS, *supra* note 217, at 343). Accordingly, the Constitution sets only minimal qualifications of age, citizenship, and residence for elected federal officials. See U.S. CONST. art. I, § 2, cl. 2 (establishing qualifications for Representatives); *id.* art. I, § 3, cl. 3 (qualifications for Senators); *id.* art. II, § 1, cl. 5 (qualifications for President). Madison explicitly links the omission of class-based qualifications for federal office to the Constitution's representation principle:

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people.

THE FEDERALIST NO. 57, at 385 (James Madison) (Jacob E. Cooke ed., 1961); see also *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1856-58 (1995) (quoting this and like assertions by Madison and Hamilton to support holding that states may not impose additional qualifications on candidates for Congress beyond Article I's minimal age, residence, and duration of citizenship requirements).

223. THE FEDERALIST NO. 14, *supra* note 5, at 84 (Madison) (emphasis added).

224. See Redish & Cisar, *supra* note 9, at 458 ("The foundations of modern separation of powers theory can be traced to the ancient Greek and Roman theory of mixed government." (citing VILE, *supra* note 212, at 23)). Historians identify at least two discrete "separation of powers" accounts current as the mixed government model evolved into the American model. From the English form of mixed government "arose the idea or ideal of checks and balances: each of the parts of the mixed constitution was supposed to restrain the power of the others in the interest of a harmonious whole." McDONALD, *supra* note 14, at 81 (describing this model in trinitarian terms: three estates "together constituted Parliament; and as in the Trinity, each was separate and distinct yet all were one"). Montesquieu, however, like Thomas Paine, altered the English focus on checks and balances, offering a theory of government that secured political liberty by separating government tasks among different institutions: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, . . . 'there can be no liberty.'" *Id.* at 82 (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 151-62 (Thomas Nugent trans., 1949) "Montesquieu's theory of the separation of powers is not only different from but is also nearly irreconcilable with the English idea of checks

institutional mechanism by which disparate social classes could compete for government power, both to advance class interests and to preserve each estate's rights and status "against the encroachments of the other two."²²⁵ The representative institutions were, after all, the primary mechanisms through which the three main social estates exerted influence at all in the whole government's decisionmaking;²²⁶ without their respective institutions, the estates would not have had a civil route to effective government power.

Moreover, mixed government supposed that each of the distinct social classes were endowed with distinct governing talents, and that each brought a different and special quality to the decisionmaking enterprise, quite apart from the specific class-interest agendas that each was expected to advance and protect. It was the *institutions* of mixed government that brought these special class-based talents into government, offering a structure for their productive interaction.

Each of these simple forms possessed a certain quality of excellence: for monarchy, it was order or energy; for aristocracy, it was wisdom; and for democracy, it was honesty or goodness. . . . Only through this reciprocal sharing of political power by the one, the few, and the many, could the desirable qualities of each be preserved.²²⁷

In a world so stratified by class, and where class dictated the form of government, it made sense for theories of power and of

and balances," under which, for example, the legislative House of Commons exercised traditionally executive control over the military and over currency. *Id.* For a discussion of Paine's critique of checks and balances, see *id.* at 83–84.

225. WOOD, *supra* note 6, at 20.

226. As late as the eighteenth century, English thinkers "continued to cling to a medieval conception of society, divided into estates or orders, with the people constituting a single unitary estate alongside the nobility and the Crown." *Id.* at 18.

227. *Id.* at 198. Wood explains the connection further:

Yet simple as it seems, the theory of mixture was complicated and comprehensive, concerned not merely with the ruling powers of government but as well with the elements of the society expressing itself in these powers. It was its ability to relate the government to the society, to involve in the government all of the social orders of the body politic—the monarch, the nobility, and the people—which was ultimately responsible for the persuasiveness of the theory. The social or psychological qualities that men used to characterize each particular form of government—"honor, virtue, and fear" . . . — had significance because the mixed government was not an institutional abstraction set apart from the society but indeed was the very embodiment of the society.

Id. at 199 (citations omitted).

the separation of powers to emphasize institutions *as institutions*. In the radically representative world posited by America's Constitution, however, that strict institutional focus is less satisfying. Constitutionally, politics matters, too.

Americans had retained the forms of the Aristotelian schemes of 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. . . . *Separation of powers, whether describing executive, legislative, and judicial separation or the bicameral division of the legislature . . . was simply a partitioning of political power*
²²⁸

The Constitution did create a government with these institutional branches, reminiscent of mixed government. And it incorporated a separation of powers principle, reminiscent of mixed government's, that is concerned with the balance of authority among those institutions as institutions. But it is also true that the American Constitution replaced mixed government with a radically representative republic, which relies profoundly on constituent-based politics *as politics* to channel the one People's undifferentiated and absolute power through all the decisionmaking branches of national government.

"The departments . . . may therefore be said to be balanced." But it was not a balance of "any intrinsic or constitutional properties," of any social elements, but rather only a balance of governmental functionaries without social connections, all monitored by the people who remained outside, a balanced government that worked, "although . . . the materials, of which it is constructed, be not an assemblage of different and dissimilar kinds."²²⁹

So understood, the replacement of the classic mixed government model with a wholly representative republic, like the principle of representation itself, supports this Article's assertion that the Constitution's structures for the practice of politics must be

228. *Id.* at 604 (emphasis added).

229. *Id.* (quoting John Dickinson and James Wilson). This may be the Constitution's solution to what one historian has identified as a central challenge following the Declaration of Independence: "how to adapt the institutions of mixed government to the doctrine of popular sovereignty." Casper, *supra* note 14, at 216. Professor Casper observes that "[t]he issue was no longer the separation of differently based powers, but the separation of power (in the singular) flowing from one source: the people." *Id.*

intrinsic to any theory of constitutional power and the separation of powers.

B. *Nested Constituencies: The General Idea*

This Article proposes that the Constitution's idea of power, and of the separation of powers, is reflected in the way the Constitution channels the People's sovereign power into government through its structures for the practice of politics. How is this done? By organizing "We the People" into a system of nested constituencies, in which each citizen belongs simultaneously to four concentric political circles of graduating circumference. One constituency is reflected in the House of Representatives, two more in the Senate,²³⁰ and a fourth in the Presidency of the United States.²³¹ Under this view, the People at ratification did not so much surrender decisionmaking power over their lives and fortunes to a tripartite institutional government as they inaugurated a per-

230. See *supra* note 2 (explaining premise that each citizen participates in two Senate constituencies).

231. A fifth constituency, not overtly political in nature, may be represented by the Constitution's judicial branch. See, for example, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), in which the Supreme Court proposed for itself a special constitutional role in reviewing majoritarian legislation that, *inter alia*, demonstrated "prejudice against discrete and insular minorities" defined by religion, race, or national origin. This special protective role can be read as describing a judicial constituency comprised of those who, for one reason or another, are deemed unable to compete fairly within their own overtly political constituencies. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 181 (1962) (stating that countermajoritarian judicial review is appropriate where it serves a purpose necessary to democracy that democratic processes cannot perform); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 181 (1980) (stating that countermajoritarian judicial review is appropriate only where majoritarian process distorted by defect, such as systemic exclusion of minorities from participation in process).

Under this view, the Judiciary differs in two immediate ways from its coequals. First, the Judiciary's constituency is described not by fixed district lines, like those of a Senator or Representative, but by the potentially fluid and geographically transcendent category of the politically disenfranchised. Second, if this category does describe the Judiciary's constituency within the Constitution's representative structure, then the Judiciary becomes the only one of the federal decisionmaking branches with a constituency that excludes those who select the branch's institutional members, federal judges. That is, under a *Carolene Products* view, the Judiciary's constituency by definition excludes the nominating President and confirming Senators, who both are and also represent winners in the majoritarian electoral process. See *THE FEDERALIST* No. 51, *supra* note 174, at 348 (Madison) ("[T]he permanent tenure by which the appointments are held in [the Judiciary], must soon destroy all sense of dependence on the authority conferring them."). Again, questions about the Judiciary's representative role, and of its situation among the Constitution's nested political constituencies described here, are beyond the scope of this Article. See *supra* note 6.

petual conversation among themselves—that is, among their several selves—in which the same “People” may assume alternate political identities as they speak through their several constituencies. Thus, the nation’s formal decisionmaking institutions become alternate mouthpieces for the People’s several voices, as they deliberate among themselves.

This Article proposes that some meaning in the Constitution’s idea of power can be inferred from its establishment of a system of nested constituencies as the structure through which debate over national policy takes place. That is, the Constitution’s argumentative *structure* for national debate, for decisionmaking by the People as a national community, tells us something about the constitutional *power* exercised through that debate.²³² If one ventures this shift in perspective, the institutions’ own static natures no longer offer the best metaphor for understanding the Constitution’s idea of power. Instead, the kinetic nature of these nested constituencies reveals power to be dynamic argument over time.

C. Nested Constituencies: Supporting the General Idea

1. *Article I.* Article I erects an institution, “a Congress of the United States,” and “vest[s]” it with “[a]ll legislative Powers herein granted.”²³³ Yet Article I’s plaineast statements about power are also its most coy. Sections 8 and 9 together grant Congress an inventory of policymaking “Powers,”²³⁴ while explicitly denying it

232. Professor Black proposed that we infer constitutional meaning from the structure and relationship of the Constitution’s static elements—that is, the three formal branches in themselves, and the federal government’s institutional supremacy over the states (though he did not speak of them as being static or not). See BLACK, *supra* note 7, at 7, (proposing that the Constitution’s meaning for a particular dispute over power may be inferred from “the structures and relationships created by the constitution in all its parts or in some principal part”). Professor Black’s idea remains widely influential. See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method In Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1248 n.91, 1299 n.248 (1995) (insisting that some element of Black’s structuralism is essential to discerning the Constitution’s true meaning, for example, in debate over whether the North American Free Trade Agreement (NAFTA) represents an unconstitutional deviation from the treaty-making provisions of Article II). In this Article, I suggest that we move one step beyond Professor Black to infer constitutional meaning from the structure of the Constitution’s kinetic element—its dynamic structures for political debate among the People in and through their nested constituencies.

233. U.S. CONST. art. I, § 1.

234. Article I, Section 8 authorizes the Congress to impose taxes, declare war, raise and maintain an Army and Navy, pay debts, borrow money, regulate interstate and for-

others.²³⁵ But despite the superficial clarity of these two catalogues, and their crisp promise to specify which "Powers" the Congress does and does not enjoy, Sections 8 and 9 have served chiefly to intensify debate over whether a particular act of Congress is in fact proper.²³⁶ They do not, in themselves, explain much about the *idea* of power animating the Constitution.

Article I's other sections may help. Largely ignored in debates over congressional power or the separation of powers,²³⁷ Sections 2 through 6 devote painstaking attention to the problem of organizing the People into the Congress' several constituencies. If one is willing to infer some meaning from the Constitution's *structure* for national political debate, then these neglected sections become significant.

Article I builds the Congress' constituencies with three basic tools: the term of office, the form of election, and the means of apportionment.²³⁸ The House of Representatives is (and was from the start) elected every two years by direct, popular vote of "the People of the several States," defined for this purpose as everyone eligible to vote in elections for the most numerous branch of his state legislature.²³⁹ House seats are to be apportioned among the states according to a population census every ten years, with one Representative for every 30,000 constituents, although each state is entitled to at least one Representative.²⁴⁰

eign commerce, control immigration and naturalization, regulate bankruptcy, and constitute federal courts inferior to the Supreme Court, and finally to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8.

235. Article I, Section 9 prohibits the Congress from passing bills of attainder or ex post facto laws; taxing American exports; granting titles of nobility; and suspending the writ of habeas corpus other than in times of rebellion or invasion. *See* U.S. CONST. art. I, § 9.

236. *See, e.g.,* United States v. Lopez, 115 S. Ct. 1624, 1626 (1995) (concluding that Congress exceeded its powers under the Commerce Clause when criminalizing possession of concealed weapons in and around school); *see also* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1124-33 (1996) (concluding that Congress exceeded its powers under the Indian Commerce Clause when abrogating state sovereign immunity against actions brought in federal court under the Indian Gaming Regulatory Act).

237. In fact, I have not encountered any judicial opinions or scholarship even suggesting that these provisions have anything to say about Congress' power or the separation of powers.

238. *See* U.S. CONST. art. I, §§ 2, 3.

239. *Id.* art. I, § 2.

240. *See id.* art. I, § 2, cl. 3. Article I authorizes the Congress to determine the num-

Senators, by contrast, are chosen every six years in staggered elections.²⁴¹ The Constitution, further, fixes the apportionment of Senators at two for each state, regardless of population.²⁴² It underscores this apportionment by stating that each Senator shall have only one vote,²⁴³ and by prohibiting any constitutional amendment that would deprive any state, without its consent, "of its equal Suffrage in the Senate."²⁴⁴

This material is familiar; its significance may not be. One may infer something about the constitutional idea of power from Arti-

ber of Representatives in the House and the size of their constituencies, requiring only that each state have at least one representative (regardless of population) and that the number of Representatives "not exceed one for every thirty Thousand" constituents. *Id.* art. I, § 2, cl. 3. The Constitution itself dictates the actual number of Representatives in the Congress, and their allotment by state, only for the first three years after the first meeting of the new Congress, by which time the Congress must have accomplished its own "Enumeration" and apportionment of Representatives. *See id.* (authorizing sixty-five Representatives among the thirteen states, with Virginia having the most at ten, and Delaware and Rhode Island each having only one). Madison argued that the limitation of one Representative for every 30,000 constituents was necessary so that the House would not become unwieldy and chaotic. "[T]he number [in a legislative body] ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." *THE FEDERALIST* NO. 55, at 374 (James Madison) (Jacob E. Cooke ed., 1961). *See generally* *THE FEDERALIST* NO. 56, at 378 (James Madison) (Jacob E. Cooke ed., 1961) (defending size of House against charge that it would be "too small to possess a due knowledge of the interests of its constituents").

241. *See* U.S. CONST. art. I, § 3, cl. 1 (establishing six-year term for Senators); *id.* art. I, § 3, cl. 2 (dividing Senate into three classes and staggering their election at two-year intervals); *see also supra* note 2 (explaining that staggered terms suggest potential for differentiation of two Senate constituencies). Originally, Senators were elected by state legislatures. *Id.* art. I, § 3, cl. 1. The Seventeenth Amendment, ratified in 1913, abandoned this practice in favor of election by popular vote. *See id.* amend. XVII (stating that the Senate would be elected "by the people" of each state who are eligible to vote for members of state legislature's most numerous branch).

242. *Id.* art. I, § 3, cl. 1. For a modern criticism of the Senate's means of apportionment, see Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMM. 213, 213-14 (1995) (arguing that the Senate's disproportionality is an "indefensible" anomaly within a Constitution that is otherwise interpreted to enshrine a "one person, one vote" principle of representation).

243. U.S. CONST. art. I, § 3, cl. 1. The Seventeenth Amendment repeats the one-Senator-one-vote restriction. *See id.* amend. XVII. By contrast, there is no explicit voting restriction of any kind imposed on members of the House, although they have, in practice, been restricted to a one-member-one-vote rule as well. *Cf.* Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 80 (1996) (arguing that Article I implicitly imposes a one-Representative-one-vote requirement on the House).

244. U.S. CONST. art. V.

cle I's construction of the constituencies who wield power through the Congress. By distinguishing terms of office, forms of election, and means of apportionment, Article I organizes the national community into political groups that are, at the same time, both concentric and clearly differentiated.

They are concentric because each citizen belongs at once to a House constituency and to two Senate constituencies;²⁴⁵ from her own viewpoint, each citizen stands at the center of all three. This was so even under the original plan for Senate election by state legislatures, which underscored a role for the Senate in representing states as states;²⁴⁶ for the state itself was simply another institution representing a political constituency—a group comprising part of “We the People.”²⁴⁷ Indeed, the Constitution's own rati-

245. See *supra* note 2 (explaining rationale for treating Senate as representing two constituencies).

246. “[T]he equal vote allowed to each state [in the Senate], is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty.” THE FEDERALIST NO. 62, at 417 (James Madison) (Jacob E. Cooke ed., 1961); see also WOOD, *supra* note 6, at 556–59 (noting the frequent Federalist argument during Convention and ratification debates that Senate would “represent the sovereignty of the states”; but concluding that Framers proffered “jumble of explanations” of Senate's role so that “Convention could never be sure of just what kind of upper house it was creating”) (emphasis omitted)). See generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 57–81 (1996) (recounting Convention debates that produced “great compromise” giving each state equal vote in Senate). At least one Convention delegate argued that structuring the Senate to represent the states as states would bring the American government in line with the classical ideal of mixed government: treating the states as English baronies would have permitted the Senate to “assimilate . . . as near as may be to the House of Lords in England,” thus institutionalizing a difference in the *class* of interests represented in the two houses of Congress. McDONALD, *supra* note 14, at 215 (quoting John Dickinson of Delaware); see *supra* Section II.A.2. (discussing mixed government ideal and theoretical dependence on class-based differences in interests represented in government).

Although the Convention did adopt a disproportionate representative structure for the Senate, it never adopted the view that the body should represent anything other than the interests of the *People* of the states, however organized into those separate political societies. See McDONALD, *supra* note 14, at 280. “The interest of the Senate is exactly the same as that of the House—the welfare of the people. . . . In America, difference of function is not a difference of interest, as in the mixed theory of the British constitution.” WILLS, *supra* note 14, at 105 (discussing Madison's careful distinction between Senate and House of Lords in *The Federalist* Nos. 62 and 63); see also RAKOVE, *supra*, at 67 (quoting Benjamin Franklin's declaration that “[t]he Interest of a State is made up of the interests of its individual members If they are not injured, the State is not injured”).

247. Not until ratification of the Seventeenth Amendment in 1913 did Senators begin to be elected by direct popular vote, like their counterparts in the House. See *supra* note

fication mechanism, which called for adoption by the People in conventions held by state, shows that states' primary structural significance was as political societies of individuals, and not as institutional governments. "[T]he source of sovereignty was the people of the states and . . . the residue of sovereignty that was committed neither to the national/federal nor to the state governments remained in them" ²⁴⁸ Madison explained that

the Constitution is to be founded on the assent and ratification of the people of America . . . not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, *the authority of the people themselves*. ²⁴⁹

241. This twentieth-century amendment does not, however, mean that the eighteenth-century Constitution designed the Senate to do other than represent "the People." To the contrary, the Seventeenth Amendment, as a product of the broader Progressive movement, was widely supported as a reform necessary to *recover* the Senate for the People from the invidious control of political party bosses and corrupting, monied special interests, into whose hands that body was perceived to have slid throughout the nineteenth century and particularly following the Civil War. *See* C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY* 17-19 (1995).

Senatorial elections had ceased to be determined by the deliberated concurrence of the state legislators, hinging instead on the dictates of the party bosses who ruled the legislative "machines." The senators, themselves, no longer valued as the sagacious and disinterested legislators of the national welfare, more closely approximated . . . a "Diet of party lords, wielding their powers without scruple or restraint in behalf of those particular interests" responsible for placing them in office.

Id. at 17-18 (describing Progressives' critique of pre-Seventeenth Amendment Senate) (quoting HENRY JONES FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS, A SKETCH OF CONSTITUTIONAL DEVELOPMENT* 270 (1889)); *see generally id.* at 83-106 (detailing Progressives' critique). Insofar as advocates of the Seventeenth Amendment argued that it would restore the Senate to its original constitutional role of representing the People, *see id.* at 17-19, that Amendment reinforces this Article's structural account of the Constitution's nested political constituencies.

242. McDONALD, *supra* note 14, at 280; *see also* WILLS, *supra* note 14, at 105 ("Admittedly, representation in the Senate was by *state*; but the state interest is not separable from that of its people, represented proportionally in the House of Representatives."). The United States Supreme Court recently adopted this same view in holding that states may not constitutionally impose qualifications on congressional candidates beyond Article I's minimal age, residence and duration of citizenship requirements. *See* *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1845 (1995).

249. THE FEDERALIST NO. 39, *supra* note 217, at 254 (Madison) (emphasis added). One historian recently examined the tension between these two views of the Senate's constituency:

Nothing better symbolized the original ambiguities of American federalism than the mixed character of the Senate. . . . [N]o one could deny that the Senate was intended to embody the equal sovereignty of the states and to protect their rights of government against national encroachment. . . . [Yet,] [i]f the Senate

Not only are Congress' three constituencies in this way concentric—organized around a single member of the People—but they are also clearly differentiated. They are painstakingly made so by Article I's mechanisms for distinguishing means of apportionment, term of office, and form of election. Article I ensures that, in every state having more than one congressional district,²⁵⁰ each House constituency will include fewer people than the Senate constituency within the same state. In turn, every Senate constituency will, by definition, thrust together citizens who belong to different House constituencies. While House and Senate constituencies will always overlap within a state, they will also always be comprised of different political groups of citizens.

Moreover, not only are the Congress' constituencies differentiated quantitatively, but Article I endows each with structural characteristics that encourage disagreement among them over time. Apportionment rules promise the House constituency a local, relatively homogeneous character: allotting one Representative for every 30,000 citizens²⁵¹ increased the likelihood that a single con-

represented states in their corporate capacity, it was hardly consistent to allow senators to vote as individuals rather than as a delegation.

RAKOVE, *supra* note 246, at 170–71. Likewise, Senators were to be paid not by the states they theoretically represented, but by the federal government. *See id.* Professor Rakove concludes, "The Senate itself would embody the mixed character of the Constitution: it would be 'federal' in origin but 'national' in orientation, somehow protecting state sovereignty and the national interest simultaneously." *Id.* at 171 (footnote omitted); *see also* WOOD, *supra* note 6, at 472–75 (arguing that, for Federalists like Madison, impetus towards Constitution and away from Articles of Confederation rested largely on desire to "cut through the structure of the states to the people themselves" following tumultuous 1780s in which state governments generated political and social chaos).

250. In the First Congress, every state except Rhode Island and Delaware had two or more congressional districts. *See* U.S. CONST. art. I, § 2; KENNETH R. BOWLING, *POLITICS IN THE FIRST CONGRESS 1789–1791*, app. 1 at 345–47 (1990). In the 105th Congress, seated in 1997, seven states have only one at-large representative: Alaska, Delaware, Montana, North and South Dakota, Vermont and Wyoming. *See* CONGRESSIONAL YELLOW BOOK, Nov. 1996, at 1–56 (Elections Spec. Ed.). The following discussion refers throughout only to states having more than one Congressional district.

251. U.S. CONST. art. I, § 2, cl. 3. The issue of House apportionment was the only substantive question that provoked comment from George Washington during the entire Constitutional Convention. He rose during the last speeches of the Convention's last day in session, September 17, 1787, to endorse a late amendment to Article I increasing the number of Representatives from one for every 40,000 to one for every 30,000. As reported by James Madison, Washington observed:

The smallness of the proportion of Representatives had been considered by many members of the Convention an insufficient security for the rights & interests of the people. [Washington] acknowledged that it had always appeared to himself among the exceptionable parts of the plan, and late as the present

stituency would coincide with a local, organic community.²⁵² And, in practice, congressional districts have traditionally tracked spontaneous, geographically compact residential and work patterns, as well as the boundaries of state political subdivisions (and the political ambitions of those drawing the lines).²⁵³ The citizen within her House constituency thus may identify herself and her political priorities primarily on the basis of local concerns.²⁵⁴

moment was for admitting amendments, he thought this of so much consequence that it would give much satisfaction to see it adopted.

JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 579 (Gaillard Hunt & James Brown Scott eds., 1987) (footnotes omitted). The amendment passed unanimously. *Id.* at 580; see also *THE FEDERALIST* NO. 56, *supra* note 240, at 383 (Madison) (observing that each member of British House of Commons effectively represented approximately 30,000 constituents).

252. In fact, the Framers appeared to assume that many Representatives would be chosen by only five or six thousand voters. See *THE FEDERALIST* NO. 57, *supra* note 222, at 388 (Madison).

253. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (identifying cognizable equal protection claim of discrimination against white voters where congressional district lines are drawn on basis of race, if district ignores "traditional districting principles such as compactness, contiguity, and respect for political subdivisions"); *id.* at 679 (Souter, J., dissenting) (asserting that districting may also take into account the shared political, but nongeographical, interests of "rural voters, . . . union members, . . . Hasidic Jews, . . . Polish Americans, or . . . Republicans").

254. But see *THE FEDERALIST* NO. 56, *supra* note 240, at 381-82 (Madison), which could be read as suggesting that the Framers assumed most states were relatively homogeneous internally, at least at the time of ratification.

Taking each state by itself, its laws are the same, and its interests but little diversified. . . . Were the interests and affairs of each individual state, perfectly simple and uniform, a knowledge of them in one part would involve a knowledge of them in every other, and the whole state might be competently represented, by a single member taken from any part of it.

Id. at 381 (reasoning that this homogeneity ensures that House apportionment would ensure adequate and informed representation). But Madison also acknowledges that individual states were expected to change rapidly into internally more complex organisms, even as the several states gradually assimilated into a Nation.

The changes of time . . . on the comparative situation of the different states, will have an assimilating effect. The effect of time on the internal affairs of the state taken singly, will be just the contrary. At present some of the states are little more than a society of husbandmen. Few of them have made much progress in those branches of industry, which give a variety and complexity to the affairs of a nation. These however will in all of them be the fruits of a more advanced population; and will require on the part of each state a fuller representation. The foresight of the Convention has accordingly taken care that the progress of population may be accompanied with a proper increase of the representative branch of the government.

Id. at 381-82. But see *THE FEDERALIST* NO. 10, *supra* note 184, at 63 (Madison) (suggesting that Constitution referred truly "local and particular" concerns to the states, while only "great and aggregate interests" were referred to the national government, including

By contrast, a Senate constituency may take on the more polyglot character of the state as a whole.²⁵⁵ By building the Senate on these statewide political communities, Article I coaxes the Senate constituent to identify herself and her priorities within that larger group, prodding her to subordinate local concerns to those of the entire state.

Moreover, a House constituency is constitutionally designed to be more mercurial than a Senate constituency. Article I anticipates that a single House constituency could be recomposed once every decade or more frequently.²⁵⁶ Senate constituencies are geographically stable by contrast, because they must correspond to state boundaries.²⁵⁷

Article I also deploys the term of office to differentiate House and Senate constituencies. The House constituent is invited to participate every two years in the political debate prompted by an election, with its potential for radical change and constituent redefinition. The constituent may thus regularly act on immediate political passions or frustrations; she may express priorities of the moment.²⁵⁸ But the very structure of the same citizen's Senate constituencies urges different conduct: the Senate constituent is asked to vote for a Senator only twice every six years. Article I in this way encourages the Senate constituent's political views to season and her priorities to evolve.²⁵⁹

House of Representatives).

255. This was true at the framing, when the Senate was chosen by state legislatures and designed in some measure to represent the states as states, and it is true today under the system of direct popular election of Senators. *See supra* note 247 (describing how both original and current systems of electing Senators were designed to represent the People of each state).

256. *See* U.S. CONST. art. I, § 2.

257. *See id.* art. I, § 3.

258. *See* THE FEDERALIST NO. 52, *supra* note 202, at 355 (Madison) (deeming frequent House elections essential to ensure that Representatives maintain "an immediate dependence on, & an intimate sympathy with the people"; liberty preserved only where government in general has such "common interest with the people").

259. *See supra* note 2 (discussing effect of Senate's staggered elections). Before the Seventeenth Amendment, the Senate constituent would have had only an indirect role in this debate; an individual's activity as a member of that constituency would have taken place, if at all, in the election of state legislators. *See* THE FEDERALIST NO. 62, *supra* note 246, at 416 (Madison) (explaining that original decision to have state legislatures elect Senators pursued the "double advantage of favouring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former; and may form a convenient link between the two systems"). *But see supra* note 247 (discussing role of Senate in represent-

What may one infer from Article I's construction of its nested constituencies? Article I encourages the same People to assume alternative political characteristics—indeed, alternative political identities—as they speak through their alternate constituencies. While they will not always think or vote differently as they take their place in one constituency and then another, Article I is set up to maximize their opportunities to do so. As manifestations of the national decisionmaking power, these concentric political groups are deliberately asymmetric, syncopated both in time and perspective. Thus, the Congress' several constituencies are structurally predetermined to engage the People in a perpetual dynamic argument with themselves over time.

This observation finds support beyond the constitutional text and structure alone. Proponents of ratification made much the same point when describing the Constitution's separation of powers principle:

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, . . . it is evident that *each department should have a will of its own*; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies, *should be drawn from the same fountain of authority, the people, through channels, having no communication whatever with one another.*²⁶⁰

In this, Madison acknowledged that the three national decision-making branches are essentially three manifestations of the same ultimate authority, the People, speaking with different voices and through different "channels." Moreover, it is the difference in character among the People's nested constituencies, and among their channels of political expression, that gives each department

ing the People even under original method of election).

260. THE FEDERALIST NO. 51, *supra* note 174, at 348 (Madison) (emphasis added). With the exception of appointment to the Judiciary, the Constitution fully adheres to this principle, providing that election to the Presidency and to the two houses of Congress take place through three distinct, unconnected channels. *See id.* (deviation from principle acceptable for Judiciary both because judges must have "peculiar qualifications" not best sought through election and because their life tenure "must soon destroy all sense of dependence on the authority conferring" their appointments).

"a will of its own," its necessary separation and independence from the others. Madison continued:

[I]t is not possible to give to each department an equal power of self defence. In republican government the legislative authority, necessarily, predominates. The remedy for this inconveniency is, to divide the legislature into different branches; *and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.*²⁶¹

Channeling the same People into asymmetric nested constituencies accomplishes another important structural purpose. The asymmetry of their constituencies not only gives each representative institution a will of its own, but it also maximizes the chances that each will have a distinctive *position* of its own on national policy issues. For example, the structural differences between the Congress' constituencies enable—indeed, encourage—the Senate to counterbalance the House politically. Madison argued that the Senate's smaller size and longer term of office were essential to maintaining legislative balance because they made the Senate "firm." By contrast, the House's size and more mercurial character left it susceptible "to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions."²⁶² The six year term for Senators, moreover, made that body more "stable" in its institutional "opinions"; the House, on the other hand, was open to a "rapid succession of new members" carrying with them "a change of opinions; and from a change of opinions, a change of measures."²⁶³

261. *Id.* at 350 (emphasis added).

262. THE FEDERALIST NO. 62, *supra* note 246, at 418 (Madison).

263. *Id.* at 420. The House's changeability did not necessarily make the Representatives themselves poorer legislators. Rather, Madison contended, "[A] continual change even of good measures is inconsistent with every rule of prudence, and every prospect of success." *Id.* Moreover, Madison suggested that the House's mutability disadvantaged it in making certain kinds of decisions. See THE FEDERALIST NO. 63, at 424 (James Madison) (Jacob E. Cooke ed., 1961). Madison noted that the Nation needed a more stable Senate to ensure those "objects of government" that "depend on a succession of well chosen and well connected measures, which have a gradual and perhaps unobserved operation"; and contrasted these to other measures "which have singly an immediate and sensible operation" (presumably most fit for House action). *Id.*

Even more importantly, these structural differences assured conflict in interaction between the different *constituencies*, enforcing a perpetual political debate by the People among their several "selves."²⁶⁴ Madison's classic explanation makes the point that

there are particular moments in public affairs, when *the people* stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated *by the people against themselves*, until reason, justice and truth, can regain their authority over the public mind?²⁶⁵

264. In addition, these structural differences made it less likely that a "sinister combination[]" tainting one constituency's elected representatives would successfully corrupt the other's. See THE FEDERALIST NO. 62, *supra* note 246, at 418 (Madison) ("[T]he improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies; it must be politic to distinguish them from each other by every circumstance" consistent with good government).

265. THE FEDERALIST NO. 63, *supra* note 263, at 425 (Madison) (emphasis added). Cf. THE FEDERALIST NO. 10, *supra* note 184, at 60 (Madison) (noting that regular elections permit a majority to preserve an enlightened government against self-interested minority factions). The cited passage could also be read to suggest that Madison believed the quasi-aristocratic Senate of blue-ribbon citizens would protect the rabble from itself. See THE FEDERALIST NO. 63, *supra* note 263, at 425 (Madison) (noting that the Senate "may be sometimes necessary, as a defence to the people against their own temporary errors and delusions"); see also THE FEDERALIST NO. 71, at 482-83 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that the President's independence from "servile pliancy" to "prevailing current, either in the community, or in the Legislature" is necessary because "[w]hen occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give [the people] time and opportunity for more cool and sedate reflection"). All the same, given that both houses of the Congress and the Presidency are fundamentally rooted in "the People," including essentially the same classifications of persons, this cannot be completely true. See THE FEDERALIST NO. 39, *supra* note 217, at 254 (Madison) (arguing that "the people themselves" are the "supreme authority in each State" and thus constitutional ratification by states remains, fundamentally, an act of the People, "not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong"); see also *supra* note 181 (discussing Constitution's failure to clearly identify which persons are included in "the People").

2. *Article II.* Like Article I, Article II erects an institution—the Presidency—and “vest[s]” it with a “Power” named but not defined in the Constitution’s text.²⁶⁶ As with Article I, the constitutional power debate has tended to emphasize only Article II’s vesting clause and its list of presidential roles, powers, and duties. Yet these textual fragments of the whole are inconclusive about the quality and extent of presidential power; they have generated more debate than meaning.²⁶⁷

If one is willing, again, to infer some meaning from the Constitution’s structure for national political debate, then Article II’s neglected elements have much to add. For, like Article I, Article II devotes its most painstaking care not to dictating the President’s job description, but to creating the Presidency’s political constituency—the Constitution’s fourth nested constituency, at whose center stands the same individual citizen who also anchors a House constituency and two Senate constituencies. Yet, while that citizen’s House constituency may fairly be called local, and each Senate constituency state-wide, Article II’s presidential constituency is *national* both in scope and in character, uniting each citizen within a single community²⁶⁸ represented by a single Chief Executive. As James Madison explained to the Convention, “The Executive Magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the [United] States.”²⁶⁹ In this way, Article II completes the nesting of the People into their four political constituencies; it offers them a fourth alternative political voice in national policymaking.

266. U.S. CONST. art. II, § 1.

267. See, e.g., Calabresi, *supra* note 4, at 1399 (recognizing that Article II imposes duties on the President, thus “preclud[ing] them from being performed by someone else, but that is a different point from a claim that the list of duties are actually grants of power”; distinguishing between “presidential obligations” and “empowerments.”). For an example of one current debate about presidential power that has concentrated heavily on Article II’s vesting and enumeration clauses, see the literature on the unitary Executive cited *supra* at note 150.

268. This assertion is commonplace, but not uncontroversial. See, e.g., Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 199 (1995) (challenging idea of Article II’s “unique national constituency” on grounds that any presidential candidate is subject to election only twice, so that no President has particularly strong incentives “to follow the polls in any close way”) (internal quotation marks omitted).

269. MADISON, *supra* note 251, at 301 (describing Madison’s support for empowering the President to nominate members of the Judiciary).

a. *Constructing a national constituency: the electoral college.* Like Article I, Article II employs three basic mechanisms to construct the President's constituency: method of election, means of apportionment, and term of office. The first of these preoccupies the text of Article II; moreover, it indelibly stamps the President's constituency as national in character.

Article II assigns the job of selecting the President to an electoral college, a group of citizens chosen within each state for the sole purpose of choosing the President.²⁷⁰ Although the electors' own selection is controlled by individual state legislatures,²⁷¹ the text strongly suggests that presidential selection is intended nonetheless to be national in scope, and not local. Thus, while the electors meet within their respective states to vote, one of their two chosen candidates must be an inhabitant of a state other than the electors' own,²⁷² forcing electoral college members to consider candidates from outside their own immediate communities.

Moreover, Article II's electoral college makes the President politically dependent on a national People and therefore relatively independent not only of the Congress institutionally,²⁷³ but of the

270. Article II provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1. According to Hamilton, this provision was "almost the only part of the system" proposed that "escaped without severe censure, or which . . . received the slightest mark of approbation from [the Constitution's] opponents" during the ratification debates. THE FEDERALIST NO. 68, at 457 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton himself boasted that "if the manner of [the electoral college] be not perfect, it is at least excellent." *Id.* at 458.

271. See *id.* This, of course, was intended to and did give states the opportunity to "retain a powerful voice" in electing the President; indeed, state legislatures commonly chose presidential electors until after the War of 1812. See MCDONALD, *supra* note 14, at 252.

272. See U.S. CONST. art. II, § 1. Although part of this section was altered in 1804 by the Twelfth Amendment, which changed the method of choosing the Vice President, the amendment reiterates that "[t]he Electors shall meet in their respective states and vote by ballot for President and Vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves." *Id.* amend. XII.

273. Throughout the Convention, opponents of a strong Executive argued that the President should be selected by one or both houses of Congress. For example, Roger Sherman of Connecticut contended in favor of having the President be appointed "by the Legislature, and for making him absolutely dependent on that body, as it was the will of that which was to be executed. An independence of the Executive on the supreme Legislature, was in his opinion the very essence of tyranny if there ever was any such thing." MADISON, *supra* note 251, at 40.

particular constituencies already represented in its two houses.²⁷⁴ The text makes this clear by disqualifying from the electoral college any "Senator or Representative, or Person holding an Office of Trust or Profit under the United States."²⁷⁵

Proponents of ratification offered much the same reading of the electoral college provision, emphasizing the President's political dependence on a national constituency. The Convention, Alexander Hamilton reported, had concluded "that the executive should be independent for his continuance in office on all, but the people themselves."²⁷⁶ The electoral college accomplished this central goal:

It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust [the Presidency] was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men, chosen by the people for the special purpose, and at the particular conjuncture.²⁷⁷

274. To be sure, Article II invests the House with substantial contingent power over the President's selection. Should the electoral college vote fail to produce a single majority candidate, then the House, with one vote for each state delegation, would either break a tie among those with a majority, or, if no one had won a majority, choose the President from among the top five vote-getters. See U.S. CONST. art. II, §1. The Twelfth Amendment left this essential power in the House's hands, but required its choice to be among the top three candidates voted out of the electoral college. See U.S. CONST. amend. XII. The electoral college plan originally proposed at the Convention authorized the Senate to choose the President in the event of a tie or failure of majority. But this proposal was rejected on the grounds that it would make the Senate "a dangerous aristocracy," since the state governments would then, directly or indirectly, choose the members of three of four national decisionmaking institutions: the Presidency, the Senate, and the Judiciary. See McDONALD, *supra* note 14, at 251. Vesting the contingent selection power in the House represented a compromise to dilute the states' influence over the office. See *id.* at 251-52.

Most Convention delegates reportedly believed that the electoral college would not usually produce a majority, and thus the House's contingent selection power was obviously significant. See *id.* at 251. Nevertheless, nothing suggests that this provision was in any way intended structurally to make the President dependent upon or otherwise entwined with the House. Hamilton stated simply, "[A]s a majority of the votes might not always happen to centre on one man and as it might be unsafe to permit less than a majority to be conclusive, it is provided, that in such a contingency, the house of representatives" shall make the final choice among the top candidates. THE FEDERALIST NO. 68, *supra* note 270, at 460 (Hamilton).

275. U.S. CONST. art. II, § 1.

276. THE FEDERALIST NO. 68, *supra* note 270, at 460 (Hamilton).

277. *Id.* at 458.

Even though this "sense of the people" would operate only indirectly,²⁷⁸ Hamilton argued that the electoral college would nonetheless produce a President identified with and linked tightly to a national constituency:

This process of election affords a moral certainty, that the office of president, will seldom fall to the lot of any man, who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue and the little arts of popularity may alone suffice to elevate a man to the first honors in a single state; but it will require other talents and a different kind of merit to establish him in the esteem and confidence of the whole union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of president of the United States.²⁷⁹

b. Constructing a national constituency: the unitary Executive. Article II underscores its creation of a national constituency through its means of apportionment: there is only one President for the entire Nation.²⁸⁰ Hamilton urged that "unity in the

278. Hamilton suggests that the indirection would itself strengthen the President's identification with the People at large. A direct presidential election would be vulnerable to "cabal, intrigue, and corruption," increasing the risk that a representative of factional interests—or even of foreign interests—would capture the office. *Id.* at 459. Perhaps less ominously, Hamilton contended, the pandemonium of a direct election threatened to deprive the People of their own best judgment in the choice of a national representative:

The choice of *several* to form an intermediate body of electors, will be much less apt to convulse the community, with any extraordinary or violent movements, than the choice of *one* who was himself to be the final object of the public wishes.

Id. at 458–59. This same end was served by having the electors meet to vote within their respective states, and not in a national convention. "[T]his detached and divided situation will expose [the electors] much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place." *Id.* at 459; *see also id.* at 459–60 (arguing that dispersal of electors over thirteen states would also make it difficult for any "combination" to corrupt the entire process).

279. *Id.* at 460–61.

280. The Framers' decision to have only one President is currently the subject of considerable academic interest on the more particular question whether, and to what extent, the Congress may involve itself in that one President's efforts to execute the laws. *See supra* note 150. Within this debate, those who argue that the President has exclusive power to control the execution of the laws refer to the President, so empowered, as the "unitary Executive." *See supra* note 150. In this Article, by contrast, I take no position within this debate and use the phrase "unitary Executive" only in its simplest sense: to indicate that the Framers deliberately chose to apportion one President for the entire Nation.

executive" would not only endow the office with "[d]ecision, activity, secrecy, and dispatch," but would also enforce the President's "due dependence on the people" and "due responsibility" towards them.²⁸¹ Hamilton reasoned:

[O]ne of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults, and destroy responsibility. . . . The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated, that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil . . . is truly chargeable.²⁸²

But the single President, Hamilton argued, would be directly answerable to the entire Nation.

[T]he plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power; first, the restraints of public opinion . . . ; and secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or their actual punishment, in cases which admit of it. . . . [I]t is far more safe there should be a single object for the jealousy and watchfulness of the people.²⁸³

Thus, apportioning one President to the entire Nation strengthens that office's identification with, and dependence on, a national constituency.

c. Constructing a national constituency: term of office. The President's four-year term²⁸⁴ also reinforces the office's relationship with its national constituency. Hamilton argued that "duration" in office was a necessary ingredient for "energy in the executive."²⁸⁵

281. THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

282. *Id.* at 476-77.

283. *Id.* at 477-79.

284. See U.S. CONST. art. II, § 1.

285. THE FEDERALIST NO. 70, *supra* note 281, at 472 (Hamilton). Hamilton took for granted that "[e]nergy in the executive is a leading character in the definition of good government," *id.* at 471, and he assumed his audience did so, too, *see id.* at 472. *How to*

But unbounded executive energy was as dangerous to the Republic as any other form of tyranny; the four-year term was chosen to harness that energy to the People themselves.²⁸⁶

Four years, Hamilton explained, is not long enough to "justify any alarm for the public liberty"²⁸⁷ that might arise from fears that a tyrant might become entrenched. But it is long enough to offer the President a degree of intermediate security, a kind of qualified tenure, in performing his office. That security, in turn, encourages a "personal firmness . . . in the employment of [the President's] constitutional powers"²⁸⁸ that can cement the Executive's independence from the Congress.²⁸⁹

At the same time, the four-year term also models the President's relationship with his political constituency, and, in turn, that constituency's definition of itself and its own political interests. For the same relative security that makes the President independent from the Congress also means that the President need not always satisfy the immediate desires of the People he represents.²⁹⁰

create an energetic yet non-tyrannical Executive was the more interesting question. See *id.* ("How far can [the ingredients of energy in the executive] be combined with those other ingredients which constitute safety in the republican sense?").

286. "It cannot be affirmed, that a duration of four years or any other limited duration would completely answer the end proposed; but it would contribute towards it in a degree which would have a material influence upon the spirit and character of the government." THE FEDERALIST NO. 71, *supra* note 265, at 484-85 (Hamilton).

287. *Id.*

288. *Id.* at 485. To Hamilton, this opportunity for "personal firmness" was one of the greatest contributions that duration in office made to an energetic Executive. *Id.* at 481.

[I]t must be evident, that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. It is a general principle of human nature, that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure, by which he holds it; will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a durable and certain title; and of course will be willing to risk more for the sake of the one, than for the sake of the other. . . . The inference from [this] is, that a man acting in the capacity of Chief Magistrate, under a consciousness, that in a very short time he *must* lay down his office, will be apt to feel himself too little interested in it, to hazard any material censure or perplexity, from the independent exertion of his powers. . . . [I]f he should be desirous of being continued, his wishes conspiring with his fears would tend . . . to corrupt his integrity, or debase his fortitude.

Id. at 481-82. To Hamilton, the second great advantage of duration in office was its promise of stability, inasmuch as short terms would mean more frequent turnover among government officials, causing "a disgraceful and ruinous mutability in the administration of the government." THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

289. See THE FEDERALIST NO. 71, *supra* note 265, at 482-84 (Hamilton).

290. Contrast Madison's expectation that members of the House of Representatives

The republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation, that the people commonly *intend* the PUBLIC GOOD. . . . But their good sense would despise the adulator, who should pretend that they always *reason right* about the *means* of promoting it.²⁹¹

Yet, whenever the President “withstand[s] the temporary delusion” of his constituency and follows a course contrary to the People’s own “inclinations,” he does so “to give *them* time and opportunity for more cool and sedate reflection” about where the public interest lies.²⁹² Then, every four years, the President must convince the People that they should adopt his view of their best interests, notwithstanding whatever “passions” or “impulses” of theirs he has ignored in the meantime. In that political process, Article II offers the People the chance to redefine themselves and their priorities at a national level.

Between the commencement and termination of such a [four-year] period there would always be a considerable interval, in which the prospect of annihilation [that is, loss of office] would be sufficiently remote not to have an improper effect upon the conduct of a man endued with a tolerable portion of fortitude; *and in which he might reasonably promise himself, that there would be time enough, before it arrived, to make the community sensible of the propriety of the measures he might incline to pursue.*²⁹³

would more likely pursue the People’s immediate desires. See *supra* note 263 and accompanying text.

291. THE FEDERALIST NO. 71, *supra* note 265, at 482 (Hamilton) (emphasis added).

292. *Id.* at 482–83 (emphasis added); see also THE FEDERALIST NO. 72, *supra* note 288, at 487 (Hamilton) (stating that a term of office “of considerable extent” is necessary to give the “community time and leisure to observe the tendency of [the President’s] measures, and thence to form an experimental estimate of their merits”).

293. *Id.* at 485 (emphasis added). Hamilton suggests that too brief a term of office might weaken the President’s relationship with his constituency by denying him sufficient time to prove the merits of his view of the public good. This, in turn, would also compromise the President’s independence from the Congress by exaggerating that body’s ability to manipulate public opinion in the next presidential election. That is, where the People have less time to reflect coolly on the President’s view of the public good, the

In this way, Article II's term of office, along with its electoral college and its unitary apportionment, serves to construct for the Presidency a national political constituency that differs in number of constituents, geographic scope, and duration from the House and Senate constituencies.

3. *Structured for Debate.* With Article II, the Constitution completes its nesting of the People into their alternative political identities, the four constituencies through which national decisions are debated and made. Again, if constitutional structure communicates meaning, these nested constituencies can reveal something about the *power* wielded through them. For all four constituencies, although concentric to the individual citizen, remain differentiated in time and perspective. Not only does the Constitution institute a Congress that is internally constructed to maximize debate between House and Senate constituencies, but it also establishes a Presidency that, because of its own unique constituency, is structurally predetermined to disagree with both: as the House amplifies local priorities, and the Senate, state-wide priorities, the President's constituency invites the People to confront their conflicting national priorities, in conversation over time. Simply stated, the Presidency's national constituency gives that department "a will of its own."²⁹⁴

This conversation was designed to maximize the chance that national policy would balance and reflect the priorities of all of these constituencies, not merely the values of one.²⁹⁵ Madison advocated the proposed Republic because it would

refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. . . . [I]t may well happen that the pub-

Congress will have more influence "which might be employed to prevent the re-election of a man, who by an upright resistance to any sinister project of that body, should have made himself obnoxious [that is, vulnerable] to its resentment." *Id.* at 484.

294. THE FEDERALIST NO. 52, *supra* note 202, at 348 (Madison); see also *supra* text accompanying notes 273-75.

295. See *supra* notes 200-08 and accompanying text (discussing views that representative structure might defend the People against their own intemperate passions and the wiles of self-interested demagogues).

lic voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose.²⁹⁶

These nested constituencies form a structure for national political debate—for the exercise of national power—that is itself dynamic, and not static. They form a structure in which power is not a thing located fixedly in one or another decisionmaking institution, but instead inheres in and animates an enforced argument among the four constituencies that the institutions represent. They form a structure where power is the perpetual debate among the People's alternative political selves, conducted over time.

D. *Sequential Decisionmaking*

The Constitution offers a second structural reason to abandon the assumption that its power is static: the procedure for exercising that power. Far from simply allocating fragments of authority among institutions, the Constitution imposes a policymaking *sequence* that matches each opportunity to speak against an obligation to listen. The result is an argumentative helix, in which institutions—and so the constituencies they represent—speak, listen, and then cycle back to speak in response to one another, vocalizing the People's perpetual political debate among their several selves. Like its nested constituencies, the Constitution's policymaking structure suggests that power itself has the quality of argument, not soliloquy.

1. *The Sequence: Enforcing Argument.* Constitutional policymaking is dynamic from the start. The Constitution does not reserve to any single branch the right to initiate the sequence, so not just the Congress but the President too may open debate, by "recommend[ing] to [the Congress'] Consideration such Measures as he shall judge necessary and expedient."²⁹⁷ The President's recommendation power is substantively unlimited; he may even propose policy that falls squarely within subject areas enumerated among the Congress' "legislative powers."²⁹⁸ In fact, there is only

296. THE FEDERALIST NO. 10, *supra* note 184, at 62.

297. U.S. CONST. art. II, § 3. The Constitution also indirectly invites the President to initiate policymaking by directing that "[the President] shall from time to time give to the Congress Information of the State of the Union." *Id.*

298. *Id.* art. I, § 8. The Judiciary's constitutional function also effectively enables

one constitutional restriction on who may speak first: "All Bills for raising Revenue shall originate in the House of Representatives."²⁹⁹

However initiated, the Constitution funnels the conversation first into the Congress, where each House must independently consider and pass any proposed policy.³⁰⁰ Having had their own opportunities to speak, however, the two Houses of Congress must yield the same to the President by "present[ing]" their decision to him for "approv[al]" or veto.³⁰¹ Should the President disapprove, he must state his "Objections"³⁰²—or, in Hamilton's words, the President must "mere[ly] sugges[t] . . . argumentative objections to be approved or disapproved, by those to whom they are addressed."³⁰³

The veto power thus plunges the President headfirst into the public argument that the Constitution envisions for questions of national policy, even on issues that appear to fall among the "legislative Powers" that Article I vests in the Congress.³⁰⁴ Indeed, the veto provision appears adopted precisely to spur this broad-gauged communication between the Congress and the President. While Hamilton famously argued that the President's qualified veto was primarily a weapon of institutional self-defense against legislative encroachments,³⁰⁵ he also contended that the veto

courts to initiate legislation. *See, e.g.,* *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177-78 (1994) (repudiating implied right of action for aiding and abetting securities fraud despite long recognition by courts and acquiescence by Congress, and thus effectively requiring Congress to amend the Securities Exchange Act of 1934 if it wished such private actions to be available). *See generally* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing that federal courts, including the Supreme Court, frequently participate in policy conversation with the political branches by inviting new or amended legislation to resolve anomalies that the Court will not).

299. U.S. CONST. art. I, § 7. *See* MCDONALD, *supra* note 14, at 252 (noting that the Convention accorded the House this role in revenue legislation as result of maneuvering and compromise over states' equal Senate representation and small states' disproportionate influence over electoral college). Even so, "the Senate may propose or concur with Amendments as on other Bills." U.S. CONST. art. I, § 7. Moreover, the Constitution does not prohibit the President from speaking first by recommending revenue bills; nor are Senators prohibited from informally initiating discussion of policy on raising revenue.

300. *See* U.S. CONST. art. I, § 7.

301. *Id.*

302. *Id.*

303. THE FEDERALIST NO. 73, at 498 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

304. U.S. CONST. art. I, § 8.

305. *See* THE FEDERALIST NO. 73, *supra* note 303, at 494 (Hamilton).

would provide "an additional security against the enactment of improper laws" generally by creating "a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body."³⁰⁶ Hamilton observed:

The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.³⁰⁷

This communicative potential in an *exercised* veto is plain. Yet simply by wedding presentment to veto, the Constitution implants the President even more fundamentally in the Congress' policy-making debate. The structural threat of veto prods the Congress to discover and to accommodate presidential "objections" even before presentment.³⁰⁸ Moreover, the President may communicate a distinctive view on a national policy issue even when approving legislation, because the ceremonial act of signing, which has spawned a practice of issuing interpretive signing statements, offers the opportunity to add meaning not necessarily realized in the legislation itself.³⁰⁹

Presentment thus gives the President an opportunity to speak, and that opportunity is matched with an obligation in Congress to listen: the President must articulate the "Objections" driving a veto, and the Congress must hear them. The President's objections must be forwarded along with the disapproved legislation to the house of Congress where it originated.³¹⁰ There, that house must

306. *Id.* at 495.

307. *Id.*

308. Hamilton touted this indirect communicative effect, praising the veto power's "silent and unperceived though forcible operation": "When men engaged in unjustifiable pursuits are aware, that obstructions may come from a quarter which they cannot controul, they will often be restrained, by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared." *Id.* at 498.

309. See Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239, 240 (1995) (arguing that presidential signing statements should influence statutory interpretation, since statements are among legislative "information that gives meaning and content to legislative actions").

310. See U.S. CONST. art. I, § 7, cl. 2.

at least acknowledge the President's objections—Hamilton's "mere suggestion of argumentative objections"³¹¹—by "enter[ing them] . . . at large on their Journal."³¹² Only then may Congress reclaim the floor from the President and reconsider the vetoed legislation.³¹³

The Constitution further underscores the Congress' obligation to listen to the President by requiring a two-thirds supermajority to override a veto.³¹⁴ The Convention suspected that the Congress would rarely pass legislation by as much as a two-thirds margin; thus, it would be rare as well that the Congress could override a veto simply by re-marshaling its original vote. Indeed, votes needed to override a veto must be coaxed either out of legislators who can be persuaded to ignore the President's objections or, worse, from those who voted against the legislation in the first place. The Constitution's supermajority requirement for overriding presidential vetoes thus guarantees that the President's objections are considered seriously before policy is made.³¹⁵ So powerful is

311. THE FEDERALIST NO. 73, *supra* note 303, at 498; *see also* text accompanying notes 301–03.

312. U.S. CONST. art. I, § 7, cl. 2. The Constitution further enforces its communication mandate by penalizing the President for failing to respond to the Congress; the Congress, in turn, is penalized for maneuvering to deprive the President of the opportunity to participate by means of a veto. Should the President fail either to sign or to veto legislation within ten days of presentment, "the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." *Id.*

313. *See id.* The Constitution encourages this sequential policymaking long after the formal legislative process is complete: it directs the President to "take Care that the Laws be faithfully executed," *id.* art. II, § 3, creating an opportunity for the enacted policy to take on an interpretive gloss according to the way in which the President executes it. At the same time, the Congress may attempt to participate in the President's execution of that policy, although there is debate over whether such an attempt is constitutional. *Compare, e.g.,* Calabresi & Prakash, *supra* note 11 (arguing in support of unitary Executive theory) with Lessig & Sunstein, *supra* note 150, at 4 (arguing that theory of unitary Executive, "with the President in charge of all administration of the laws . . . is just myth").

314. *See* U.S. CONST. art. I, § 7, cl. 2.

315. *See id.* Hamilton described the supermajority requirement as a kind of filter permitting members of Congress to purge themselves of any improper, self-interested, or precipitous motivation behind an initial vote in favor of later-vetoed legislation. "It is to be hoped that it will not often happen, that improper views will govern so large a proportion as two-thirds of both branches of the Legislature at the same time; and this too in defiance of the counterpoising weight of the executive. It is at any rate far less probable, that this should be the case, than that such views should taint the resolutions and conduct of a bare majority." THE FEDERALIST NO. 73, *supra* note 303, at 498 (Hamilton); *see also* Charles L. Black, Jr., *Some Thoughts on the Veto*, LAW & CONTEMP.

the supermajority requirement's compulsion on the Congress to listen to the President, that Hamilton cited that requirement itself as a mechanism that would embolden a President to veto improper laws, for:

A man who might be afraid to defeat a law by his single [that is, absolute] VETO, might not scruple to return it for re-consideration; subject to being finally rejected only in the event of more than one third of each house concurring in the sufficiency of his objections. He would be encouraged by the reflection, that if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence would be united with his in supporting the propriety of his conduct, in the public opinion.³¹⁶

The Constitution's general mandate of communication also animates its more specific divisions of labor outside of domestic policymaking. The President may nominate "Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court," but appointments are made only with the "Advice and Consent of the Senate"; likewise, the President may make treaties binding on the entire United States, but only after seeking the advice, and receiving the consent of two-thirds, of the Senate.³¹⁷ And, as another example, the same communication mandate informs the Constitution's division of war-related tasks between the Congress and the President. The Congress is empowered to "declare War raise and support Armies provide and maintain a Navy [and] make Rules for the Government and Regulation of the land and naval Forces," among other things, while the President is named "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."³¹⁸

Both in its general policymaking sequence and its specific divisions of labor, then, the Constitution makes one fundamental point: national decisions do not belong to any one institution alone, but take form through *exchange and argument* among institutions, and thus among the People in their several constituencies.

PROBS. Spring 1976, at 87, 93-98 (arguing that qualified veto has become effectively absolute given the political difficulty in mustering override supermajority).

316. THE FEDERALIST NO. 73, *supra* note 303, at 498 (Hamilton).

317. See U.S. CONST. art. II, § 2, cl. 2.

318. *Id.* art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1.

2. *Power as Sequence.* As a structure communicating meaning, the Constitution's policymaking sequence can illuminate its idea of power. The sequence demonstrates that power does not rest simply in institution-bound reservoirs, but instead inheres in an ongoing debate among the constituencies represented by all three institutions. That is, instead of simply assigning the privilege of institutional authority, the Constitution obliges its institutions to participate substantively in national policymaking; each constituency speaks, listens, and then cycles back to speak in response. Constitutional power, through this constitutional structure, becomes argument.

The step of recognizing sequence as a structural clue immediately enriches the idea of power. If, for purposes of analysis, we treat the Constitution's institutions as providing the only structures through which to understand constitutional power, then the idea of power naturally assimilates those institutions' static natures. Emphasizing sequence, by contrast, exposes the *dynamic* nature of constitutional power. It may open a theory of power that can take account of the Constitution's full decisionmaking helix, not just its institutions; a theory that considers all of the Constitution's loops and arcs to discern how power animates the whole.

III. THE SEPARATION OF POWERS

This Article has proposed that the Constitution's idea of power might find meaning in two unusual sources: the Constitution's structure for nested political constituencies and its structure for sequenced decisionmaking. Both suggest that, like argument, constitutional power is kinetic.

These observations about the nature of constitutional power may also help decode the Constitution's separation of powers principle—the principle that channels the People's energy into governmental authority. When the separation of powers principle is expanded to include the kinetic dimension of constitutional power, then the principle's meaning and its role may shift as well. The Constitution's policymaking sequence, together with its nesting of political constituencies, shows that the Constitution pursues two fundamental values in channeling the flow of power: participation by each constituency in policy decisions, and meaningful accountability to all three constituencies for each decision.

A. *Participation*

The participation value is plain. As already demonstrated, the Constitution channels power through a highly choreographed interaction among nested constituencies, in which the People, in their alternative political identities, are both structurally and sequentially urged to speak and to listen to themselves, then to cycle back and speak in response. Policy is thus made only when each constituency of the People has had its chance to participate meaningfully in the deliberation, and when each has been prodded to consider the views of the others. In this light, participation becomes a necessary condition for the exercise of power.

B. *Accountability*

The Constitution's commitment to accountability is also apparent from the structural clues this Article describes. In fact, these clues suggest that the Constitution pursues at least three related species of accountability.

1. *Accountability to Master*. First, there is what can be called answerability, the accountability imposed on an agent selected, directed, monitored, and given regular reviews by a known principal, or master. As already demonstrated, the Constitution deliberately crafts each of its decisionmaking institutions to ensure that each gains its voice somehow from a particularized popular constituency—whether by means of direct popular election, as with the House of Representatives and the post-Seventeenth Amendment Senate, or through more indirect political selection, like the Presidency and the original Senate. Each of these institutions, moreover, remains directly dependent on, and publicly and regularly answerable to, the constituency it represents.³¹⁹

It was this kind of accountability that Hamilton described when, advocating the proposed Presidency, he wrote, "The circumstances which constitute safety in the republican sense are, 1st. a due dependence on the People, [and] secondly a due responsibili-

319. See *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) ("The [Constitution's] clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.").

ty."³²⁰ To Hamilton, answerability was the main advantage of the unitary Executive:

[O]ne of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults, and destroy responsibility.

.....

. . . [T]he plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power; first, the restraints of public opinion, which lose their efficacy as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment, in cases which admit of it.³²¹

The Constitution makes literal this commitment to answerability by paving clear information channels between agent and principal through explicit public reporting requirements:

Each House [of Congress] shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.³²²

A President who vetoes proposed legislation must articulate objections and forward them to the originating house, "who shall enter the Objections at large on their Journal" before reconsidering the

320. THE FEDERALIST NO. 70, *supra* note 281, at 472.

321. *Id.* at 476, 477-78. Hamilton's argument here gives necessary context to his assertion elsewhere that "secrecy" is a positive byproduct of unitariness in the Executive, along with "[d]ecision, activity, . . . and dispatch." *Id.* at 472. Hamilton is not contending that the President's conduct should be generally or even regularly cloaked from the People. Indeed, Hamilton uses the word "secrecy" again, discussing the Presidency, only in defending the Constitution's exclusion of the House of Representatives from any "share in the formation of treaties." THE FEDERALIST NO. 75, at 507 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The "fluctuating" and "multitudinous" House, according to him, lacks the qualities of "decision, secrecy, and dispatch" necessary to foreign affairs decisions. *Id.* Hamilton did not so object to the Senate's participation. *See id.* at 505. Hamilton's approval of secrecy in the Presidency under some circumstances does not outweigh his commitment to presidential answerability.

322. U.S. CONST. art. I, § 5.

legislation.³²³ Both of these reporting provisions can trigger, in Hamilton's words, the "restraints of public opinion"; they increase the People's "opportunity of discovering with facility and clearness the misconduct of the persons they trust."³²⁴

2. *Accountability for Engagement.* The Constitution's nested constituencies and sequential decisionmaking pursue a second species of accountability, which can be described as the "no clean hands" principle. That is, the Constitution so integrates each institution into the policymaking debate that it is structurally awkward, over time, for any one to either avoid involvement in a national policy question or to elbow out another constituency altogether; each has something of an affirmative obligation to eventually grapple with questions of national importance. This enforced participation makes it more costly for any one institution to hide or to exclude another from a national debate than a strict division of decisionmaking authority would have done.³²⁵

This is not to suggest that the structural design is infallible. Experience shows that every one of these institutions can on occasion maneuver the others out of influence; each can avoid account-

323. *Id.* art. I, § 7. This apparent commitment to open government contrasts starkly with the secrecy guarding the Convention itself. One of the delegates' first corporate acts was to reject a proposed procedural rule authorizing "any member to call for the yeas & nays and have them entered on the minutes" on objections that such a record would deter members from changing their minds as well as "furnish[ing] handles to the adversaries of the Result of the Meeting." MADISON, *supra* note 251, at 18-19. And the delegates' last corporate act was to consider whether the "Journals of the Convention should be either destroyed, or deposited in the custody of the President," given fears that "if suffered to be made public, a bad use would be made of them by those who would wish to prevent the adoption of the Constitution." *Id.* at 582. The Convention voted to deposit the Journals and other papers "in the hands of the President," who was to retain them, even against delegates' requests for copies, "subject to the order of the Congress, if ever formed under the Constitution." *Id.* at 583.

324. THE FEDERALIST NO. 70, *supra* note 281, at 477-78 (Hamilton). *But see* Shane, *supra* note 268, at 196 (arguing that electoral accountability is insufficient restraint on President's conduct; since voters get no more than one opportunity "to vote 'No' on extending a President's White House stay," accountability, if any, must come from other "operationally realistic" mechanisms for imposing responsiveness).

325. In his *Chadha* dissent, Justice White argued that the legislative veto was constitutional in part because that political innovation actually increased the Congress' accountability for the policymaking authority it delegated to coordinate branches or to agencies. *See INS v. Chadha*, 462 U.S. 919, 1002-03 (1983) (White, J., dissenting) (stating that legislative veto is "a necessary check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress").

ability with relative ease by evading and passing on responsibility. Notwithstanding the potential for corruption, however, the system appears set up to maximize the chances that this kind of accountability will be achieved—that no one institution can keep its hands clean forever—despite its inability to enforce perfect accountability in fact.

3. *Accountability to Self.* The Constitution pursues a third species of accountability through its nested constituencies and sequential decisionmaking. Together, they limit the opportunity for a single institution to implement its constituency's immediate priorities without the intervention of other constituencies that are structurally designed to disagree over time. No single constituency may advance its own policy preferences free of the mediating influence of other constituencies, defending their own. No one constituency gets both the first and the last word.

This enforces an accountability of constituency to constituency; it makes the People answerable to themselves in the several constituencies that they comprise. This is so because, as a structural matter, a single constituency may realize its own policy goals over time only by convincing others that those goals have merit—that they coincide with something that can be called a shared interest. At the least, a single constituency must convince others that its goals do not conflict chronically with the others' own preferences. Getting one's way, then, requires some level of substantive persuasion and, over time, compromise.

Unlike the Constitution's first two species of accountability, the third imposes a standard not only on the *process* that produces national policy, but also on its substantive *content*: it attempts to increase the odds that national policy will advance shared and thus, in one sense, *national* interests.³²⁶

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large

326. See *infra* notes 329–32 and accompanying text (recognizing the debate over the potential for Madisonian “interests” ever to approximate the “public interest”).

bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?³²⁷

This passage describes the Constitution's third principle of accountability; here, Madison unequivocally asserts that no single interest will have its way under the Constitution without confronting and persuading other interests. That "[n]o man is allowed to be a judge in his own cause" means, at the very least, that the interested man must convince another that his own cause has merit. Another must have the last word on the cause that so interests the first.³²⁸

This is not to say that Madison believed that the Constitution's process for political argument ensured necessarily that any interest that survived the vetting would also represent the public interest, or that it would otherwise be a substantively good outcome. Indeed, some commentators observe, to Madison and other Framers the idea of a "public good" was by definition antithetical to the idea of "interest," which carried an essential connotation of bias and selfishness.³²⁹ "Madison assumes it is the very nature of

327. THE FEDERALIST NO. 10, *supra* note 184, at 59 (Madison).

328. See GWYN, *supra* note 168, at 35–36. Gwyn describes the early rationale for separation of powers as seeking a slightly different form of institutional accountability: "If the same persons both made and executed the law, government would no longer be under law since those persons in their legislative capacity would always modify the law to excuse whatever they might do in their executive capacity." *Id.* at 35. Professor Verkuil rests his "conflict of interest" approach to the separation of powers on this same principle. "[T]he notion that no man can be a judge in his own cause was among the earliest expressions of the rule of law in Anglo-American jurisprudence." Verkuil, *supra* note 155, at 305; see *id.* at 305–11 (discussing historical and textual support for rule of law principle in Constitution).

329. See WILLS, *supra* note 14, at 205–07. One historian notes that such a belief in a transcendent public good coincided with a belief in "moral law, natural law, the law of God," even though the latter was arguably incongruous with the contemporaneous belief in "popular sovereignty or popular consent" to justify positive law. See GWYN, *supra* note 168, at 12. Professor Gwyn describes how the two views coexisted in some seventeenth- and eighteenth-century thought:

Englishmen shared with their medieval ancestors the belief that values were capable of being rationally known, and to this belief was joined the assumption that to discover those things of value to the whole community—the common, or public, interest—it was necessary that members of the community participate in the search. . . . [E]very individual has certain private interests which are concerned only with his own welfare and certain other interests which he has in common with other members of his society. It is likely that in pursuing the former he will thwart the latter, for not being a perfectly rational creature he will prefer his private good to that of society. Therefore, only when "the whole People" participate in making laws will there be achieved the common interest,

interest to 'oppress the rest.' . . . [A]ssertion of a partial [that is, "interested"] claim can never be on the same footing with regard for the *common* good."³³⁰ Madison himself defined the reviled "faction" explicitly in contrast to a nearly mythic public interest: a faction is any "number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."³³¹

Yet even if Madison would not accept factional interests as a path to his ideal public good, he nonetheless unequivocally asserts that an interest *untried* in the court of competing interests certainly makes for unacceptable public policy. That is, while pursuing a true public good transcending banal (that is, selfish or factional) interest, Madison nonetheless injects a practical principle of accountability to shore up his quotidian second best: no single constituency may advance its own policy preferences free of the mediating tension of other constituencies, defending their own. No one gets both the first and the last word. "No man is allowed to be a judge in his own cause."³³²

"which is no other than common Right and Justice, excluding all Partiality or privat [sic] Interest."

Id. at 13 (quoting James Harrington, in *THE OCEANA OF JAMES HARRINGTON AND HIS OTHER WORKS* 386, 240-44 (J. Toland ed., 1700)). A similar view is carried forward in the modern civic republican movement. *See supra* note 7.

330. WILLS, *supra* note 14, at 206 (quoting *THE FEDERALIST* NO. 10 (Madison)).

331. *Id.* at 193-94 (quoting *THE FEDERALIST* NO. 10 (Madison)); *see also supra* notes 190-210 and accompanying text (discussing Madison's beliefs about political faction). Madison's observation that no one may sit on his own cause has proven very elastic to those who debate the Constitution's separation of powers principle particularly. Some suggest that the principle can boil down to a profound prohibition against national decisions tainted by any conflict of interest. *See, e.g.,* WILLS, *supra* note 14, at 202-07.

332. *THE FEDERALIST* NO. 10, *supra* note 184, at 59 (Madison). Hamilton echoes much the same point to distinguish the proposed American Presidency from the English monarchy. The King, he argued, was a non-accountable official in part because there was no structural requirement that he ever incorporate or, indeed, even consider the perspective of any constituency other than himself:

In England the king is a perpetual magistrate; and it is a maxim, which has obtained for the sake of the public peace, *that he is unaccountable for his administration, and his person sacred*. . . . He is the absolute master of his own conduct, in the exercise of his office; and may observe or disregard the council given to him [by the executive council] at his sole discretion.

THE FEDERALIST NO. 70, *supra* note 281, at 478 (Hamilton) (emphasis added). In this view, the King remained always the judge of his own cause; he held both first and last words in one set of hands. Hamilton thus explained why an executive council necessary in monarchy, creating a plural executive, would be destructive in the American Republic: "In the American republic [an executive council] would serve to destroy, or would greatly

In these ways, the Constitution pursues an accountability of power both by making the People's agents answerable to their principals and by making the People answerable *to themselves* in their several constituencies.

C. Cadencing Power

The Constitution channels national decisionmaking power through structures that elevate participation and accountability as fundamental values. These values reinforce the kinetic nature of constitutional power itself. Both participation and accountability presuppose time and interaction; they both assume that power inheres in ongoing argument among the Constitution's institutions and the constituencies they represent. They both assume perpetual debate and exchange, and in this way they assume movement.

Recognizing a kinetic dimension to the Constitution's idea of power, and to the separation of powers principle, opens the possibility that the Constitution is less concerned with each institution's hoard of decisionmaking tasks than with the cadence of how all three institutions—the House, the Senate, and the President—make decisions together. That dimension opens the possibility, furthermore, that the separation of powers is less concerned with the authority of any single institution than with ensuring that the People's power remains channeled through an ongoing argument in which all participate and all are held responsible, over time. It may suggest that the Constitution is more committed to ensuring that all three institutions join and affect the debate than to enforcing a linear, unidirectional decisionmaking process.³³³

As a practical matter, then, a kinetic Constitution is susceptible to an alternative approach to the question of whether an action by one or another branch violates the separation of powers, an approach that would sometimes permit the People's power to be channeled more flexibly into national authority. Instead of pri-

diminish the intended and necessary responsibility of the chief magistrate himself." *Id.*

333. *But see, e.g., INS v. Chadha*, 462 U.S. 919, 951, 957–59 (1983) (prohibiting legislative veto because Constitution's bicameralism and presentment clauses dictate one exclusive and unidirectional process for congressional decisionmaking). Dissenting in *Chadha*, Justice White argued that the "central concern of the bicameralism and presentment" clauses is that "when a departure from the legal status quo is undertaken, it is done with the approval of the President and both Houses of Congress," *id.* at 994 (White, J., dissenting), and that the legislative veto satisfied this concern, *see id.*

marily surveying institutional boundaries and determining whether there has been a trespass, this approach would ask whether any of the Constitution's constituencies, through their representative institutions, had been denied the opportunity to participate in the decision to take that action. Likewise, a kinetic separation of powers would ask whether the action had been taken in a way that permitted the actor to evade the Constitution's demands for accountability—whether, for example, the action had been taken in secret or in a manner that otherwise left the actor free to pursue its own interest, or the interest of its particular constituency, without having to convince another, thus leaving the actor free to judge its own cause. But if neither participation nor accountability had been compromised, then the disputed action might well satisfy the Constitution even though it defied the formal division of tasks among institutions that preoccupies traditional accounts of the separation of powers.

D. *How It Might Work*

I have suggested throughout this Article that traditional doctrine may miss rich constitutional meaning both by treating the Constitution's separation of powers primarily as a legal line-drawing tool and by assuming that the principle, traditionally conceived, will itself dictate whether any institution's particular exercise of authority is constitutional or not. This Article does not propose to substitute a new line-drawing principle for the old. Rather, this Article suggests that conflicts over power be approached with something in mind other than institutional boundaries: the Constitution's kinetic values of participation and accountability.

1. *Revisiting Youngstown.* Under this Article's reading of the separation of powers, the *Youngstown* Court might have evaluated President Truman's seizure of the steel mills not simply by parsing his claims of institutional prerogative under Article II—his assertions of power under the text's Commander in Chief clause or "take care" clause, or under an inherent emergency power—or by determining whether the Congress had preempted a field of action granted to it exclusively under Article I. The Court might also have considered constitutionally relevant a political fact completely undiscussed. On the morning after President Truman issued his executive order seizing the steel mills, he addressed a message to the Congress informing its members of his action, explaining his

reasons, and inviting the Congress to respond.³³⁴ The message is worth quoting at length:

[I]t was my judgment that Government operation of the steel mills for a temporary period was the least undesirable of the courses of action which lay open. . . .

It may be that the Congress will deem some other course to be wiser. It may be that the Congress will feel we should give in to the demands of the steel industry for an exorbitant price increase and take the consequences so far as resulting inflation is concerned.

It may be that the Congress will feel the Government should try to force the steel workers to continue to work for the steel companies for another long period, without a contract, even though the steel workers have already voluntarily remained at work without a contract for 100 days in an effort to reach an orderly settlement of their differences with management.

It may even be that the Congress will feel that we should permit a shut-down of the steel industry, although that would immediately endanger the safety of our fighting forces abroad and weaken the whole structure of our national security.

I do not believe the Congress will favor any of these courses of action, but that is a matter for the Congress to determine.

It may be, on the other hand, that the Congress will wish to pass legislation establishing specific terms and conditions with reference to the operation of the steel mills by the Government. Sound legislation of this character might be very desirable.³³⁵

The Congress made no answer.³³⁶ Twelve days later, on April 21, 1952, the President sent a second message to the President of the Senate, again inviting a response from the Congress: "The Congress can, if it wishes, reject the course of action I have followed in this matter."³³⁷ Again, Congress ignored the invitation.³³⁸ As

334. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 676-77 (1952) (Black, J.); see *id.* at 675-77 (Vinson, C.J., dissenting) (reproducing in full President Truman's Message to Congress of April 9, 1952, 98 CONG. REC. 3962-63 (1952)).

335. *Id.* at 676-77 (Vinson, C.J., dissenting) (quoting Truman's Message to Congress, *supra* note 334).

336. See *id.* at 583 (Black, J.); *id.* at 677 (Vinson, C.J., dissenting). Historian David McCullough notes that there were calls for congressional investigations and for President Truman's impeachment. See MCCULLOUGH, *supra* note 37, at 899.

337. *Youngstown*, 343 U.S. at 677 (Vinson, C.J., dissenting) (quoting 98 CONG. REC. 4192 (1952)).

338. See *id.*

of June 2, 1952, when the Supreme Court announced its decision in the conflict, the Congress still had not responded to the President's messages.³³⁹

The President's communications suggest an attempt to engage the Congress in a debate about national policy in order to respond to a labor crisis threatening an industry important to the Nation as a whole. The President identified the major constituent interests he thought were involved in the dispute, he outlined major issues the dispute appeared to raise, and he requested a response from his audience. In light of this dramatic invitation to grapple politically with a pressing political problem, the President's seizure of the steel mills begins to look less like an institutional power grab, and more like an effort to initiate, but not monopolize, the making of public policy.

Had the *Youngstown* Court considered the separation of powers principle less as an institutional line-drawing tool, there might have been room in its reasoning for this political fact. The Court might have considered that Congress did have the opportunity to participate in the seizure controversy, and, indeed, the Congress could have requested³⁴⁰ the President to withdraw the order immediately upon receiving his first message on April 9, 1952.³⁴¹

339. *See id.*

340. The Congress could have expressed its views on the conflict in the form of a resolution, or even, less formally, through its leadership. Nothing in the Constitution suggests that the Congress may engage in *political debate* with the President only through formal legislation. *But cf.* *INS v. Chadha*, 462 U.S. 919, 951 (1983) (holding legislative veto unconstitutional because it purports to *make law* without following Article I's "single, finely wrought and exhaustively considered, procedure").

341. At least one member of the *Youngstown* majority suggests that discussion of this issue had already been concluded between the Congress and the President. Justice Frankfurter characterizes as conversation the legislative history of the Taft-Hartley Act and Congress' failure in that statute to grant the President explicit seizure powers:

By the Labor Management Relations Act of 1947, Congress said to the President, "You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation." This of course calls for a report on the unsuccessful efforts to reach a voluntary settlement, as a basis for discharge by Congress of its responsibility—which it has unequivocally reserved—to fashion further remedies than it provided.

Youngstown, 343 U.S. at 603 (Frankfurter, J., concurring) (footnote omitted). To Justice Frankfurter, this conversation was not an ongoing political debate among the constituencies represented in the Congress and in the Presidency; instead, the matter had been settled institutionally and would remain so unless and until the Congress addressed it again by means of formal legislation. Until that time, however, the President could not pursue unauthorized alternatives. *See id.* at 600 (reading Taft-Hartley legislative history as favoring reliance on "*ad hoc* legislation" respecting property seizures "as a particular emergen-

Moreover, the Court might have considered that the President's action not only left him fully accountable to the voting public, since he openly, indeed, notoriously, shouldered responsibility for the seizure;³⁴² it also left him accountable to the Congress, inasmuch as he invited that body to reject his action if they wished.

But because the Supreme Court saw the separation of powers principle as, essentially, a legal line-drawing tool to mark institutional boundaries, the Court had no use for these realities. Politics and constitutional law had little to say—though, perhaps, much to teach—to each other.

2. *A Modern Steel Seizure.* A brief example from more recent history concludes the discussion. Immediately following his inauguration in 1993, President Bill Clinton attempted to honor a campaign promise to abolish a ban on service by gay men and lesbians in the United States military.³⁴³ Clinton claimed a constitutional power to make this policy change unilaterally, citing his Article II role as Commander in Chief.³⁴⁴ The Congress angrily disagreed both with the proposed change of policy and with the President's assertion of power to make the change unilaterally.³⁴⁵ The Congress cited its own Article I power to decide the issue: prominent Senators and Representatives from both political parties argued that "the Constitution gives Congress power to raise armies, maintain a navy and to make rules for the government and regulation of the land and naval forces."³⁴⁶

In this case, both the President and the Congress were able to cite specific textual support for an assertion of exclusive decision-making power over the policy question, and both could also point to significant constituent support for their positions.³⁴⁷ But that

cy might call for it").

342. See MCCULLOUGH, *supra* note 37, at 899 (describing media's vehement negative response to seizure).

343. See Adam Clymer, *Lawmakers Revolt On Lifting Gay Ban In Military Service*, N.Y. TIMES, Jan. 27, 1993, at A1.

344. See Leo Rennert, *Gay Ban Must End, President Tells Brass*, SACRAMENTO BEE, Jan. 26, 1993, at A1; see also U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States.").

345. See Clymer, *supra* note 343, at A1, A14.

346. *Id.* at A14 (internal quotation marks omitted).

347. See Eric Schmitt, *Military Cites Wide Range of Reasons for Its Gay Ban*, N.Y. TIMES, Jan. 27, 1993, at A1, A14 (reporting somewhat conflicting results of several public opinion polls).

only intensified the constitutional conflict between them. In the end, that conflict had to be resolved through interbranch argument and negotiation³⁴⁸ conducted well in view of the public. After months of debate, both sides accepted a compromise permitting gay men and lesbians to remain in the military as long as they neither engage in homosexual acts nor admit their sexual orientation.³⁴⁹ This compromise, "Don't Ask, Don't Tell" policy has not been challenged in court on separation of powers grounds.³⁵⁰ Yet, were such a challenge brought, raising the claims to predominant institutional power that characterized the early conflict between the Congress and the President, a reviewing court considering the kinetic hypothesis might ask not simply which institution

348. "The suddenly intense Congressional opposition . . . seemed based both on hostility to the proposed change in policy and on a sense that Congress needed to be consulted, not only as a matter of constitutional prerogative but also as a question of political respect." Clymer, *supra* note 343, at A14; *see also id.* (quoting Senator Mitchell's statement to reporters that, "[s]ince any executive order can be overturned by act of Congress, it is prudent and sensible for the President to take into account the view of Congress on this matter, which is what he is doing").

349. *See* 10 U.S.C. § 654 (1994) (codifying compromise policy); *see also* Michael R. Gordon, *Pentagon Spells Out Rules For Ousting Homosexuals; Rights Groups Vow a Fight*, N.Y. TIMES, Dec. 23, 1993, at A1 (describing new rules as "slightly more permissive" than old ones President Clinton had promised to drop); Eric Schmitt, *U.S. Opposes Court Interference in Gay Troop Ban*, N.Y. TIMES, Mar. 5, 1993, at A14 (reporting preliminary compromise between President Clinton and Senate leaders reached January 29, 1993, agreeing to delay executive order for six months, during which time soldiers who revealed their homosexuality would not be discharged, although they could be placed on "standby reserve" without pay or benefits during that period).

350. The compromise has, however, been challenged as violating a number of other constitutional principles, including the First Amendment and the Fourteenth Amendment's guarantee of equal protection. No such constitutional challenge to the compromise policy has yet succeeded. *See, e.g.,* Philips v. Perry, 106 F.3d 1420, 1424-30 (9th Cir. 1997) (rejecting First Amendment and Equal Protection challenges to "Don't Ask, Don't Tell" policy); Richenberg v. Perry, 97 F.3d 256, 260-63 (8th Cir. 1996) (same); Able v. United States, 88 F.3d 1280, 1292-96 (2d Cir. 1996) (rejecting First Amendment challenge to policy's presumption that one who admits *being* a homosexual engages in, intends to engage in, or has a propensity to engage in homosexual acts, thus justifying separation from armed services; remanding for consideration whether military may constitutionally ban homosexual acts by service members); Thomasson v. Perry, 80 F.3d 915, 927-34 (4th Cir. 1996) (*en banc*) (rejecting First Amendment and equal protection challenges to the policy). The old armed services regulation banning homosexuals from the military, which was replaced by the "Don't Ask, Don't Tell" compromise, was once challenged in court under separation of powers principles as an "invalid exercise of executive power," but the argument was abandoned by the plaintiff and thus not considered by the court. *See* Cammermeyer v. Aspin, 850 F. Supp. 910, 929 (W.D. Wash. 1994) (concluding that plaintiff's failure to respond to summary judgment motion on separation of powers claim amounted to concession that claim lacked merit).

had the superior claim to power over this decision. Rather, the court would ask whether the compromise embodied the dynamic of interbranch argument—a dynamic ensuring participation and accountability—that the Constitution's separation of powers principle preserves.

CONCLUSION

The Constitution breathes power in and out. It does so not simply through its three formal institutions, but also through a constitutional politics centered on and structured to be driven by a politically active People. This Article takes seriously the Constitution's structures for the practice of politics—its nested constituencies and its deliberative policymaking sequence—in order to rethink the Constitution's idea of power and, in particular, its separation of powers.

Having made constitutional *politics* central, and resisting the law's traditional preoccupation with the authority of *institutions*, this Article has explored the hypothesis that the Constitution's idea of power is fundamentally an idea about political argument among the People themselves; it has explored the hypothesis that constitutional power is kinetic. Once power is reconceived as political argument, the Constitution's separation of powers principle looks less like a device for policing institutional boundaries and more like a standard for preserving in that debate the qualities of participation and accountability. The separation of powers principle marks the cadence for the People's argument among themselves over time.

This Article does not advocate an utterly new formula for deciding separation of powers conflicts that are brought before the courts. But it does offer a constitutional account that may broaden the law's view of the values served by the separation of powers principle and so broaden the law's view of what political actions that principle permits. The kinetic hypothesis thus offers a way to integrate constitutional politics into constitutional law.