

## ARTICLES

TOWARD A UNIFYING THEORY OF THE  
SEPARATION OF POWERS\*BRUCE G. PEABODY\*\*  
JOHN D. NUGENT\*\*\*

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\*\* Assistant Professor of Political Science, *Fairleigh Dickinson University*. B.A., 1991, *Wesleyan University*; Ph.D., 2000, *University of Texas at Austin*.

\*\*\* Institutional Research Associate, *Connecticut College*. B.A., 1991, *University of Iowa*; Ph.D., 1998, *University of Texas at Austin*.

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### INTRODUCTION

This Article rethinks the American separation of powers—the distribution of legal and political authority amongst various constitutional institutions and offices. We believe that existing scholarship in both the legal academy and political science is characterized by errors and oversights in describing this system and discussing its performance normatively. We propose a new conception of separated powers that reinvestigates basic questions about how our constitutional system was designed and how it has operated. By rethinking the purposes and capacities of separated powers, we gain greater purchase in explaining and understanding a variety of contemporary and historical political conflicts, dynamics, and problems.

In our view, the deficiencies of scholarship on separation of powers are especially troubling in the contemporary context. The continuation of “divided government,”<sup>1</sup> ongoing legislative-executive disputes about terrorism,<sup>2</sup> budgets,<sup>3</sup> congressional oversight,<sup>4</sup> judicial

1. See generally MORRIS FIORINA, *DIVIDED GOVERNMENT* (2d ed. 1996) (discussing the emergence and effects of “divided government” as a relatively stable feature of contemporary political life).

2. See Mike Allen & Juliet Eilperin, *Bush Aides Say Iraq War Needs No Hill Vote: Some See Such Support As Politically Helpful*, WASH. POST, Aug. 26, 2002, at A1 (setting out some of the lines of debate regarding the legality of executive use of force in Iraq without specific congressional authorization); Dana Milbank, *Bush Presses Senate To Act on His Agenda: Terror Insurance, Judgeships Spark Complaints*, WASH. POST, Apr. 9, 2002, at A2 (reporting on conflict between the President and the Senate over legislation to assist companies seeking terrorism insurance).

3. See, e.g., David Firestone, *Does Pain Make States Stronger?*, N.Y. TIMES, Apr. 27, 2003, at WK4 (discussing disagreements between state officials and the Bush Administration over how to address state budget shortfalls); Janet Hook, *White House Ways Alienate Lawmakers*, L.A. TIMES, Oct. 31, 2003, at A14 (describing members of Congress’s frustration with “the high-handed way they believe the administration has treated the legislative branch” during debates over funding for military operations in Iraq).

4. See, e.g., Douglas Jehl, *Senate Panel Demands C.I.A. Data Leading Up to Iraq War by Friday Noon*, N.Y. TIMES, Oct. 30, 2003, at A14 (reporting on the Senate Intelligence Committee’s demands that the CIA turn over documents and interviews

appointments,<sup>5</sup> executive privilege,<sup>6</sup> and the activism of the Rehnquist Court,<sup>7</sup> all suggest that the separation of powers is more central to public affairs than it has been for over thirty years. Indeed, understanding the objectives of our system of separated powers, and the roles and responsibilities of each branch in fulfilling these purposes, has seldom been more important than today.

We note at the outset of this Article the difficulty of our undertaking. While the separation of powers was a persistent concern at the time of the constitutional convention, there are no particular constitutional provisions or other easily identifiable guidelines for ascertaining “originalist” conceptions of the proper operations of this arrangement of powers, even as a starting point for further discussions about the doctrine’s meaning and purposes.<sup>8</sup> Since the Constitution’s ratification, scholars and jurists have been unable to agree upon how the doctrine should be construed or even what aspects of the constitutional text should comprise the basis for understanding separated powers.<sup>9</sup> Indeed, on the whole, both the

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pertinent to its investigation of intelligence obtained prior to the war with Iraq).

5. See, e.g., Neil A. Lewis, *Senator Seeks a Consensus in Replacing Any Justice*, N.Y. TIMES, June 16, 2003, at A15 (outlining U.S. Senator Patrick Leahy’s proposal for more extensive White House consultation with the Senate regarding nominees to the Supreme Court).

6. See, e.g., George Lardner, Jr., *Bush Seeks Secrecy For Pardon Discussions*, WASH. POST, Aug. 27, 2002, at A1 (discussing the Bush Administration’s attempt to invoke executive privilege to protect discussions about presidential pardons, on the grounds that pardoning is a core power exclusively entrusted to the President). This list is not, of course, an exhaustive account of recent interbranch conflicts. See, e.g., George Lardner, Jr., *Bill Aimed at Reversing Bush Order on Records*, WASH. POST, Apr. 12, 2002, at A8 (explaining that members of the House introduced legislation to overturn an executive order restricting the release of presidential records); Mike Allen, *Panel Demands Enron Papers; White House Letter Follows Subpoenas*, WASH. POST, May 23, 2002, at A1 (discussing the Senate’s reaction to perceived “stonewalling” by the Bush Administration on the Enron Corporation controversy).

7. See generally THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., 2002) (offering examples of the Rehnquist Court’s activism); Cass Sunstein, *A Hand in the Matter*, LEGAL AFF., Mar./Apr. 2003 (defining “judicial activism,” and identifying the Rehnquist Court as “highly activist”), available at [http://www.legalaffairs.org/issues/March-April2003/feature\\_marapr03\\_sunstein.html](http://www.legalaffairs.org/issues/March-April2003/feature_marapr03_sunstein.html) (on file with the American University Law Review).

8. One of the better sources for understanding “original” perspectives on the separation of powers is, of course, *The Federalist Papers*. See THE FEDERALIST NOS. 47-51 (James Madison) (Clinton Rossiter ed., 1961) (examining the distribution of power among the “constituent parts” of government). We note that, generally speaking, we consult the Constitution’s “framers” not out of a sense that they have a privileged authority to describe and assess the separation of powers, but with the view that their arguments and perspective are well considered and worth revisiting.

9. See E. Donald Elliot, *Why Our Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989) (“In a sense, the ‘text’ in separation of powers law is everything that the Framers did and said in making the original Constitution plus the history of our government since the founding.”); Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L.

scholarship and jurisprudence on separated powers is marked by its inconsistency and lack of synthesis.<sup>10</sup>

We see these shortcomings as providing an opportunity to consider and propose a more “unified” vision of the separation of powers. This designation signals our aspiration to outline and defend a theoretical framework for understanding our constitutional regime based on surfacing and integrating aspects of separated powers that are either given short-shrift or treated as irrelevant in other scholarly projects. We believe our approach provides new insights about the character of our polity and its (im)proper operations, and even dysfunction. While we do not presume to have accomplished the goal in this Article, we hope our investigation can ultimately help move scholars towards an account of separated powers that is cohesive and combined, bringing different research endeavors together in what we believe are somewhat unusual but mutually fructifying ways.

This study begins by summarizing recent research on the separation of powers by legal scholars and political scientists. We identify a number of discrete “clusters” of work in this area—scholarship brought together by common concerns but not necessarily common conclusions—and we outline reasons for dissatisfaction with this literature. Our purpose here is not just to provide a critical background review of pertinent scholarship, but to help make a case that this work is insufficiently synthesized and inclusive in its approach to separated powers. By arguing for both the contributions and limitations of prior traditions of research on separated powers, we facilitate our ensuing discussion of our distinctive theory, a discussion that both builds upon and transcends earlier work. In sketching our new understanding of separated powers, we demarcate its various elements and argue for its broad contributions. As a means of illustrating the novelty and utility of our approach, we conclude by applying our theory in the context of three introductory and very much abbreviated case studies. These studies include analyses of specific aspects of the War Powers Resolution, the

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REV. 565, 624-26 (1999) (addressing the difficulty of determining which separation of powers principles to apply when interpreting constitutional provisions, such as the Twenty-Second Amendment).

10. See Peabody & Gant, *supra* note 9, at 625 (briefly surveying the competing approaches to separation of powers research); Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57, 57-62 (1990) [hereinafter Fisher, *Separation of Powers*] (contending that the Supreme Court’s jurisprudence has oscillated between formalistic and functional approaches to interpreting separation of powers).

role of state officials in influencing the national policymaking process, and the presidential veto.

### I. THE SCHOLARLY CONTEXT

Overall, one can identify three general, and largely unconnected, clusters of research on the separation of powers. First, a significant bloc of scholarship is marked by its preoccupation with interbranch dynamics, controversies, and resulting policies that can be ultimately traced to the presidency of Richard Nixon. A second body of research, originally rooted in political science, attempts to assess the political effects of separated powers, typically by adopting rational choice or game theoretic approaches that understand the Constitution as providing rules through which political actors bargain and attempt to maximize their interests. Lastly, we describe a third group of scholars, loosely unified by their theoretical interest in identifying the purposes of the separation of powers system and in articulating the institutional and political conditions most conducive to this system's goals.<sup>11</sup>

While this Article is certainly driven by many of these last architectonic concerns about the proper ends of separation of powers,<sup>12</sup> the account we sketch is also informed by the other scholarly traditions. Like earlier work emerging from the Nixon era, we think separation of powers theory must be able to wrestle with actual, contemporary political controversies. And, given our sense that separation of powers analysis necessarily entails a discussion about which political arrangements and structures are conducive to the "best regime," we are keenly interested in scholars' enduring efforts to chart the effects of different interbranch relationships.

#### A. *Separation of Powers Research as a Response to Nixon*

To a considerable extent, separation of powers scholarship over the past generation has been marked by the long shadow of President Richard M. Nixon. In particular, much modern research on

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11. Obviously, the demarcations between these different clusters of scholarship are not always distinct. *See generally* THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS (Gordon S. Jones & John A. Marini eds., 1988) (exploring normative questions about the appropriate balance of power between the federal departments in the context of assessing the effects of different separation of powers arrangements).

12. *See generally* Stephen Salkever, *Aristotle's Social Science*, in ESSAYS ON THE FOUNDATIONS OF ARISTOTELIAN POLITICAL SCIENCE (Carnes Lord & David K. O'Connor eds., 1991) (discussing the role of social science in offering "criticism of and guidance for particular regimes and cultures").

separated powers emerged as a reaction either to specific interbranch conflicts<sup>13</sup> during Nixon's presidency or to resulting policies enacted by Congress—legislative initiatives responding to perceived abuses of executive authority and representing a more general effort to counteract or rein in the accrued powers of the “imperial presidency.”<sup>14</sup> Contemporary scholars in political science and law have, for example, meticulously examined such issues as the legislative veto,<sup>15</sup> executive privilege,<sup>16</sup> and the independent counsel statute,<sup>17</sup> all topics which received heightened scrutiny following Nixon's administration.<sup>18</sup>

13. See, e.g., Alison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1638 n.20 (2003) (describing the “Saturday Night Massacre” where Nixon fired the Attorney General, Deputy Attorney General, and Archibald Cox, the special prosecutor appointed to investigate the President).

14. See generally ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1989) (outlining the “appropriation” by the presidency of “powers reserved by the Constitution and by long historical practice to Congress”).

15. See generally BARBARA HINKSON CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 3-35 (1990) (examining the institutional dispute over the legislative veto, a mechanism allowing Congress to supervise delegations of power to administrative agencies by invalidating their regulations and orders); JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* 27-47 (1996) (examining the scope and significance of the *Chadha* decision); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 284-90 (1993) [hereinafter Fisher, *The Legislative Veto*] (recognizing that the legislative veto continues to persist in executive agencies and congressional committees); Peter L. Strauss, *Was There A Baby In the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789 (1983) (distinguishing the legislative veto in the context of executive-congressional relations from that used in the regulatory context, and arguing that only the latter use prompts constitutional concerns).

16. See RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974). But see MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* 21-61 (1994) (arguing that the separation of powers doctrine legitimates claims of presidential privilege).

17. See generally TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL* (1989) (analyzing the origins, enactment, constitutionality and public policy concerns of the independent counsel statute); KATY J. HARRIGER, *THE SPECIAL PROSECUTOR IN AMERICAN POLITICS* (2d ed. 2000) (analyzing the role of the independent counsel in the post-Watergate political arena); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988) (examining the Supreme Court's decision to uphold the Ethics and Government Act in *Morrison v. Olson*, 487 U.S. 654 (1988)); Katy J. Harriger, *Separation of Powers and the Politics of Independent Counsels*, 109 POL. SCI. Q. 261 (1994) [hereinafter Harriger, *Separation of Powers and Independent Counsels*] (tracing the separation of powers debate since the enactment of the independent counsel statute); Carl Levin, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11 (1987) (finding that the independent counsel supports checks and balances within the federal government and restores public confidence in the criminal justice system); Donald J. Simon, *The Constitutionality of the Special Prosecutor Law*, 16 U. MICH. J.L. REFORM 45 (1982) (examining and defending the constitutionality of the Independent Counsel Act); William French Smith, *Independent Counsel Provisions of the Ethics in Government Act*, in *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE*

A substantial subset of this research has emphasized the judiciary's—and especially the Supreme Court's—treatment of legal aspects of separation of powers disputes during this period.<sup>19</sup> Consequently, this work typically consists of rather painstaking parsings of contemporaneous judicial rulings, or efforts to reconcile past and present (and sometimes anticipate future) doctrine related to the division of executive, legislative, and judicial power.<sup>20</sup>

To some extent, scholars' focus on the Nixon Administration and its aftermath is understandable and appropriate. Many of the debates and controversies from this period were not only important on their own terms, but shaped the state of American politics for years to come.<sup>21</sup> The Nixon years, for example, ushered in a period when both divided government and contentious executive-legislative relations became steady features of modern political life. In addition, a number of significant legislative reforms from the 1970s can be traced, at least in part, to congressional conflicts with the President, arising from disagreements over Vietnam, the budget process, the scandals associated with the 1972 presidential campaign, and widespread concerns with the rise of presidential power.<sup>22</sup>

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EXECUTIVE BRANCH 253-61 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (asserting that the independent counsel process is constricted, cumbersome, expensive, and does not obviously serve justice).

18. See, e.g., Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 404 (1989) (listing the various separation of powers cases to come before the Supreme Court since 1980, including those concerning the legislative veto, independent counsel statute, and executive privilege).

19. See, e.g., 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 (1987) (analyzing the Burger Court's lack of justification for its use of entirely distinct methods of constitutional interpretation pertaining to the separation of powers).

20. See Fisher, *Separation of Powers*, *supra* note 10 (attempting to reconcile the Supreme Court's use of both formalistic and functional approaches to resolve separation of powers disputes); Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587 (1990) (arguing that the Rehnquist Court's more flexible approach modified the rigid separation of powers jurisprudence of the Burger Court).

21. See, e.g., Danner, *supra* note 13, at 1638 n.20 (discussing how the "Saturday Night Massacre" elicited public outrage and ultimately led to the enactment of the independent counsel statute).

22. Scholars have devoted much attention to the altered relationship of the three branches of government during the 1970s. See, e.g., RICHARD L. HALL, PARTICIPATION IN CONGRESS 21-24 (1996) (discussing increasing legislative demands such as the greater number of session hours, greater number of days spent in the congressional district, and increasing number of appearances on the House floor); DAVID PRICE, THE CONGRESSIONAL EXPERIENCE 35-41 (1992) (discussing the extensive workload and competing personal and professional demands facing federal legislators); DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 17-39 (1991) (discussing House reforms from 1970-1977 and the motivations of those enacting these changes); BARBARA SINCLAIR, LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE

At the same time, many of the discussions in this tradition of separation of powers research obviously have a somewhat dated feel. Much of the landmark legislation from this period has now been repealed, lapsed, or proven ineffective.<sup>23</sup> While a number of contemporary interbranch disputes certainly echo the vociferous controversies of the 1960s and 1970s, others, such as the Court's recent reinterpretation of the boundaries of federalism, are not so obviously informed by policies, legal categories, and controversies drawn from the Nixon presidency.<sup>24</sup>

### B. *Studying the Effects of Separated Powers*

Much recent scholarship has also looked at the effects of various arrangements of the separation of powers,<sup>25</sup> a line of research that only sometimes explicitly references the Nixon context and the rise of executive power in the twentieth century. A significant portion of this research entails a somewhat specific debate about the implications (if any) of "divided government."<sup>26</sup> A more general and

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OF REPRESENTATIVES IN THE POSTREFORM ERA 29-44 (1995) (reviewing changes in Congress, including the "Sunshine Reforms," aimed at expanding political participation and facilitating Democratic policymaking); THE NEW CONGRESS 101 (Thomas E. Mann & Norman J. Ornstein eds., 1981) (explaining that friction between Congress and the Nixon Administration led to a new budgetary process); Frank M. Coffin, *The Federalist Number 86: On Relations Between the Judiciary and Congress*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 23-25 (Robert A. Katzmann ed., 1988) (describing how legislative-judicial relations evolved after the Watergate era as economic interests and individual rights came into conflict and social attitudes changed).

23. See, e.g., Gail Kijak Martens, *Nixon v. Shrink Missouri Government PAC: Further Dissension Over the Federal Election Campaign Act*, 50 CATH. U. L. REV. 819, 823-25 (2001) (addressing the ongoing debate regarding the Federal Election Campaign Act's effectiveness); Joseph P. Tomain, *The Dominant Model of United States Energy Policy*, 61 U. COLO. L. REV. 335, 372 n.71 (1990) (discussing energy-related legislation from the Nixon Administration that has since proven to be ineffective).

24. See, e.g., Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069, 1071 (2001) (arguing that judicial review of the boundaries of federalism is justified by constitutional history).

25. See generally BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS: POLITICIANS, PROSECUTORS, AND THE PRESS FROM WATERGATE TO WHITEWATER* (3d ed. 2002) (discussing the contribution of separation of powers to the declining ability of elections to grant definitive governing power to electoral "winners").

26. See generally DAVID MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990* (1991) (asserting that significant policymaking will occur regardless of whether the government is "unified" or "divided"); John J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821 (1999) (suggesting that a divided government greatly complicates the policymaking process); FIORINA, *supra* note 1 (arguing that although our government may be "divided," it is not necessarily poorly governed); Marg N. Franklin & Wolfgang P. Hirczy, *Separated Powers, Divided Government, and Turnout in U.S. Presidential Elections*, 42 AM. J. POL. SCI. 316 (1998) (asserting that divided government has resulted in lower voter turnout in president elections).

active set of scholarly discussions explores the political significance of separated powers by adopting (or criticizing) a framework that is sometimes characterized as “positive political theory” or PPT.<sup>27</sup> Positive political theorists argue that significant political outcomes are largely determined by the actual and anticipated interactions of multiple institutional “players,” their assessments of the preferences and activities of others, and the surrounding context of rules and structures governing these relationships.<sup>28</sup> PPT scholars are therefore interested in the separation of powers as providing the legal environment in which various political agents must operate in order to achieve their individual and institutional goals.

Among other contributions, this research captures the impact of different institutional actors and a variety of inter- and intragovernmental relationships (such as those between Congress and the executive bureaucracy) in creating, maintaining, and reconfiguring important legal and political environments.<sup>29</sup> For

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27. See, e.g., Jenna Bednar, *The Madisonian Scheme to Control the National Government*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT (Samuel Kernell ed., 2003); Jenna Bednar et al., *A Political Theory of Federalism*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 223 (John Ferejohn et al. eds., 2001) (explaining that federalism can be viewed as a way of stabilizing or decentralizing governmental arrangements); John Ferejohn & William Eskridge, *Virtual Logrolling: How the Court, Congress, and the States Multiply Rights*, 68 S. CAL. L. REV. 1545, 1547 (1995) (examining separation of powers and federalism in the context of U.S. cultural history and rational choice theory); John Ferejohn, *Law, Legislation and Positive Political Theory*, in MODERN POLITICAL ECONOMY 191-215 (Jeffrey Banks & Erik Hanushek eds., 1995) (emphasizing the importance of understanding judicial preferences in light of their surrounding institutional structures); John M. de Figueiredo et al., *Congress and the Political Expansion of the U.S. District Courts*, 2 AM. L. & ECON. REV. 107 (2000) (examining how Congress expands the number of U.S. district judgeships as a form of political control over the federal courts); John M. de Figueiredo & Rui J. de Figueiredo, Jr., *The Allocation of Resources by Interest Groups: Lobbying, Litigation, and Administrative Regulation*, 4 BUS. & POL. 161 (2002) (examining how competing interest groups lobby courts to affect administrative rulemaking); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (examining strategic judicial action vis-à-vis Congress from two competing viewpoints, the attitudinal model and positive political theory).

28. See, e.g., William Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-34 (1992) (analyzing Article I, Section 7 of the Constitution as setting up a sequential game).

29. An active debate is underway within positive political theory about the relative “dominance” of various institutions. See generally PHILLIP COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2002) (examining the strength of presidential power and how it affects democracy); WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003) (asserting that presidential power expands with the weakening of congressional power); KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER (2002) (discussing the role of executive orders in increasing the power of the presidency); Terry M. Moe, *An Assessment of the Positive Theory of “Congressional Dominance,”* 12 LEGIS. STUD. Q. 475 (1987) (arguing that Congress controls the bureaucracy); Terry Moe & William Howell, *The*

example, some strains of positive political theory highlight judges' vital role in separation of powers debates, both in helping to fix the boundaries between the three federal departments and in themselves serving as some of the most important, powerful, and active participants in interbranch negotiations and disputes.<sup>30</sup>

But positive political theory typically offers a fairly restricted vision of the nature and purposes of the separation of powers *per se*. This shortcoming can lead to several kinds of problems. To begin with, PPT does not appear to be well-equipped on its own to offer a nuanced account of what comprises the core of the separation of power system. How do we know what gets included and what does not? Scholars in the PPT tradition tend to focus on the formal, legal aspects of separation of powers, passing over what we believe are some of the more interesting, important, and politically decisive elements of this system, such as historical and institutional customs, some of which arguably cut against a strictly strategic orientation.<sup>31</sup>

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*Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999) (asserting that most presidential powers are ambiguous because the Constitution does not define them and that this ambiguity gives them strength); Keith Whittington & Dan Carpenter, *Executive Power in American Institutional Development*, 1 PERSP. ON POL'Y 495 (2003) (examining three cases to illustrate that the executive branch and conflicts between Congress and the President have often driven institutional developments).

30. See, e.g., Emerson Tiller & Joseph L. Smith, *The Strategy of Judging: Evidence From Administrative Law*, 31 J. LEGIS. STUD. 61 (2002) (testing the "strategic instrument" model of judicial decision-making). Judicial "attitudinalists" go further, criticizing and even dismissing positive political theory on the grounds that it gives insufficient attention to the degree to which the Supreme Court can act autonomously from the other branches of government. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 12-14 (1993) (noting that because the Framers were not afraid of judicial threats to the Constitution, they did not grant complete control over selection of judges to the executive or legislative branches). *But see* Segal, *supra* note 27, at 28 (arguing that while attitudinalists claim that Supreme Court Justices make decisions based on their preferences, positive political theorists note that the Court's decisions can still be affected by Congress's ability to statutorily preempt them).

Generally, research ignores the question of whether the judiciary can contribute to divided government. Taking this issue seriously might lead us to conclude that even during periods of supposed unified partisan rule, government is actually divided. For instance, consider the first two years of the Clinton presidency, when Democratic executive and legislative branches confronted a Republican, conservative Supreme Court.

31. See, e.g., Mickey Edwards, *Political Science and Political Practice: The Pursuit of Grounded Inquiry*, 1 PERSP. ON POL'Y 349, 349 (2003) (suggesting how political science misunderstands key aspects of legislative politics); Howard Gillman, *More and Less Than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics*, 7 LAW & CTS. 6, 6 (1996-1997) (highlighting the interpretive-historical institutionalism approach to American politics and public law); Howard Gillman & Cornell Clayton, *Introduction to SUPREME COURT DECISION MAKING: NEW INSTITUTIONALIST APPROACHES* 1-12 (Cornell Clayton & Howard Gillman eds., 1999) (asserting that the attitudinal model is insufficient on its own to analyze Supreme Court jurisprudence); Howard Gillman, *The Court as an Idea, Not a Building (Or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in

This oversight poses the dual problems of wrongly describing or eliding key aspects of the separation of powers system,<sup>32</sup> and inadequately explaining many of its outcomes.<sup>33</sup> Moreover, some PPT scholars treat the separation of powers system as an inherited backdrop against which strategic interbranch relationships are navigated, running the additional risk of treating this system as ahistorical and uncontested.

Finally, PPT research is insufficient to address questions about what different institutional arrangements we should prefer as most conducive to the public interest. For example, while PPT can provide insight into the institutional preconditions necessary for (and the consequences of) different forms of power-sharing and delegation between the Congress and President, these findings need to be supplemented with accounts of the goals of our polity, in order to assess whether these relationships are dangerous or advantageous.

### C. *Architectonic Approaches to the Separation of Powers: Four Views*

Indeed, despite the copious amount written on separation of powers issues, we believe that insufficient attention has been paid to fundamental questions about the character, development, and proper operation of the overall system of separated powers.<sup>34</sup> How should we conceive of the separation of powers? How should it function? What, if anything, is wrong with its current operation? What standards should we use to assess our constitutional division of powers?

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SUPREME COURT DECISION MAKING: NEW INSTITUTIONALIST APPROACHES 65-87 (Cornell Clayton & Howard Gillman eds., 1999) (explaining that although the strategic approach may help gain perspective on judicial decision making, it ignores other factors).

32. We believe, for example, that the separation of powers system contains divisions of power between federal and state governments, but this element is frequently left out of positive political theory approaches. An exception is THOMAS R. DYE, *FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990) (outlining a theory of federalism based on principles of microeconomics). See generally Jeffrey A. Segal, *Correction to 'Separation-of-Powers Games in the Positive Theory of Congress and Courts'*, 92 AM. POL. SCI. REV. 923 (1998) (providing a survey of separation of powers models).

33. For example, a positive political theory ("PPT") reading of the proposal and ratification of the Twenty-Second Amendment (restricting presidents to two elected terms in office) would likely overlook the strong roles played by partisanship, personal distaste for Franklin Delano Roosevelt, and support for the "two-term tradition" supposedly initiated by George Washington; these are all factors that strategic analysis does not explicitly explain. See generally Peabody & Gant, *supra* note 9 (discussing the Twenty-Second Amendment to the U.S. Constitution).

34. But see THE SEPARATION OF POWERS: DOCUMENTS AND COMMENTARY (Katy J. Harriger ed., 2003) (including examples of scholarship that explicitly addresses questions about the relationship between separation of powers and the overall design and purposes of the political regime).

Among those scholars and jurists who do systematically engage these issues, there appears to be widespread descriptive agreement about only the most basic features of our system of separated powers. According to this rather “thin” consensus, the Constitution fragments political authority “horizontally” in two ways: amongst the three branches of the national government and bicamerally between the House of Representatives and the Senate. In addition, the dominant view holds that these institutional divisions were intended to serve the “negative” purpose of creating multiple and mutual checks to avoid the tyrannical accumulation of power.<sup>35</sup>

From this agreement, however, the prevailing views diverge rather widely. Overall, we can identify four major competing theories or models of the separation of powers and how it should operate.<sup>36</sup> To begin with, a number of separation of powers theorists embrace or at least take seriously some version of “originalism”—the belief that we can best understand the appropriate purposes and operation of our separated powers by turning to the intentions of the constitutional framers.<sup>37</sup>

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35. See, e.g., *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.”); William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Governance*, in SEPARATION OF POWERS—DOES IT STILL WORK? 65-66 (Robert A. Goldwin & Art Kaufman eds., 1986) [hereinafter SEPARATION OF POWERS] (stating that the goal of constitutionalism is to protect liberty and avoid tyranny). Cf. KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANINGS (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION] (examining the Constitution’s definition of and constraints on political power); Louis Fisher, *Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113 (1971) (contending that the constitutional Framers embraced separation of powers to facilitate greater administrative efficiency rather than out of anxiety over executive tyranny).

36. There are, of course, a number of scholars whose analyses do not fit easily into these categories. See generally KORN, *supra* note 15 (arguing against the enthusiasm for overcoming the separation of powers); HARVEY C. MANSFIELD, AMERICA’S CONSTITUTIONAL SOUL (1993) (calling for a defense of formal constitutionalism); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987) (assessing the expansion over time of presidential powers vis-à-vis Congress); WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 35 (analyzing methods of constitutional construction in light of politics); Theodore J. Lowi, *Constitutional Merry-Go-Round: The First Time Tragedy, the Second Time Farce*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 189-202 (William N. Eskridge Jr. & Sanford Levinson eds., 1998) (finding that Congress failed to honor the Framers’ constitutional vision); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (sketching a model of separated powers based on recognizing extensive presidential authority to engage in constitutional interpretation independent from the judiciary).

37. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (discussing the Framers’ intention in adopting the doctrine of separation of powers). See generally George Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. REV. 151 (1978) (arguing that the writings and remarks of Madison clearly

Second, scholars and judges have advanced a “formal,” delineated understanding of the separation of powers in which, according to one of its more crude articulations, the three branches must be “entirely free from the control or coercive influence, direct or indirect, of either of the others.”<sup>38</sup> This approach emphasizes the importance of drawing bright lines between the various prerogatives and powers of the three branches of federal government, presupposing that the parameters of institutional power are distinct, definable, and largely ahistorical.<sup>39</sup>

A third widely used conception of separated powers emphasizes “functionality” or the maintenance of a “working government” rather than adherence to strict divisions between the institutions of governance. This approach looks to preserving “the essential functions of each branch”<sup>40</sup> within an adaptable system of checks and balances.<sup>41</sup> Functionalists stress the “ambiguities of the distribution of powers”<sup>42</sup> and embrace flexible principles governing what authority each branch of government can properly exercise. In this view,

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indicate his overall concerns regarding government tyranny and democratic control of government); Gerhard Casper, *The American Constitutional Tradition of Shared and Separated Powers: An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989) (asking whether separation of powers as the Framers intended was successful on a practical level).

38. *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935); *see also* *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (describing the President as the head of “a separate and wholly independent Executive Branch” and minimizing Congress’s capacity to check the President through constitutional means); Stephen L. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L. REV. 719 (1987) (defending formalism as an approach to construing the separation of powers).

39. This formal orientation to separated powers gained prominence when it was asserted in several major Supreme Court decisions in the 1980s that invalidated important federal legislation on the grounds that the legislation encroached on the constitutionally defined powers and functions of the presidency. *See* *INS v. Chadha*, 462 U.S. 919 (1983) (holding invalid the legislative veto because the Constitution requires every bill that Congress passes to be presented to the President and, if he disapproves, to be overruled by a two-thirds majority of both the Senate and House); *Bowsher*, 478 U.S. at 714 (holding that provisions of the Budget and Emergency Deficit Control Act of 1985 violated separation of powers by giving Congress too much control over inherently executive powers).

40. *See* *United States v. Nixon*, 418 U.S. 683, 707-13 (1974) (rejecting Nixon’s sweeping claim of absolute privilege and instead calling for “a workable government” that protects “the essential functions of each branch,” including Congress’s oversight functions and the judiciary’s role in adjudicating criminal disputes). *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (containing both formalist and functionalist invalidations of President Truman’s executive order seizing private steel mills).

41. *See, e.g.*, Adam J. Rappaport, *The Court of International Trade’s Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429 (2001) (distinguishing formal and functionalist approaches to separated powers).

42. HARRIGER, *supra* note 17, at 262.

therefore, the separation of powers is an evolutionary system which can assume a variety of legitimate forms alongside developments in the state.<sup>43</sup> For functionalists, the “persistence” and widespread institutional acceptance of different political practices or arrangements of power are important measures for assessing their constitutionality.<sup>44</sup>

Finally, we can identify what might be called a “fused” or “parliamentary” view of the separation of powers. This understanding evaluates different distributions of American institutional power by implicitly or explicitly appealing to a model of governance in which executive and legislative authority is closely coordinated or even formally joined.<sup>45</sup> Scholars in this tradition typically criticize our separated powers as giving rise to incoherent and unresponsive lawmaking, due to, among other factors, the pervasive influence of interest groups, partisan bickering, and needless institutional conflict, division, and gridlock.<sup>46</sup> Some of those

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43. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) [hereinafter Strauss, *Formal and Functional*] (arguing that the Supreme Court has applied a functional approach to the separation of powers doctrine where the purpose of the branches and their relationships are not in danger).

44. See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 715 (1985) (contrasting the Supreme Court’s formal and functional approaches to separated powers).

45. See generally PAUL CHRISTOPHER MANUEL & ANNE-MARIE CAMMISA, CHECKS AND BALANCES? HOW A PARLIAMENTARY SYSTEM COULD CHANGE AMERICAN POLITICS 120 (1999) (discussing how the American government would have been more effective and representative had a more parliamentary system been established within the United States).

46. In American politics, the classic expression of this critique is WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (Meridian Books 1956) (1885). There are more contemporary critiques in this vein. See MANUEL & CAMMISA, *supra* note 45, at 145-54 (advocating reform of American democracy by changing the structure of the legislative and executive branches of government and by revamping the electoral process); MICHAEL L. MEZEY, CONGRESS, THE PRESIDENT, AND PUBLIC POLICY 202 (1989) (stating that democracy is compromised by Congress’s reliance on outside interest groups to finance their electoral campaigns and that effective reform is needed to enable the President to make better public policy); Lloyd N. Cutler, *To Form a Government*, in SEPARATION OF POWERS, *supra* note 35, at 1 (describing the need for a more effective governing structure); Lowi, *supra* note 36, at 202 (arguing that governmental legitimacy and effectiveness will suffer greatly under a doctrine of absolute separation of powers); cf. Evron M. Kirkpatrick, *Toward a More Responsible Two-Party System: Political Science, Policy Science, or Pseudo-Science?*, 65 AM. POL. SCI. REV. 965, 974-75 (1971) (finding that the British political system, on which the parliamentary critique is based, does not promote intra-party democracy). But see AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT 8-9 (1962) (arguing that a two-party system, in which the majority controls the government, is the only way to have a truly democratic government for the people of the United States); Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 682-84 (1993) (countering the arguments of the parliamentary critics of the separation of powers).

analyzing separation of powers from this perspective call for stronger parties or other systemic or institutional changes (such as according greater power to one branch) to promote more accountability and to overcome the system's purported tendencies towards stasis.<sup>47</sup>

#### D. *Assessing Existing Debates*

Not surprisingly, adherents of these different models frequently debate their relative appeal. Originalists and formalists sometimes contend that the functional approach is too formless, allowing judges and politicians to construe the separation of powers on an *ad hoc* and ultimately incoherent basis.<sup>48</sup> Functionalists counter that originalist and formalist theories fail to recognize that complexities of the modern administrative state require flexibility in delegating and sharing separated powers.<sup>49</sup> Those adopting a "parliamentary" perspective, on the other hand, contend that other approaches to separated powers too readily accept our polity's fragmented policymaking processes and fail to take seriously the deleterious consequences of these arrangements and the need for major structural revision.<sup>50</sup>

But in adopting distinct standards for evaluating our system of separated powers the scholars in these different "schools" often talk past one another and fail to appreciate the insights of their competitors. In contrast, our approach to the separation of powers strives to borrow from (and ultimately transcend) these debates. We attempt to retrieve the most powerful arguments set out by our constitutional framers, without limiting ourselves to their specific conception of the separation of powers. While sympathetic to the functionalist perspective, we believe more can be said about the criteria delineating what institutional power-sharing arrangements

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47. See, e.g., JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 232 (1992) (discussing numerous structural reforms of the executive and legislative branches).

48. See, e.g., Michael L. Yoder, Comment, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173, 174 (1990) (noting that the danger of the functional approach is apparent when justices allow political beliefs to influence their decisions).

49. See HARRIGER, *supra* note 17, at 263 (stating that the formalist approach does not consider the realities of the American political system); see also Strauss, *Formal and Functional*, *supra* note 43, at 518 (finding that administrative agencies take power away from all three branches and that because the day-to-day operations of the government are not controlled by any one branch, the need to limit the powers of the different branches lessens).

50. See, e.g., 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. 449, 487-505 (1991) (advocating the enforcement of separation of powers to prevent tyranny and bolster democracy).

threaten core constitutional values. Although we think parliamentary critiques of separation of powers are overstated, we concede that responding to these criticisms is useful in surfacing and evaluating neglected aspects of our system of separated powers. Even though, as noted, some of our analysis resembles functionalism, the framework we set out below is not hostile to employing formalism and even originalism as part of the pertinent analysis of separation of powers issues in a particular case.<sup>51</sup>

While recognizing the contributions of existing work on the origins, consequences, purposes, and potential malfunctioning of the separation of powers, we think this literature suffers from three trenchant defects, some of which we have already indicated. First, this scholarship is insufficiently integrated. Not only do the different architectonic schools generally fail to appreciate the potential teachings of the others, but the normative work on separated powers is divorced from most of the positive political theory scholarship, which is itself often insufficiently attentive to foundational questions concerning, for example, the very nature of separated powers.<sup>52</sup>

Second, much of the work we have examined adopts what we believe is an incomplete judicial-legal framework in discussing the structure and rationale for the separation of powers, conceiving of (and criticizing) separated powers using court opinions, categories, and doctrine, and often presuming that the separation of powers is a doctrine that must be enforced by judges. Prevailing scholarship assesses different separation of powers relationships against a cramped and apolitical understanding of constitutionalism.<sup>53</sup> As we argue more fully below, we believe that this focus runs contrary to the basic design of the Constitution, which is premised on an energetic superintendence of the divisions between government by all three federal departments and the states.<sup>54</sup> The legalistic, judge-enforced

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51. See generally *id.* at 505 (discussing the reasons that formalism offers a more tangible solution to separation of powers).

52. See Yoder, *supra* note 48, at 175 (explaining that the Supreme Court's inability to choose between formalist and functionalist doctrines is reflected in the Court's inconsistent separation of powers decisions over the past hundred years).

53. See Bruce Peabody, Article, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENTARY 63 (1999) (interpreting the work of prominent legal scholars to support the notion that nonjudicial actors can engage effectively in independent, distinctive, and politically healthful forms of constitutional interpretation).

54. See THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) (discussing how "the interior structure of the government [should be designed so] . . . that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places"); see also Paulsen, *supra* note 36, at 222 (describing which branch should have the power to interpret the Constitution and

model of separated powers adopted by many commentators is both descriptively false and dangerous to the extent that it presumes the judiciary can and should maintain divisions between the units of governance, a presumption we contest.

Third, and closely related to this last point, we believe that prevailing accounts of the separation of powers bypass or ignore vital features of this system. We discuss these neglected aspects in the following section of this Article.

## II. REVISITING THE SEPARATION OF POWERS: ELEMENTS OF A “UNIFYING” THEORY?

In the following section, we elaborate upon our revised conception of separated powers, setting out a model that builds on previous understandings while introducing five intertwined and distinctive features, each of which is somewhat novel in the context of this discussion. First, we expand the dominant contemporary understanding of the constitutional separation of powers to include the “vertical” separation of powers between state governments and the national government.<sup>55</sup> Second, we note that the Constitution’s separations of powers serve both negative and “positive” purposes. Third, we argue that it is both logical and useful to identify several distinctive levels on which the separation of powers operates. Fourth, we contend that our model, contrary to the assumptions of many scholars and jurists, allows and even encourages a wide range of configurations consistent with the goals of separated powers and constitutionalism more generally. Finally, we make the case that the maintenance of separated powers depends upon the vigilance and active participation of all the federal departments and the states, and not just the federal courts.

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why); Bruce Peabody, *Recovering the Political Constitution: Nonjudicial Interpretation, Judicial Supremacy, and the Separation of Powers* 46 (2000) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with the American University Law Review) [hereinafter Peabody, *Recovering the Political Constitution*] (finding that the separation of powers doctrine promotes public interest and provides a system that prevents one branch from assuming excessive power and authority).

55. The notion of a “vertical” separation of powers has been used in at least two senses. We refer to the state-federal separation rather than the version outlined by Justice Kennedy in *Clinton v. New York*. See 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (asserting that the “[s]eparation of powers operates on a vertical axis . . . between each branch and the citizens in whose interest powers must be exercised”); see also Victoria Nourse, *The Vertical Separation of Power*, 49 DUKE L.J. 749 (1999) (describing the “vertical” separation of powers as an analysis of political relationships that can help identify and correct constitutional harms).

*A. Federalism as a Separation of Power*

We first depart from traditional conceptions of separated powers by arguing that the Constitution actually separates powers in *three* basic ways: among the three branches, bicamerally, and between the states and the federal government. In part, we retrieve our vision of federalism as a separation of power from James Madison's explanation in *Federalist* No. 51 that "[i]n the compound republic of America, the power surrendered by the people is *first* divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."<sup>56</sup> One reason state activities can fulfill functions typically associated with the horizontal (national) separation of powers is that state officials have opportunities to share their views on legislation and policy with members of Congress and the executive branch.<sup>57</sup> There are many channels through which this occurs,<sup>58</sup> such as testimony before congressional committees by governors and state legislators; meetings between the President, governors, and state legislators during the annual meetings of the National Governors' Association and the National Conference of State Legislatures; and the daily interactions of state and federal administrators involved in the implementation of federal and state policy.<sup>59</sup>

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56. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

57. While here we highlight the ways in which state officials contribute to national political processes and powers, we note additionally that much of our constitutional system is structured to induce national institutions to promote state goals and interests. As Lloyd Anderson notes, Article III of the U.S. Constitution both creates and empowers a Supreme Court and allows Congress to control the Court's appellate jurisdiction. But this balance was promoted at the Constitutional Convention, not so much to provide balance between the federal, legislative, and judicial branches, but as a compromise "between proponents of a strong national judiciary that would guarantee the supremacy of federal law, and states' rights partisans who opposed the creation of any national courts out of fear they would usurp the authority of state courts." Lloyd Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRAND. L.J. 417, 422 (2000).

58. See, e.g., John D. Nugent, *The Informal Political Safeguards of Federalism* (paper presented at the annual meeting of the Midwest Political Science Association, Chicago, Ill., Apr. 27-30, 2000) (on file with the American University Law Review) [hereinafter Nugent, *Informal Political Safeguards*] (outlining five extraconstitutional means by which state officials influence the making and implementation of federal policy today); Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 215 (2000) [hereinafter Kramer, *Putting the Politics Back*] (stating that the founders believed state officials could combat any efforts by Congress to seize state power by organizing political action).

59. See, e.g., DENISE SCHEBERLE, *FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION* 13 (1997) (discussing partnerships between state and federal officials in environmental law); Lael Keiser, *Street-Level Bureaucrats*,

The scholarly literature assessing federalism as a constitutional separation of power is rather limited. As Thomas Dye notes, much of contemporary political science scholarship has focused on the practical, administrative aspects of intergovernmental relations rather than on federalism as a core element of a separated powers system.<sup>60</sup> Other scholarly and judicial approaches to federalism attempt to locate the precise (and judicially enforceable) line separating state-governmental authority from that of the federal government and emphasize the “separateness” of state and federal authority.<sup>61</sup> Finally,

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*Administrative Power and the Manipulation of Federal Social Security Disability Programs*, 1 ST. POL. & POL'Y Q. 144, 145-47 (2001) (analyzing the behavior of state governments toward federal policy); Lael Keiser & Joe Soss, *With Good Cause: Bureaucratic Discretion and the Politics of Child Support Enforcement*, 42 AM. J. POL. SCI. 1133, 1144 (1998) (finding that the politics of the Republican and Democratic national parties unduly influence state bureaucracies and bureaucrats in charge of implementing state child support programs); MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* 10 (1970) (arguing that “the conduct of state governments departs from the intended goals [of federal legislation] in varying degrees, and thus the extent to which the federal government seeks to exercise influence varies (as does the extent to which it succeeds)”).

60. See DYE, *supra* note 32, at 3-5 (1990) (outlining a theory of federalism premised on the idea that competition rather than cooperation among governments will protect liberty and provide better public services); see also AMERICAN INTERGOVERNMENTAL RELATIONS 33 (Laurence J. O'Toole ed., 2000) (analyzing the theoretical standpoints of traditional interpretations and views of federalism); W. BROOKE GRAVES, *AMERICAN INTERGOVERNMENTAL RELATIONS: THEIR ORIGINS, HISTORICAL DEVELOPMENT, AND CURRENT STATUS* 435-67 (1964) (discussing federalism as it affects the fiscal relationships between the federal and state governments); *INTERGOVERNMENTAL RELATIONS AND PUBLIC POLICY* 1-12 (J. Edwin Benton & David R. Morgan eds., 1986) (providing a brief overview of federalism with a focus on public policy); MICHAEL D. REAGAN, *THE NEW FEDERALISM* 31-53 (1972) (reviewing the fiscal problems of federalism as they affect state and local governments); DEIL S. WRIGHT, *UNDERSTANDING INTERGOVERNMENTAL RELATIONS* 31-64 (1988) (providing a detailed analysis and overview of federalism and the different models of intergovernmental relationships).

61. See, e.g., RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 48-99 (1987) (discussing court decisions and the Tenth Amendment to the U.S. Constitution in order to define firm lines between federal and state powers); MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 114-32 (1999) (promoting different strategies for reinforcing the separation of state and federal governments); M.J.C. VILE, *THE STRUCTURE OF AMERICAN FEDERALISM* 87-135 (1961) (identifying and defining the boundaries of federalism); ERIC N. WALTEBURG & BILL SWINFORD, *LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT* 121 (1999) (discussing presidential influence on federalism through the appointment of Supreme Court Justices); K.C. WHEARE, *FEDERAL GOVERNMENT* 14 (1946) (noting that “each [level of] government should be limited to its own sphere and, within that sphere, should be independent of the other”); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 2 (1950) (arguing that the rights endowed by the Constitution have evolved into powers, and that those powers have consolidated within the national government); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 440 (2002) (noting the “collective autonomy” that allows citizens of a state to adopt policies contrary to those of other states or the nation as a whole). *But see* Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1305-06 (1999) (criticizing federalism because it indirectly promotes judicial activism by federal courts, thereby failing to control the federal government); Geoffrey H.

some legal scholars examine federalism from a “political safeguards” perspective, asking whether state governments today can better protect their prerogatives vis-à-vis the federal government through political processes such as the Electoral College or electing U.S. legislators,<sup>62</sup> or by relying on the federal courts to serve as a referee of state-federal relations.<sup>63</sup>

Each of these approaches gives little attention to our notion that federal-state relations should themselves be treated as a constituent feature of a larger system of divided institutions and governmental authority directed towards a complex and evolving set of regime goals. In bypassing this dimension of federalism, scholars neglect the numerous ways in which state governments contest and resist federal efforts to reduce state governments to administrative units or “field offices.”<sup>64</sup> With few exceptions, mainstream federalism research also does not provide very thorough or sophisticated accounts of the wide variety of means by which state governments exert pressure on federal officials during the course of policy formulation and implementation.<sup>65</sup>

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Moulton, *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 895-96 (1999) (discussing the negligible benefit of having a judicially-enforceable federalism).

62. See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 171-259 (1980) (analyzing the ways in which the state governments and individuals are protected by the electoral process and by the judiciary); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 552-58 (1954) (describing the power of the states in the presidential and congressional election processes); Larry Kramer, *Understanding Federalism*, VAND. L. REV. 1485, 1503 (1994) [hereinafter Kramer, *Understanding Federalism*] (arguing that even without a judicially-protected federalism, the states are protected by the structure of the federal government itself); Kramer, *Putting the Politics Back*, *supra* note 58, at 233 (analyzing the states’ historical safeguards against an ever-expansive federal government).

63. See Pete DuPont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J.L. & PUB. POL’Y 137, 140-42 (1993) (describing how the national government, by winning judicial support for its growing powers, is destroying federalism); Carol Lynn Tebben, *In Defense of State Government: A Critical Analysis of Jesse Choper’s Federalism Proposal*, 5 BENCHMARK 41, 51 (1991) (arguing that “the Framers contemplated that one appropriate role of the Supreme Court would be as an arbiter between state decision-making power and national decision-making power”); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313-14 (1997) (finding that federalism is best protected by the judiciary because the “political safeguard approach” actually destroys state sovereignty instead of protecting it).

64. But see Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1959-60 (1993) (arguing that Justice O’Connor misinterpreted the original intent of the Framers, and therefore the federal government can compel the states to carry out federal laws).

65. The work of Larry Kramer is the primary exception. See Kramer, *Putting the Politics Back*, *supra* note 58, at 279-84 (describing states’ attempts to limit federal power through the electoral process and political parties); Kramer, *Understanding Federalism*, *supra* note 62, at 1547-49 (describing the structural limitations on power

Overall, we are inclined to believe that scholars and jurists are likely to miss the full reach, implications, and effects of the separation of powers unless they consider the political dynamics between state officials and national officials in addition to those between members of Congress, the presidency, and the federal judiciary. Put differently, our perspective appreciates that there are both intragovernmental and intergovernmental separations of powers that must be described and explained if we are to understand American constitutionalism in a thorough and rigorous way.

Why should we treat federalism specifically as part of the separation of powers rubric, rather than simply recognize it as one of the additional *divisions* of power explicitly and implicitly contained in the U.S. Constitution (such as the Constitution's provision that judicial power may be divided between the Supreme Court and "inferior" courts created by Congress)? We view the distribution of power amongst the three federal branches, between the two houses of Congress, and between the states and federal government as forming a coherent, distinctive, cognate set of "separated powers" for two reasons. First, unlike other "divisions of power," the constitutional separations of power leave somewhat open the identity of the political entity ultimately authorized to decide how contested power is to be exercised. For example, while Article III of the U.S. Constitution allows Congress to create inferior federal courts to share the judicial power with the Supreme Court, the Court retains trumping judicial authority.<sup>66</sup>

Second, separations of power—such as federalism and bicameralism—create different allocations of authority precisely so that they can be utilized differently, as distinctive kinds of power; "divisions of power" do not obviously serve this end.<sup>67</sup> In a way, then,

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allocations between the state and federal governments). *But see* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1461-63 (2001) (providing an overview and critique of the top political safeguard theorists); Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 996-98 (2002) (setting forth a detailed account of how states attempt to maintain autonomy through the electoral process); Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS 93, 94-97 (2001) (promoting the constitutionality of judicial reviews of federalism). *Cf.* Nugent, *Informal Political Safeguards*, *supra* note 58 (discussing five informal safeguards of federalism used by state officials today).

66. *See, e.g.*, HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 170 (1993) ("The Supreme Court . . . stands at the very pinnacle of the judiciary: there is no higher court, and all others bow before it—or, at least, are expected to do so.").

67. *See* TULIS, *supra* note 36, at 42-45 (setting out a model of separated powers that includes a discussion of the special qualities needed by each branch "to secure its governmental objectives").

we agree with traditional understandings that the separation of powers is limited to functional divisions of power among different agents. We simply think that the powers exercised by state politicians are qualitatively different from (but complementary to) their national analogues.<sup>68</sup>

*B. Positive and Negative Functions of Separated Powers*

In addition to this central observation about federalism, our approach to the separation of powers emphasizes taking stock of a number of “positive” functions associated with this system, aside from its commonly acknowledged “negative” role of checking institutional overreach.<sup>69</sup> These benefits may include (1) a wide-ranging political representation of diverse interests,<sup>70</sup> (2) helping to achieve broad-based consensus across a diverse, vast republic, (3) promoting distinctive “qualities and functions” associated with each branch or division of government,<sup>71</sup> (4) improving the administration of state and federal policy, and (5) providing the means of overcoming temporary legislative or political impasses.

The separation of powers arguably facilitates a complex set of representation functions by providing numerous interdependent political access points through its division of governing powers and diverse mechanisms for choosing public officials. As Morris Fiorina has observed, by giving voters a choice of multiple candidates in different offices, the American two-party separation of powers system actually supplies its electorate with a numerically greater set of

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68. This discussion explains briefly the logic of our departure from the traditional understandings of separation of powers. In a later section, we will expand upon the analytic benefits that flow from our expanded inclusion of federalism as a separation of power. We would like to thank Keith Whittington for prompting us to clarify this point.

69. The traditional emphasis on the separation of powers as a set of “negative” arrangements designed to prevent tyrannical rule can be partly attributed to the arguments of early supporters of the Constitution. They were keenly aware of anti-federalist complaints about how the new government would centralize power and threaten individual liberties. See, e.g., THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.”).

70. See, e.g., BRADLEY H. PATTERSON, JR., THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND 12-21 (2000) (describing the relationships between different interest groups, the executive branch, and the legislative branch, as they pertain to public policy issues).

71. See TULIS, *supra* note 36, at 45 (discussing the view that the checks and balances in government could produce positive results because the Constitution created “forms of political behavior consonant with the special tasks and perspectives of each governmental branch”).

alternatives than many multi-party schemes.<sup>72</sup> This flexibility provides voters with at least the theoretical opportunity to moderate polarization between the parties (and ideological positions outside of the mainstream) through ticket-splitting and other strategies.<sup>73</sup> In addition, the different modes by which various political actors are selected, along with their distinctive institutional concerns or “missions” result in differences of opinion which often slow down the policy process and force interbranch compromise.<sup>74</sup> The failure of constitutional actors to reach agreement may therefore indicate a lack of consensus among the population at large, or the need for further deliberation in smaller forums like committee hearings or study groups.

Indeed, separation of powers can be closely related to building consensus generally throughout the “extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces.”<sup>75</sup> In a separation of powers system, politics requires harnessing and aggregating different publics. This vetting and construction process itself has a tendency to seek out and induce widespread agreement. The constitutional separation of powers’ super-majoritarian mechanisms make it further likely that major governing initiatives will be supported by a substantial body of citizens and political officials.<sup>76</sup>

In addition to these positive contributions, we believe that another signature feature of the constitutional separation of powers is its tendency to foster special qualities associated with good governance, such as deliberation, energy, steady administration, and judgment—qualities linked with individual departments and needed to secure

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72. See FIORINA, *supra* note 1, at 119 (outlining the causes and consequences of “ticket-splitting” and divided government).

73. *Id.* at 81.

74. See Howard Gillman, *More and Less Than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics*, 7 *LAW & CTS.* 6, 9 (1996) (discussing how elected officials can accrue a sense of institutional mission while fulfilling their political roles).

75. THE FEDERALIST NO. 51, at 325 (James Madison) (Clinton Rossiter ed., 1961).

76. See generally KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998) (arguing that large, bipartisan coalitions tend to have greater success breaking through the divisions inherent to U.S. lawmaking); ARENDT LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 185-231* (1999) (discussing consensual versus majoritarian democratic systems); Keith E. Whittington, *Extrajudicial Constitutional Adjudication: Three Objections and Responses*, 80 *N.C. L. REV.* 773, 835-36 (2002) (arguing that elected officials not only have incentive to respond to the concerns of those constituents in the majority, but, because of the insecurity of public office, the concerns of the minority as well). *But see* ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 103-19 (2002) (noting that the American system of government is neither proportional nor majoritarian, but rather a hybrid of these two models).

their different governmental objectives.<sup>77</sup> Thus, the intermingling of the Congress, President, and the Judiciary in policymaking, for example, provides for not only the energy and secrecy usually attributed to executive leadership but also the deliberation that is the frequent byproduct of legislative activity, and the judiciary's authoritative legal judgment and institutional inclination to articulate (especially constitutional) rights.<sup>78</sup> Put differently, we believe that the legislative, executive, and judicial branches play distinct but potentially complementary roles in performing basic government functions, and it is the very separation (with overlap) of these institutions that often produces salutary effects for governance.<sup>79</sup>

This argument obviously departs from that of scholars who promote the "fused" or "parliamentary" approach to what constitutes good governance. Nevertheless, we believe it better comports with our institutions and history, and is based on the defensible position that the primary goal of government is not simply to be efficient (or "energetic"), but also to be deliberative, representative, and accountable. As Senator Sam Ervin wrote, ours is "a system of successive cautious steps, of successive checks and rechecks, and of continuous accommodation and compromise."<sup>80</sup> These steps do more than simply slow down the process; they also have the potential to add value to the ultimate products of government.

Separation of powers can also bring about the positive goal of implementing federal and state policies effectively, although again,

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77. See TULIS, *supra* note 36, at 42 (linking deliberative qualities with Congress, energy with the executive, and judgment with the judiciary); see generally Gwyn, *supra* note 35, at 65-89 (outlining the historical justifications given for the separation of powers system and analyzing whether the system is in need of revision); Peabody, *Recovering the Political Constitution*, *supra* note 54, at 46 (noting that each branch brings a distinctively positive quality to the functions of government).

78. See, e.g., TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 209-54 (2001) (arguing that judicial review fosters a system that allows more groups access to the political process, and improves prospects for achieving a stable and reliable political consensus); Christopher Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348-49 (1994) (offering a middle ground to the debate over judicial supremacy based on the belief that while no one branch has complete interpretive authority of the Constitution, there are occasions when one institution may give deference to another); Lee H. Hamilton, *War Powers: Revise Resolution to Make It Work*, WALL ST. J., Mar. 20, 1989, at A14 (discussing Congress's role in decisions about war).

79. See, e.g., JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 182-211 (1994) (providing an overview and history of how Presidents have used their office to influence congressional deliberations); ARTHUR MAASS, *CONGRESS AND THE COMMON GOOD* 13-18 (1983) (examining the interaction between the President and Congress, as well as their distinctive roles in formulating policy).

80. Sam Ervin, *The Case Against Reform: A Nobler Purpose than Political Efficiency*, in *THE SENATE INSTITUTION* 194 (Nathaniel Stone Preston ed., 1969).

this capacity is contingent upon only a *partial* separation or division of governing authority in our constitutional system. As John DiIulio and Donald Kettl note, “[s]ince the end of World War II, virtually every major [federal] domestic policy initiative in the United States has involved state and local governments: Medicare, Medicaid, antipoverty, interstate highways, environmental cleanup, and much, much more.”<sup>81</sup> In an extended republic like the United States, there is no likely alternative to using state officials as administrators of federal policies. Among the advantages of this administrative reliance on states is the possibility of tailoring putatively uniform national policies to local or regional circumstances so that they better address political and popular needs and interests.<sup>82</sup>

While some lament the degree to which this federal-state division of labor “impedes efforts to secure the necessary public capacity for achieving policy objectives equitably and efficiently across the nation,”<sup>83</sup> this charge reiterates what we think is the somewhat misplaced emphasis of scholars in the parliamentary tradition. These critics view separation of powers as an impediment to the goal of governmental efficiency without recognizing the benefits that the system may induce, such as the inclusion of state officials’ voices in deliberations and implementation decisions, and the consensus-building opportunities it affords by engaging multiple sets of elected officials in the process.<sup>84</sup> If one assumes an overall vision of politics that is open-ended, agonistic, ongoing, and pluralistic, our conception of separated powers and state and federal interaction may be more attractive and pragmatic than that offered by the “unifying” approach.

Finally, the separation of powers, rather than being an impediment to the functioning of government, can be used as the means of *resolving* intra- or intergovernmental impasses. As a federal appeals court noted, “the resolution of conflict between the coordinate

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81. JOHN J. DI IULIO & DONALD F. KETTL, *FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM* 16 (1995).

82. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 672 (2001) (noting that the federal government’s growing practice of delegating the implementation of federal laws to the states stems in part from the fact that “state governments have become increasingly competent in economic regulation and public administration.”).

83. DAVID B. ROBERTSON & DENNIS R. JUDD, *THE DEVELOPMENT OF AMERICAN PUBLIC POLICY: THE STRUCTURE OF POLICY RESTRAINT* 3 (1989).

84. See generally James W. Ceaser, *In Defense of Separation of Powers*, in *SEPARATION OF POWERS*, *supra* note 35, at 173 (noting that many separation of powers critics complain specifically that the system “lacks a strong, unitary policymaking system situated in some kind of executive officer”).

branches . . . [is] an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system.”<sup>85</sup> Although the branches are often said to check one another (implying that one branch halts the actions of another), permanent impasses are exceedingly rare. Louis Fisher has characterized relations among the national branches of government as “an intersection where congressional and presidential interests converge,” and he notes that “[d]espite the heavy traffic, head-on collisions are rare. Instead, individual drivers merge safely at high speeds.”<sup>86</sup>

The infrequency of these impasses and collisions can partly be attributed to the ways in which the separation of powers establishes essential, iterative interbranch (and intergovernmental) procedures that provide numerous opportunities to revisit entrenched positions and make clear the political stakes of non-cooperation. As Ann Stuart Anderson argues, “[p]owers were divided to make possible their effective use. To this end, constitutional means (checks) were provided for each political (legislative and executive) branch. The purpose of a check . . . was to *prevent* deadlock, not to create it.”<sup>87</sup> A presidential veto, for example, does not stop the legislative process, but rather indicates what the next step must be: a reconsideration of the bill by Congress in order to determine whether it has supermajority support in each house.<sup>88</sup> Similarly, the Senate’s rejection (or threatened rejection) of a presidential nominee sets the stage for a new round of interbranch discussions about the sort of

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85. *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977).

86. LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* xi (4th ed. 1998) [hereinafter FISHER, *POLITICS OF SHARED POWER*].

87. Ann Stuart Anderson, *A 1787 Perspective on the Separation of Powers*, in *SEPARATION OF POWERS*, *supra* note 35, at 144; *see also* SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 386 (1993) (noting that the aim of American constitutionalism is “not to put a brake on popular government but to make it work”).

88. *See* CHARLES M. CAMERON, *VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER* (2000) (describing how Presidents use vetoes and veto threats to shape legislation and gain concessions from Congress); *see also* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 109-11 (Robert A. Goldwin & William A. Schambra eds., 1980) (asserting that the presidential veto is an important tool for facilitating, not stifling, deliberation); Peabody, *Recovering the Political Constitution*, *supra* note 54, at 111-53 (analyzing the use and conception of the veto between 1789 and 1988, with an emphasis on its parameters as well as on the politics underlying the veto message).

nominee who would win the Senate's approval.<sup>89</sup> Scholars have attributed similar dynamics and results to federalism arrangements.<sup>90</sup>

By intertwining major institutional operations between the various branches of government, the separation of powers also ties the achievement of different actors' goals to enduring partnership. Because many of our most significant political powers depend upon the authority of more than one unit of government, even the most self-interested and confrontational political figures are likely to want to work with the other branches, at the very least to construct a stable environment in which everyone can pursue their chosen ends.<sup>91</sup> As Elster and Slagstad forewarn, "if all institutions [were] up for grabs all the time . . . there would be large deadweight losses arising from bargaining and factionalism."<sup>92</sup>

Similarly, while Madison characterized intergovernmental relations in terms of the ability of state governments to "resist and frustrate" the actions of the national government,<sup>93</sup> state and national officials typically overcome their differences and reach resolutions that both can accept. Despite the existence of the Supremacy Clause in the Constitution,<sup>94</sup> state-federal relations today rarely involve one level of government attempting to stop the other in its tracks by using legalistic assertions of supremacy or privileged sovereignty. Instead, state-federal relations today are typified by negotiation, exhortation, and compromise.<sup>95</sup> These bargains take place in such contexts as

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89. See generally FISHER, *POLITICS OF SHARED POWER*, *supra* note 86, at 118-20, 155-60 (discussing the interplay that exists between the President and Senate on the issue of president appointments and nominations).

90. See John E. Petersen, *States and the Markets*, in 15 *GOVERNING: THE MAGAZINE OF STATES AND LOCALITIES* 11, 58 (2002) (noting that "[o]ne of the virtues of our expensive and convoluted system of federalism is that if one level is stymied, another will act").

91. This analysis suggests additionally that separate institutions may have reasons to protect some of the power and prerogatives of their competitors. See, e.g., Mark Graber, *The Non-Majoritarian Problem: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 44 (1993) (explaining that judicial review can sometimes provide great benefit to the other two branches of government by "removing from the political agenda issues that are disruptive to existing partisan alignments"); Paulsen, *supra* note 36, at 337-40 (describing circumstances when the executive may refrain from exercising his interpretive authority over the Constitution in order to avoid potentially harmful conflicts with the U.S. Supreme Court).

92. JON ELSTER & RUNE SLAGSTAD, *CONSTITUTIONALISM AND DEMOCRACY* 9 (1988).

93. *THE FEDERALIST* NO. 46, at 295 (James Madison) (Clinton Rossiter ed., 1961).

94. U.S. CONST. art. VI.

95. See DONALD H. HAIDER, *WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING* 308 (1974) (noting that the federal government's power over the states is "severely limited"); see also Martha Derthick, *American Federalism: Madison's Middle Ground in the 1980s*, 47 *PUB. ADMIN. REV.* 66, 67 (1987) (asserting that because Congress has relied on the cooperation of the states in performing domestic duties, the federal government and the states are very dependent upon each other); WRIGHT, *supra* note 60, at 40-43 (stating that the

state applications for waivers from federal program requirements,<sup>96</sup> as well as in the development of state implementation plans and environmental performance partnership agreements for policies such as the Clean Air Act and Clean Water Act.<sup>97</sup> As with deliberations involving Members of Congress or the President, intergovernmental relations are frequently slow and contested.<sup>98</sup> The resulting policies and administrative partnerships, however, are often improved as a result of this process.

*C. The Separation of Powers and the Different "Levels of Governance"*

In addition to considering how federalism contributes to our system of separated powers, and emphasizing affirmative or constructive aspects of this system, we also contend that separated powers operate on at least four distinguishable, but interdependent levels or arenas. Discerning these four levels is valuable, we believe, because it enables us to be analytically clear and systematic, supports our contention that vital features of separated powers have been somewhat neglected, and allows us to argue, ultimately, that tracing controversies through these different levels can help identify and understand contemporary problems related to the malfunctioning and "breakdown" of the separation of powers system.

Most scholarship on this issue presumes that either the distinct ways in which particular federal officials are selected or the division of specific constitutional powers serve as the key features of separated powers.<sup>99</sup> We identify several additional ways in which powers seem to

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collaboration between the states and federal government has existed throughout the 19th and 20th century, but that its significance is questionable).

96. See MARK GREENBERG & STEVE SAVNER, CENTER FOR LAW & SOCIAL POLICY, WAIVERS AND THE NEW WELFARE LAW: INITIAL APPROACHES IN STATE PLANS (1996) (discussing how states choose to comply with the welfare reforms of 1996 and apply for a waiver that was in effect before passage of the law), available at <http://www.clasp.org/DMS/Documents/1037121552.82/newwelf.html> (on file with the American University Law Review); Saundra K. Schneider, *Medicaid Section 1115 Waivers: Shifting Health Care Reform to the States*, PUBLIUS, Spring 1997, 89, 90 (describing how states are working under federally granted waiver authority to formulate new and innovative techniques for implementing their Medicaid programs using Section 1115 waivers).

97. See David N. Cassuto, *Nastygram Federalism: A Look at Federal Environmental Self-Audit Policy*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 261, 271-82 (1999) (examining the conflict between the federal government and states regarding the Environmental Protection Agency's audit policy).

98. See BESSETTE, *supra* note 79, at 180-81 (noting that the time Congress and the President use to deliberate many policy issues often extends over "several, even many, Congresses").

99. See, e.g., DAHL, *supra* note 76, at 65 (describing the U.S. separation of powers system by emphasizing its division of powers and its mode of selecting the executive); WILSON, *supra* note 46, at 136 (arguing that "the Senate is just what the mode of its

be divided in the American constitutional context, involving areas of political life which are typically overlooked as essential elements of our system of “separated institutions sharing powers.”<sup>100</sup>

### 1. *General and fundamental sovereignty*

Scholars and statesmen have frequently and favorably invoked the notion that sovereignty, or the authority of the ultimate governing agent,<sup>101</sup> while formally retained by the people as a whole, is temporarily delegated by the separation of powers system.<sup>102</sup> For example, as James Wilson, a member of the Constitutional Convention and later an Associate Justice on the Supreme Court argued:

[Sovereignty] *resides* in the PEOPLE, as the fountain of government . . . . They have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare . . . they can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper.<sup>103</sup>

When thought of in this manner, “general sovereignty” in the context of American democracy appears to be so decisively influenced by the separation of powers that the very concept seems to lose its original, core definition. In the regular course of public affairs, we cannot

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election and the conditions of public life in this country make it”); Wechsler, *supra* note 62, at 544 (arguing that states protect their interests vis-à-vis the federal government through “their strategic role in the selection of the Congress and the President”)

100. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 33 (1960). We note that this discussion borrows generously, but departs from, an insightful account of separation of powers laid out by political scientist James Ceaser. See James Ceaser, *In Defense of Separation of Powers*, in *SEPARATION OF POWERS*, *supra* note 35, at 168-93 (asserting that contemporary arguments in favor of revising the separation of powers system are not only misguided, but also based on the mistaken notion that a parliamentary system would be more effective).

101. See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 166 (Wilfrid E. Rumble ed., 1995) (1832) (noting that sovereignty is a power characterized by the fact that a majority of the citizenry are habitually obedient to a “common superior” and that some citizens are *not* habitually obedient to any superior) (emphasis added).

102. See THOMAS HOBBS, *LEVIATHAN* 228-29 (C.B. MacPherson ed., 1985) (1651) (discussing how the rights of the sovereign are conferred upon it by the people); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 530 (1998) (noting that James Wilson originated the federalist argument that the sovereign power was in the people, who then gave portions of the power to the government as needed).

103. James Wilson, *Pennsylvania Ratifying Convention of 1787*, quoted in WOOD, *supra* note 102, at 530; see also *THE FEDERALIST* NO. 78, at 464-72 (Alexander Hamilton) (Clinton Rossiter ed., 1961); ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 228-35 (Sanford Levinson ed., 2000) (discussing the relationship between “popular sovereignty” and “fundamental law” in American constitutional history).

claim that the U.S. population as a whole is genuinely exercising its ultimate arbitral powers. Indeed, ordinarily it is not possible to discern even which delegate of the people has a claim to “final” governing authority, as this power is continually dispersed and contested within the federal government and between the federal government and the states.

The separation of powers operates in a more apparent and specific way at what we might identify as a level of “fundamental sovereignty,” understood as “the power to form and modify the basic character of the government, determining its powers and its structure.”<sup>104</sup> The Constitution establishes a formal legal mechanism for altering the structure of government in Article V, identifying the states, acting in several capacities, and the Congress as the possible movers of this process.<sup>105</sup> This division of responsibility represents a compromise between a more state-oriented approach to sovereignty (such as that found under the Articles of Confederation) and more federal and popular forms.<sup>106</sup>

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104. Ceaser, *supra* note 100, at 174.

105. See U.S. CONST. art. V (outlining the formal process for proposing and ratifying amendments to the U.S. Constitution). As Ceaser notes, this power of fundamental sovereignty also exists in a “primitive” form “with the body of the people in the right of revolution.” Ceaser, *supra* note 100, at 174; cf. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 259-65 (1993) (differentiating the Founders’ expectations of how the doctrine of the separation of powers would be used from modern practice); KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 121-27 (2001) (examining the underpinnings of separation of powers alongside the doctrine of popular sovereignty); Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519 (1997) (asserting that the Constitution is interpreted in different ways according to the generation that is in power, and based on the popular attitudes, beliefs, and mores of the time); Jack Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1703-04 (1997) (discussing barriers to “constitutional fidelity” by the public, particularly the Constitution’s continued allowance of injustice); Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13-24 (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*] (discussing how to determine the boundary between questions that require constitutional interpretation and those that require constitutional amendment); Keith Whittington, *From Democratic Dualism to Political Realism: Transforming the Constitution*, 10 *CONST. POL. ECON.* 405, 405 (1999) (critiquing the assertion that the Constitution can and has been amended through means other than those provided for in Article V, and the idea that the meaning of the Constitution is dependent upon who is in power).

106. See generally RICHARD PARKER, *HERE, THE PEOPLE RULE* (1994) (attempting to dispel the belief that the Constitution was designed to restrain “populist democracy” by arguing that the political energy of ordinary people defines the attitudes and shape of American democracy); Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, *supra* note 105, at 89-115 (examining popular sovereignty in relation to the process of amending the Constitution).

## 2. *Primary powers*

In addition, the separation of powers applies to the exercise of “primary powers,” that is, to legislative, executive, and judicial authority. While each of the three federal departments has basic oversight and responsibility for exercising the fundamental powers of government, these responsibilities are also shared with state authorities and amongst the federal departments.<sup>107</sup> For example, although legislative power is distinctively associated with Congress, the President has considerable claim to exercising this power as well, contributing to the lawmaking process through the presidential veto and the power to propose legislation. Similarly, executive authority under the Constitution is partially shared between Congress, the states, and the President. Consider, in this regard, congressional oversight authority over presidential actions, and, more controversially, the legislature’s involvement with constitutional war powers, and the confirmation process for many executive appointments.<sup>108</sup>

## 3. *The political-electoral level*

As already indicated, the separation of powers also operates on what we might call a political-electoral level insofar as each federal branch and the states have different methods for selecting their public officials (often occurring in entirely different election cycles).<sup>109</sup> The importance of this aspect of separated powers is clear enough: each division of government requires some level of autonomy and independent power to secure its desired ends and promote the overall goals, both negative and positive, of separated powers. In the words of *The Federalist*:

[I]n order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, 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

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107. See Harold J. Krent, *Fragmenting the Unitary Executive: Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 80-83 (1990) (discussing the extensive delegation of federal power to states including the enforcement of federal laws and implementation of federal programs).

108. See generally FISHER, POLITICS OF SHARED POWER, *supra* note 86 (focusing primarily on areas where the constitutional separation of powers affects the interactions between and duties of the executive and legislative branches).

109. Consider, for example, that only twenty-two percent of states elect their governors in years in which there is a presidential election. MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2004, at 1788 (2003).

have as little agency as possible in the appointment of the members of the others.<sup>110</sup>

These different modes of selection influence the agendas, claims to authority, and political outputs of each of the Constitution's units of governance.<sup>111</sup>

#### 4. Policy

Finally, and closely related to these prior observations, we believe that the separation of powers functions in a distinctive way in shaping how public policies are developed, adopted, and administered.<sup>112</sup>

While the separation of powers is clearly not the only determinant of the character of our policy process, in most instances an observer would be hard pressed to explain how U.S. policy is formed and implemented without some reference to the fractured ways in which political authority is distributed between various institutions of governance.<sup>113</sup>

One can perhaps see the separation of powers operating at the level of the policy process most clearly in political contexts where constitutional divisions seem to be overcome in other ways. For

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110. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

111. A vast collection of literature discusses how the distinctive electoral "connections" affect the political responsibilities and capacities of the different federal departments. See ROGER H. DAVIDSON, THE ROLE OF THE CONGRESSMAN 110-39 (1969) (noting that representatives' actions and policies are affected by their constituents' demands); see also SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP 1-4 (1996) (explaining that representatives may be forced to support policies promoted by the federal government, which they otherwise would not support, because of appeals made directly to the representatives' constituencies by high-ranking government officials); JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 30-31 (3d ed. 1989) (indicating that congressmen with similar constituency demands may influence each other's voting decisions); Larry Bartels, *Constituency Opinion and Congressional Policymaking: The Reagan Defense Buildup*, 85 AM. POL. SCI. REV. 457 (1991) (asserting that defense spending increased significantly in the fiscal year 1982 as a result of constituency demand); Erik Gartzke & J. Mark Wrighton, *Thinking Globally or Acting Locally: Determinants of the GATT Vote in Congress*, 23 LEGIS. STUD. Q. 33, 35 (1998) (noting that "the theoretical association between constituency interest and congressional roll-call voting is sound"); Keith Whittington, *Oppositional Presidents and Judicial Negotiations: Judicial Authority in Political Time* (Sept. 3-6, 1998) (unpublished manuscript, on file with the American University Law Review) (arguing that the political conditions surrounding Presidents when they are elected decisively influence their capacity to contribute to constitutional interpretation and oppose the courts).

112. See KORN, *supra* note 15, at 12 (maintaining that separating the executive, legislative, and judicial branches "preserves the independent capacity of each of them to fulfill its particular tasks").

113. See ROBERTSON & JUDD, *supra* note 83, at 16 (observing that fragmented national government power remains today, demonstrated by the process of policy making which requires approval by the legislative branch, the executive branch, and review by the U.S. Supreme Court). This point also seems to be implicit in the basic orientation of positive political theory.

example, despite the presence of large congressional majorities of what was at least nominally his own party, President Jimmy Carter was frequently at odds with Congress over policy matters, most notably those involving energy issues.<sup>114</sup>

### 5. *Interdependence*

Although logically distinguishable, and sometimes also distinct as a matter of practice, the four elements of separated powers just delineated are clearly interconnected. Separation of powers disputes at one level frequently overrun into another arena.<sup>115</sup> While not every policy debate has constitutional implications and not every interbranch constitutional contest has immediate policy consequences, in many instances these interbranch disputes are fought over multiple levels at once. Debates about the constitutional powers and responsibilities of each branch, for example, do not ordinarily emerge *de novo*, but rather are typically nested in policy-based disagreements between political actors. While the result is that inherently constitutional issues are typically freighted with other political concerns and agendas, the resulting “dialogues” about constitutional questions take place with some relevant political context including a sense of the stakes and long-term implications of the discussion.<sup>116</sup>

Consider, in this regard, that the controversy over whether the Bush Administration was obligated to release the records of Vice President Richard Cheney’s National Energy Policy Group to the General Accounting Office partly stemmed from disagreements about the appropriate content of U.S. national energy policy, as well as who should serve as the authors of that policy.<sup>117</sup> What began as a policy initiative turned into both an institutional and a constitutional issue once the Administration claimed that executive privilege

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114. SUNDQUIST, *supra* note 47, at 165-66; *see also* KREHBIEL, *supra* note 76, at 157-59 (asserting that a unified government does not mean complete compatibility between the executive and legislative branches).

115. *See generally* Fisher, *Separation of Powers*, *supra* note 10, at 65-93 (discussing the separation of powers disputes between the three branches, including disputes over presidential veto power, the legislative veto, and war power issues).

116. This political context is obviously absent in many of the decisions of European constitutional courts which frequently inspect constitutional questions “a priori” and “in the absence of a real case or controversy.” *See* Lee Epstein, *The Comparative Advantage*, 9 LAW & CTS. 1, 4 (1999) (describing the European constitutional court system).

117. *See, e.g.*, Neely Tucker, *Suit Versus Cheney is Dismissed; Judge Gives Administration Broad Victory on Oversight*, WASH. POST, Dec. 10, 2002, at A1 (maintaining that the records were sought because environmental groups were concerned that the Administration excluded environmental issues when developing its energy policy).

relieved them of the obligation to make public the records of the Group's meetings, despite the apparent applicability of the public notification provisions of the 1972 Federal Advisory Commission Act to such task forces.<sup>118</sup> Similar issues were raised by then-First Lady Hillary Clinton's service on the Clinton Administration's health care reform task force.<sup>119</sup>

*D. The Polymorphism of the Separation of Powers*

As already indicated, in contrast with some legal analysis, we do not focus on the separation of powers as an end in itself, but see it as a set of arrangements designed to promote multiple goals, each potentially fulfilled at several levels or layers of governance. Therefore, in our view, honoring the principles of the separation of powers does not entail dividing authority and functions between federal government and the states in order to distribute a reserve of undifferentiated political power evenly or safely. Instead, the separation of powers ties different functions and traits essential for governance and different kinds of power to distinct institutions in order to promote accountability, effective policymaking and administration, and political legitimacy, among other goals.

As a consequence, constitutional institutions can facilitate some or all of the goals of the separation of powers system through a variety of political configurations and behaviors. Changes in relationships and power arrangements between the executive, legislative, and judicial branches and the states may point less to overall system instability and incoherence, than to the differing capacities and opportunities of the various branches and the changing political priorities of the nation in different historical and legal contexts.<sup>120</sup> Moreover, the failure or inability of a branch or level of government to protect some element of the separation of powers system might be compensated for by a different political institution—perhaps temporarily acting outside of its traditional role. In short, as we see it, the separation of powers can

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118. *See id.* (noting the judicial finding that the General Accounting Office, the investigative arm of Congress, did not have the power to bring suit to enforce its request for information from the Administration because of separation of powers concerns).

119. *See, e.g.,* Charles Lane, *A Washington Battle Often Fought Before: Familiar Issues Underlie GAO-White House Dispute*, WASH. POST, Jan. 30, 2002, at A1 (stating that questions of confidentiality surrounded President Clinton's health care policy task force).

120. *See* THE SEPARATION OF POWERS: DOCUMENTS AND COMMENTARY, *supra* note 34, at 17 (observing that the boundaries of the executive, legislative, and judicial powers have shifted over time due to changes in the political environment).

assume a variety of forms, none of which is prima facie worse than another simply because it deviates from even a well-established status quo.

Because our approach may seem evasive or impermissibly open-ended, we note, in passing, that important intellectual traditions comport with the basic view that multiple configurations of our separation of powers are possible as well as normatively acceptable. Perhaps the earliest sources of this view are the authors and leading proponents of the Constitution themselves. Reading the key essays in which Madison sketches the sorts of intergovernmental and interdepartmental dynamics he expected would perpetuate the constitutional system,<sup>121</sup> one is struck by their emphasis on vibrant and developmental processes rather than prescribed outcomes and fixed institutional arrangements. Indeed, Madison's linkage of tyranny with "[t]he accumulation of *all powers*, legislative, executive, and judiciary, *in the same hands*" sets a high bar for abuse of power, and seems to imply a broad spectrum of less alarming and perhaps even desirable institutional configurations and power sharing.<sup>122</sup>

The "polymorphic" approach we have been outlining is applicable in state-federal relations as well. As Woodrow Wilson famously noted:

The question of the relation of the States to the federal government . . . cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question . . . . The subject matter of this definition is the living body of affairs. To analyze it is to analyze the life of the nation.<sup>123</sup>

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121. See generally THE FEDERALIST NOS. 45-51 (James Madison) (Clinton Rossiter ed., 1961).

122. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). Our reading of the separation of powers, emphasizing (1) specific features and goals of this system, (2) the considerable variation that the Constitution allows in realizing these complex and sometimes conflicting objectives, and (3) the benefits that accrue from this basic structural indeterminacy, is also somewhat reminiscent of an argument made by Philip Bobbitt about the enterprise of constitutional interpretation itself. According to Bobbitt, constitutional interpretation is defined by particular "modalities" that can be combined and applied in a variety of ways to reach fundamentally defensible readings of the constitutional text. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-12 (1991). This indeterminacy is a strength in constitutional interpretation: the modalities "taken as a group . . . enable justice, not because they are determinate but . . . precisely because they are *not* determinate, i.e., do not specify unique results." *Id.* at 31-32.

123. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173-74 (1908). See also THOMAS J. ANTON, AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS 208 (1989) (arguing that the Constitution provides insufficient

Wilson implies that the relationships and even the objectives of federalism are contingent and evolutionary, and are not dependent upon a fixed process or static set of goals, premised, for example, on dividing federal-state power chiefly to block the actions of the respective governments.

*E. Nonjudicial Actors and the Maintenance of the Separation of Powers*

In addition to the observations already made, we believe that maintaining the complex goals of separated powers and safeguarding the integrity of each branch depends upon the active participation and “self-regulation” of explicitly political actors (Congress, the President, and the states) rather than just the courts. Indeed, the judiciary, we argue, should be reluctant to enter separation of powers disputes, although we do offer some general conditions under which judicial review of such interbranch conflict would be necessary.

It is almost a truism to observe that while the Constitution outlines the basic powers that each branch of government may exercise, these grants of authority are ambiguous in many cases and must be further constructed and applied.<sup>124</sup> Traditionally, scholars, lawyers, and political practitioners have accorded the judiciary privileged authority to remove this ambiguity in individual cases, including, or perhaps especially, when it comes to creating and applying doctrine that will give meaning to our commitment to separated powers.<sup>125</sup> In the common view, the federal court system, with the Supreme Court sitting in ultimate judgment, is the appropriate referee in competitions for power between the political branches and the different levels of government.<sup>126</sup> The Court can provide fair legal standards and rules to divide the authority of Congress, the President, and the states; left to their own, this view holds, these branches and

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guidance for definitively resolving questions about the scope of federal power); PAUL L. POSNER, *THE POLITICS OF UNFUNDED MANDATES: WHITHER FEDERALISM?* 223 (1998) (arguing that “all partners in the federal system have attempted to use one another to achieve their own policy goals, regardless of the traditional boundaries implicit in a federal system”).

124. See WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 35, at 207-08 (explaining that the Constitution’s silence and ambiguity on many issues empowers political officials to construct constitutional meaning in these legal interstices).

125. See WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*, *supra* note 105, at 1-2 (maintaining that although other government officials may interpret constitutional text, the U.S. Supreme Court is understood to be the major interpreter of the Constitution).

126. See Tebben, *supra* note 63, at 51 (discussing the arbiter role of the Supreme Court); Paul A. Freund, *Umpiring the Federal System* 54 *COLUM. L. REV.* 561-78 (arguing that in the American constitutional order, “the courts may be conceived of as umpires determining what kinds of contests are permissible” among levels and branches of government).

governments would be unable to articulate consistent, principled constructions of their powers, responsibilities, and limits.<sup>127</sup>

Obviously, a number of scholars have dissented from these conclusions about the Court's competence, authority, and unique obligation to resolve disputes over the separation of powers<sup>128</sup> and federalism disputes.<sup>129</sup> These critics contend, *inter alia*, that the judiciary is not always able to foresee the implications of its decisions and that the Court's entry into interbranch and intergovernmental disputes often short-circuits a beneficial process for resolving constitutional ambiguities (and securing other political goals)<sup>130</sup> Others note the institutional benefits that accrue to the Court when it steers clear of interbranch disputes, especially those that threaten to become "unequal contests" between the judiciary and a well-formed political consensus.<sup>131</sup>

In large measure, we are sympathetic to these concerns, and we arrive at similar conclusions. In many cases, separation of powers disputes do seem to call for judgments beyond the judiciary's expertise.<sup>132</sup> Frequently, members of the legislative and executive

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127. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 249 (1962) (arguing that legislators are less able than judges to achieve a "bias-free perspective" and resist popular pressures that conflict with proper judgment).

128. See, e.g., CHOPER, *supra* note 62, at 263 (arguing that the federal judiciary should not be allowed to decide constitutional questions concerning distribution of power between Congress and the President); FISHER, *POLITICS OF SHARED POWER*, *supra* note 86, at XII (suggesting that the process of judicial review is more political than legal); ROZELL, *supra* note 16, at 151-53 (concluding that constant judicial intervention in political controversies is undesirable); Fisher, *Separation of Powers*, *supra* note 10, at 57 (asserting that the U.S. Supreme Court is limited in its ability to resolve separation of power issues); Paulsen, *supra* note 36, at 221 ("The power to interpret law is not the sole province of the judiciary; rather, it is a divided, *shared* power not delegated to any one branch but . . . to . . . all of them . . .").

129. See, e.g., Larry Kramer, *But When Exactly Was Judicially Enforced Federalism "Born" in the First Place?*, 22 HARV. J.L. & PUB. POL'Y 123, 135-36 (1998) (concluding that the political system resolves issues of federalism more successfully than intervention by the U.S. Supreme Court); Moulton, *supra* note 61, at 895-96 (arguing that the U.S. Supreme Court's recent promotion of federalism was a failure); Cross, *supra* note 61, at 1309 (stating that judges support federalism in order to promote certain policy objectives).

130. See ROZELL, *supra* note 16, at 153 (maintaining that informational conflict between the political branches would be better settled by the branches themselves than through judicial intervention).

131. See PHILIPPA STRUM, *THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION* 142 (1974) (explaining that the political question doctrine allows the Court to restrain itself from deciding issues that may "tear the always delicate social fabric"); MCCLOSKEY, *supra* note 103, at 228-35 (discussing the benefits of the Supreme Court's doctrinal flexibility and responsiveness to changes in the public ethos). *But see* WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER* 255 (1988) (noting that the U.S. Supreme Court has repeatedly ruled contrary to majority opinion).

132. See Whittington, *supra* note 76, at 813 (arguing that the Supreme Court's ability to "provide principled deliberation on constitutional values" is questionable); Fisher, *Separation of Powers*, *supra* note 10, at 57-59 (stating that the Supreme Court

branch are able to resolve disagreements about the limits and boundaries of constitutional powers on their own,<sup>133</sup> and states and the federal government similarly work out many of their conflicts through political means. Judicial intervention into these disputes may needlessly unsettle longstanding and widespread political consensus.<sup>134</sup> In still other circumstances, the resolution of separation of powers questions may demand distinctively political information that is easy for the judiciary to misread or misapply,<sup>135</sup> such as understanding executive and legislative perceptions of whether their core powers are being encroached upon or not.

In *Bowsher v. Synar*, for example, the Supreme Court invalidated a provision in the Gramm-Rudman-Hollings Act of 1985 allowing the Comptroller General to specify where required budget cuts would occur if Congress could not reach agreement first.<sup>136</sup> *Bowsher* essentially turned on two assessments: whether the Comptroller General was (1) functionally independent or an agent of Congress,<sup>137</sup> and (2) whether his (in this case) power to specify budget cuts was essentially an executive function.<sup>138</sup>

On the first question, the Court determined that the “critical factor” was Congress’s power to remove the official; the Court cursorily dismissed the claim that the Comptroller General might act independently despite this legislative control.<sup>139</sup> On the second issue,

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only plays a limited role in separation of power disputes because the disputes encompass too many issues for the Court to address).

133. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* 296 (1997) (noting that the legislative and executive branches, not the judicial branch, were the original interpreters of constitutional arguments regarding separation of powers); FISHER, *POLITICS OF SHARED POWER*, *supra* note 86, at 18-19 (recounting the Nixon Administration’s debate with the legislative branch regarding pocket vetoes, which was settled without the assistance of the U.S. Supreme Court).

134. See Fisher, *Separation of Powers*, *supra* note 10, at 59-60 (pointing out that the U.S. Supreme Court’s decision regarding the legislative veto has been largely ignored because of its incompatibility with political consensus).

135. Scott D. Gerber et al., *Symposium on Impeachment*, 8 *LAW & CTS.* 4 (1998) (including discussions by several scholars who suggest that understanding the meaning of impeachable “high crimes and misdemeanors” requires judgments about public support and the executive’s likely ongoing effectiveness).

136. *Bowsher v. Synar*, 478 U.S. 714, 721-34 (1986). The Comptroller General is an official nominated by the President from a short list provided by Congress. He or she can be removed from office by a joint congressional resolution. *Id.*

137. *Id.* at 727, 732; see William Haltom, *Separating Powers: Dialectical Sense and Positive Nonsense*, in *JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING* 127, 134 (Michael W. McCann & Gerald L. Houseman eds., 1989) (noting that the majority in *Bowsher* found that the Comptroller General was under the “coercive control” of Congress).

138. See Haltom, *supra* note 137, at 127, 134 (remarking that the Supreme Court found the Comptroller General’s responsibilities were executive in nature).

139. *Bowsher*, 478 U.S. at 727-32; see Haltom, *supra* note 137, at 137 (observing that

the Court majority invoked a rather formalistic understanding that the Constitution forbids Congress from intruding in executive functions.<sup>140</sup>

On both matters, we believe, the Court's decision would have been valuably supplemented by a more thorough exploration of, and deference to, the understandings and experiences of executive and legislative officials who worked with the Comptroller General and who served under the law. For example, notwithstanding the Court's view that the "removability" issue disposed of the question of the Comptroller General's (lack of) independence from Congress, we think such an inquiry, while difficult, especially for judicial agents removed from political settings, is entirely proper in assessing different separation of powers arrangements.<sup>141</sup>

We note that when the judiciary does attempt to resolve interbranch disputes or revisit settled understandings between the branches, we should not be surprised, given the opportunities each branch has to intercede into the activities of the others, when these efforts are frustrated. Even relatively unambiguous pronouncements by the Court can obviously be resisted, slowed, undercut, and even quietly or openly disavowed, and the states as well as legislative and executive branches can find alternate ways to assert their constitutional understandings.<sup>142</sup> Reducing the profile of the courts

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because Congress could remove the Comptroller General for actions other than "high crimes and misdemeanors" required for impeachment, the Comptroller General was not independent of Congress).

140. *Bowsher*, 478 U.S. at 732-34; see Haltom, *supra* note 137, at 138-39 (noting that the Supreme Court found that the Comptroller General was exercising executive power in violation of the separation of powers doctrine).

141. See generally FISHER, POLITICS OF SHARED POWER, *supra* note 86, at 191-206 (discussing separation of power arrangements arising from the Constitution, such as delegating to Congress the power to declare war, but naming the President as Commander-in-Chief). Similarly, in a number of war powers cases, the courts have treated congressional reticence over actions taken by the executive as authorization of these measures—certainly not an obvious conclusion, and one better asserted (or denied) by the legislature itself. See LOUIS FISHER, PRESIDENTIAL WAR POWER 130 (1995) [hereinafter FISHER, PRESIDENTIAL WAR POWER] (discussing court cases in which Congress's past appropriations or lack of objection have been construed as sanctioning executive action).

142. See generally KEVIN T. MCGUIRE, UNDERSTANDING THE U.S. SUPREME COURT: CASES AND CONTROVERSIES 165-97 (2002) (explaining the responses of Congress and other political entities to the Supreme Court's decision about the legality of congressional attempts to control campaign finance in federal elections). The Court's invalidation of the legislative veto in *INS v. Chadha*, 462 U.S. 919 (1983), illustrates effectively a number of these points. As Louis Fisher has noted, *Chadha* struck down the executive and legislative branch's longstanding understanding that these arrangements comported with the institutional interests of both branches and did not compromise core constitutional functions of either. At the same time, the decision was widely ignored and circumvented. Fisher, *The Legislative Veto*, *supra* note 15, at 273-75. Indeed, given the pervasiveness of the separation of powers and its

as arbiters of separation of powers disputes is surely a helpful but not sufficient condition for furnishing nonjudicial officials with the time, opportunities, and incentives to resolve disagreements about separated powers on their own.<sup>143</sup>

As noted previously, we do not suggest that the judiciary should never intervene in separation of powers conflicts.<sup>144</sup> But we do think this intervention should be infrequent, restrained, and guided by the following principles. First, in order to provide the various branches of government sufficient opportunity to resolve interbranch disputes on their own, and to construct an adequate record for judges to assess, court rulings ought to be delayed and retrospective. The judiciary should, to the best of its ability, resist efforts to become embroiled in interbranch disputes while they are still unfolding. In short, separation of powers disputes ought to be allowed ample time to play themselves out through political processes before judicial intervention occurs.

Second, when the judiciary does intervene in disagreements over the authority or powers of the different divisions of government, it should attempt self-consciously to address how its ruling will affect the various levels at which the separation of powers operate.<sup>145</sup> For example, judicial assessment of the War Powers Act should consider not just the application of this measure as a particular piece of legislative policy, but how it impacts the constitutional allocation of authority (and assumption of responsibility) to wage and oversee war.

As a final guideline for judges wading into separation of powers conflicts, we offer the belief that the judiciary is probably most qualified to enter into these controversies where, for whatever reasons, the assumptions set out in this Article seem least likely to apply. That is, the courts have a special obligation to judge separation disputes where the ordinary political processes for debate, compromise, resolution, and reworking these issues are “blocked”—where one branch consistently wields the upper hand, for example,

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numerous mechanisms for interbranch oversight and control, Congress found a variety of tools to help it perform functions similar to the legislative veto. *See, e.g.*, KORN, *supra* note 15, at 43-44 (describing the report-and-wait provisions Congress uses as an informal legislative veto).

143. *See, e.g.*, Fisher, *Separation of Powers*, *supra* note 10 (providing examples of nonjudicial officials resolving conflicts about constitutional meaning with little intervention by the judiciary).

144. Here we differ from Jesse Choper, who elucidates conditions under which the judiciary should refrain specifically from entering separation of powers disputes, namely where “constitutional questions [arise] . . . concerning the respective powers of Congress and the President vis-à-vis one another.” CHOPER, *supra* note 62, at 263.

145. *See* discussion *supra* Part III.C.

to the exclusion of the others.<sup>146</sup> In those areas of political life where the institutional incentives and routines frustrate or bypass the dynamic, contested, iterative process we have described earlier in this piece, the judiciary has a special (if difficult) role to play in trying to dislodge this stasis.

How do we identify this subset of separation of powers cases where the courts should be especially active? While the topic requires a more extended treatment than we are willing to provide here, some of the favorable indices for heightened judicial scrutiny might include the following factors:

First, we favor more aggressive judicial review of separation of powers issues when some or all of the institutions discussed in this Article are politically inert in areas of public life that are either of high contemporary salience or have historically been the object of substantial interbranch interest. At a minimum, this lack of activity seems to stray from the model of dynamic and contested politics sketched in this piece. It may further imply a degree of implicit or explicit institutional collusion, negotiation, or deference likely to cut against some of the goals of constitutionalism already outlined.

These concerns may be amplified or underscored when (a) they can be additionally linked to the sustained efforts of private parties to articulate and defend separation of powers principles or institutional prerogatives that are not pursued by governmental officials; (b) institutions advance novel powers or new claims to authority that are not countered or opposed by another branch or level of governance; (c) some of the “positive” goals of the separation of powers seem to be elided or frustrated by institutional inaction;<sup>147</sup> (d) significant constitutional powers appear to be invoked and applied more or less unilaterally and without controversy.<sup>148</sup>

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146. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 117 (1980) (arguing that “unblocking stoppages in the democratic process is what judicial review ought preeminently to be about”); THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (asserting that, when constitutional questions arise, “[t]he courts must declare the sense of the law”).

147. See Keith E. Whittington, *William H. Rehnquist: Nixon’s Strict Constructionist, Reagan’s Chief Justice*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 8, 26-28 (Earl M. Maltz ed., 2003) (arguing that some of Rehnquist’s separation of powers jurisprudence is better understood as an effort to protect the President’s capacity to perform his constitutional duties, rather than a commitment to formalism). We note that we would be inclined to allow more aggressive court intervention where, for example, political minorities (or majorities) assert consistent claims that their constitutional rights are being compromised by the political inertia of one or more branches. Consider, in this regard, the civil rights struggle either after the Civil War or in the 1950s and 1960s.

148. Our presumption here is that “significant constitutional powers” tend to rely on interbranch activity for their proper exercise.

We are also inclined to support greater judicial involvement in the area of separation of powers where there is widespread interbranch and popular consensus that judicial intervention is needed to address some concern or problem that would otherwise be ignored or mishandled.<sup>149</sup>

Finally, the courts should intervene more readily when interbranch disputes involve the judiciary itself and the parameters of its own power.<sup>150</sup> These are circumstances, after all, where we should expect courts to be able to express their institutional needs and purposes at least as well as anybody else.

### III. IMPLICATIONS OF THE NEW MODEL

The approach set out in this Article stresses aspects of political life that have generally not been treated concurrently as vital elements of the separation of powers system. But beyond suggesting the limits of mainstream scholarship on separated powers, what insights and special scholarly purchase is offered by our perspective?

It should be readily apparent that we consider the separation of powers to be a dominant feature and even the gravitational core of our nation's political life—it is not just a background assumption that helps to shape or frame the polity. As we see it, the separation of powers is central to American politics in several connected senses. To begin with, our basic structure of divided institutions and powers directly impacts a wide range of political phenomena, and not just major policy disputes and resulting litigation, the focus of many scholars.<sup>151</sup> In addition, our account serves as a reminder of an obvious point: federal institutions and the states are powerfully connected in a network of formal and informal, political and legal relations; it is therefore exceedingly rare that a branch of government can assert significant power in isolation, despite frequent attempts to do so.<sup>152</sup>

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149. We believe that the facts surrounding *United States v. Nixon*, 418 U.S. 683 (1974), qualify for this condition. See RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 155-60 (2001) (arguing *Bush v. Gore*, 531 U.S. 98 (2000), was a case that needed intervention because of popular consensus); Graber, *supra* note 91, at 36 (noting that the U.S. Supreme Court has engaged in judicial review “only when the dominant national coalition is unable or unwilling to settle some public dispute”).

150. ROZELL, *supra* note 16, at 153.

151. See THE SEPARATION OF POWERS: DOCUMENTS AND COMMENTARY, *supra* note 34, at 15 (broadly discussing the importance of the separation of powers in such areas as emergency powers, impeachment, delegation, and executive privilege).

152. See GINSBERG & SHEFTER, *supra* note 25, at 216 (arguing that “despite their various efforts, neither presidents nor Congress have acquired sufficient formal authority to govern autonomously”).

In advancing our arguments about federalism and the different “levels” at which separated powers operate, we also offer an expanded, and, we believe, more accurate account of a critical feature of American politics, a contribution that might prove valuable in a wide range of scholarly projects and even approaches to teaching American government. For example, our model suggests that researchers and teachers interested in evaluating the political effects of our constitutional commitment to separated powers will need to examine a more complex set of interbranch configurations than those traditionally considered.

As an additional significant contribution, we believe the perspective offered in this piece can help scholars and leaders assess whether various political developments, institutional activities, public policies, and proposed reforms are consistent with or run counter to the basic purposes and design of separated powers. An especially important aspect of this endeavor entails using the framework and precepts set out in this Article to identify, reflect upon, and help design solutions to pronounced problems or dysfunction in the separation of powers system.

In this vein, we note that our model often inclines us to see partial, diffuse, and systemic success where other commentators see regular political failure. Overall, we associate the separation of powers with disruptive, inexact divisions of power which are deliberately designed to intrude different institutions and levels of government into each other’s political activities for a variety of (sometimes contradictory) purposes, which are, admittedly, unevenly realized.<sup>153</sup> While in the eyes of some, these features will suggest disorder, uncertainty, instability, and inefficiency, to us, they point to our polity’s impressive combination of flexibility, dynamism, and stability, as well as its vast

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153. Cf. generally Karen Orren & Stephen Skowronek, *The Search for American Political Development*, Chapter 3 (unpublished manuscript, on file with the American University Law Review) [hereinafter Orren & Skowronek, *American Political Development*] (discussing innovative scholarship on institutional order and change in American politics); TULIS, *supra* note 36, at 3-4 (proposing that the institution of the presidency has increased its power over Congress through the use of popular or mass rhetoric); THE FEDERALIST NO. 48, at 308-13 (James Madison) (Clinton Rossiter ed., 1961) (asserting that legislatures have a tendency to usurp the power of other branches, and that a “mere demarcation on parchment” is insufficient to prevent a “tyrannical concentration” of power); Paulsen, *supra* note 36, at 221 (arguing that, consistent with the Constitution, the President should have co-equal interpretive authority with the courts and Congress); Karen Orren & Stephen Skowronek, *Beyond the Iconography of Order: Notes for a “New Institutionalism”*, in THE DYNAMICS OF AMERICAN POLITICS: APPROACHES AND INTERPRETATIONS 329-30 (Lawrence C. Dodd & Calvin Jillson eds., 1994) [hereinafter Orren & Skowronek, *New Institutionalism*] (emphasizing the “impinging, interactive, and contingent character” of institutional relations in the context of American politics).

capacity for evolution and continuous and varied political legitimacy. Thus, while our model underscores the extent to which the U.S. policy process, superimposed over the separation of powers framework, is inevitably disjointed and lurching, the iterative and staggered nature of this process frequently produces broad consensus and guarantees that contentious issues can be readily revisited.

Despite the somewhat sanguine cast of this portion of our argument, we are certainly aware of the potential for dysfunction in separated powers; indeed, we believe our analysis can help to reveal and address these problems. As noted earlier, the traditional approach to separated powers is associated with the “negative” function of preventing encroachment by one branch on the powers and responsibilities of another and ultimately of barring the “accumulation of all powers, legislative, executive, and judiciary, in the same hands.”<sup>154</sup> As discussed, we believe different institutional arrangements, conflicts, and policies should be assessed not just by their tendency toward tyranny, but by their capacity to promote or inhibit the positive aspects of separated powers, the special qualities and contributions of each branch, throughout the political system, and over time.<sup>155</sup>

We do not necessarily foresee political problems where one branch simply tries to seize and retain new power,<sup>156</sup> and do not even think political disability results where a department temporarily appropriates institutional functions or responsibilities traditionally associated with another.<sup>157</sup> We do, however, anticipate long-run

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154. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

155. The distinction between the positive and negative functions of separated powers is a somewhat illusory dichotomy, of course. Focusing on the ways that different institutional arrangements and (in)action threaten different positive values of the separation of powers (a branch’s ability to fulfill its core constitutional duties, for example) is one way we may avoid abusive rule by any one branch, or combination of branches, before it becomes substantially damaging or entrenched. Indeed, by linking judicial intervention in separation of powers disputes to the protection of positive aspects of separated powers (among other factors), we try to provide the courts with an opportunity to help avoid, slow down, or at least identify trends toward tyranny that are short of Madison’s “accumulation of all powers, legislative, executive, and judiciary, in the same hands.” *Id.* By the time we have satisfied this standard, it is likely too late for effective judicial intervention of any kind.

156. Indeed, given the nature of our system, we expect that this behavior would be co-incident with the basic scheme of government. *See* THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) (stating Madison’s expectation that the powers held by ambitious politicians will be exercised aggressively).

157. *Cf.* ABRAHAM LINCOLN, SPECIAL SESSION MESSAGE (July 4, 1861) *reprinted in* 6 MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897 20, 24 (James D. Richardson ed., 1898) (defending his initial responses to the Civil War as involving powers within “the constitutional competency of Congress”).

difficulties in securing the goals of separated powers where one or more branches cedes authority, becomes a passive political actor, or fails to express and assert its special institutional character on a consistent basis.<sup>158</sup> If ambition is to be made to counteract ambition, it must enter, in some form, into all the crevasses of political life.

We believe our perspective on contemporary political problems allows us to identify a more subtle set of dangers as well. Given the open and competitive nature of American politics, the different constituencies and missions of each branch, and the numerous opportunities each actor in the separation of powers has to intercede in the activities of others, it would be surprising to discover many areas of political life in which a single branch regularly and widely accumulates power in a tyrannical fashion, or exercises action without it being checked, altered, and even improved upon, by the actions of another.<sup>159</sup> But our analytic framework suggests another kind of problem may occur where the separation of powers appears to operate effectively at one level of governance while breaking down at another.<sup>160</sup> In this way, the apparent functioning of the system of separated powers at one level (as marked, for example, by robust interbranch debate) may conceal dysfunction—encroachment or deference—on other levels. Even in areas of political life where interbranch ambition and competition seem to be the order of the day, this opposition may not occur equally effectively at each of the “levels” of separated powers identified in this piece.

A final problem that we believe our approach can help identify relates to the mutability of separated powers over time. Different historical configurations of the separation of powers—developed at different moments and for different purposes—may yield distinct institutional practices, norms, and understandings that endure,

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158. Cf. STEPHEN R. WEISSMAN, *A CULTURE OF DEFERENCE* 3 (1995) (contending that Congress has failed at leadership in foreign policy); Jeffrey K. Tulis, *Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1331 (1997) (arguing that the Senate has tended to defer to the President with respect to Supreme Court nominations, and has thereby given up an important function); Bruce Ackerman, *Never Again*, in 14 THE AMER. PROSPECT, May 1, 2003 (addressing the situation created when Congress authorized the second Gulf War before the United Nations consented to it, effectively giving the President a “blank check to make war” because Congress ceded its authority over military affairs before the war began), available at <http://www.prospect.org/print/V14/5/ackerman-b.html> (last visited Nov. 9, 2003) (on file with the American University Law Review).

159. *But see supra* notes 146-148 and accompanying text (discussing political conditions in which our assumptions about the separation of powers are less likely to apply).

160. *See infra* notes 164-178 and accompanying text (discussing constitutional war powers and the “levels of governance” identified in this piece).

overlap, contradict, and chafe.<sup>161</sup> We can see this perhaps most obviously with the continuing, powerful appeal in legal and political circles for the specific vision of the separation of powers supposedly articulated by the framers, a vision that sometimes clashes with the contemporary “reality of the ways in which the branches interact in American politics.”<sup>162</sup> For example, the framer’s definition of the tyranny that separated powers is designed to prevent was informed by their historical fear of monarchy and the accumulation of all primary powers into the hands of one individual or institution.<sup>163</sup> Focusing on this historical and outdated picture of what the separation of powers is supposed to achieve (or avoid) may obscure our appreciation of some of the contemporary problems set out here, such as those that arise when departments fail to express their core functions. In short, the powerful historical image of tyranny provided by the founding generation still resonates, but may blur our appreciation of new forms of tyranny that require clearer definition and protection in the twenty-first century.

#### IV. ASSESSING THE NEW MODEL: THREE CASE STUDIES

Our dissatisfaction with existing accounts of the separation of powers is partly attributable to their frequent failure in helping us to understand the ramifications of inter- and intragovernmental divisions of power in the context of specific political contests. The following case studies highlight our approach to separated powers and ground and test our propositions about its core features, contributions, and potential for malfunction. While each study is cursory at best, we focus on problems that seem most pertinent to our previous discussion and claims.

##### A. *The War Powers Resolution of 1973*

Superficially, the 1973 War Powers Resolution seems like a successful effort to reassert a congressional voice—and the

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161. See Orren & Skowronek, *New Institutionalism*, *supra* note 153, at 320-21 (discussing how “[a]s institutions congeal time . . . they decrease the probability that politics will coalesce into neatly ordered periods, if only because the institutions that constitute the polity at that time will abrade against each other and, in the process, drive further change”).

162. Harriger, *Separation of Powers and Independent Counsels*, *supra* note 17, at 263 (citing the rationale of critics of the positivist reading of the separation of powers doctrine).

163. See James Randolph Peck, *Restoring The Balance of Power: Impeachment and the Twenty Second Amendment*, 8 WM. & MARY BILL RTS. J. 759, 786-87 (2000) (discussing the founders’ fears that if a President had too much time in power it would “establish the President as a tyrannical de facto monarch”).

legislature's "positive" and "negative" contributions to our system of separated powers—in the exercise of war powers. In its own language, the measure was passed to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces" into hostilities.<sup>164</sup> According to Representative Lee Hamilton, the very purpose of the War Powers Resolution was to make the President pause and consider congressional perspectives before going to war: "The call for early and regular coordination with Congress encourages the president to gauge support for controversial decisions carefully."<sup>165</sup>

But the purported success of the War Powers Resolution at what we have identified as the "policy level" of the separation of powers system obscures the arguable failure of Congress to assert itself at a level of "primary powers." In winning the initial *legislative* War Powers battle in the 1970s,<sup>166</sup> Congress may have lost the larger fight over the *constitutional* war power. Indeed, as some scholars have noted, the legislation seems to have actually legitimated unilateral military activity by Presidents, by giving it a legal veneer.<sup>167</sup> According to Arthur Schlesinger, prior to "passage of the resolution, unilateral presidential war was a matter of usurpation. Now . . . it [is] a matter of law."<sup>168</sup> While continuing to act on their own in deploying troops and approving significant military activity, Presidents have sometimes cited the Resolution to endorse their military initiatives.<sup>169</sup> Simultaneously, however, Presidents have challenged the authority of the measure, refusing to admit that they are bound by it (and indeed, by any congressional restraints).<sup>170</sup> Congress has defended and implemented the Resolution somewhat fitfully, generally failing to challenge Presidents under its terms.<sup>171</sup>

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164. War Powers Resolution, Pub. L. No. 93-148, § 2(a), 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (2000)).

165. Hamilton, *supra* note 78, at A14.

166. Congress, after all, overcame a Nixon veto in order to pass the measure. See FISHER, PRESIDENTIAL WAR POWER, *supra* note 141 (detailing the battle between Nixon and Congress over the War Powers Resolution).

167. *Id.* at 128.

168. SCHLESINGER, JR., *supra* note 14, at 434-35.

169. See FISHER, PRESIDENTIAL WAR POWER, *supra* note 141, at 132-33 (discussing how Presidents have typically reported under the War Powers Act in ways that do not trigger the "sixty-to-ninety-day" limits outlined in Section 5).

170. *Id.*

171. *Id.* at 205 (discussing Congress's failure to check "executive usurpation" of war powers during the Vietnam War). Cf. SUSAN BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES 63-108 (1992) (discussing Congress's mixed record in opposing unilateral presidential war making).

In short, the presence of the War Powers Resolution, and the debates that periodically surface about its effectiveness, potentially distract us from ways in which the separation of powers may be functioning incompletely and poorly. Among other hazards, the developments discussed here diminish the legislature's role as a deliberative body in decisions about going to and continuing war, and (a point observed far less often) they minimize the political cover and authority of the Commander in Chief.<sup>172</sup>

The danger illustrated by the war powers example—that the operation of the separation of powers on one level of governance may obscure its malfunctioning at another—suggests that we ought to be especially attentive to areas of American politics where institutions and political actors lack the tools, opportunities, or incentives to contest and revisit questions about the nature and current status of overlapping or ambiguous powers.

Related to this point, we think that special political problems may emerge when the U.S. system of separated powers appears to resemble parliamentary or “fused” governance of the sort favored by many critics of the American system, as arguably occurs, for example, in the exercise of war powers, where one branch of government has dominant sway.<sup>173</sup> In addition to diminishing the negative and positive features of separated powers, a period of close institutional cooperation or deference may lead to “self-confident unified government” as institutions and leaders lack the traditional checks and procedures for realistically assessing the limitations of governance, including policy formation and implementation.<sup>174</sup> These apparent periods or moments of more or less unified rule may also ratchet up expectations about what kinds of leadership and political outcomes the citizenry can expect in other political settings.

What conclusions do we draw from this discussion? On its own, the failure of the War Powers Resolution is relatively insignificant. Just as before the Resolution was enacted, Congress retains powers and claims to authority (including some of the Constitution's explicit references to war) that can be used to reassert a greater congressional presence in superintending armed conflict.<sup>175</sup> But the War Powers

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172. FISHER, PRESIDENTIAL WAR POWER, *supra* note 141, at 130.

173. See FIORINA, *supra* note 1, at 112-15 (explaining the differences between a two-party and a multi-party system).

174. *Id.* at 110.

175. FISHER, PRESIDENTIAL WAR POWER, *supra* note 141, at 130. Scholars such as Abraham Sofaer, Gary Schmitt, and Robert Scigliano have countered this vision, arguing for a largely presidential approach to war-making. See, e.g., Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 33-34 (1995) (arguing that

Resolution is part of an evolutionary process through which Congress has sometimes abnegated constitutional responsibilities to contribute to the separation of powers in positive and negative ways.

Consistent with what we have been saying throughout this Article, however, we note that even in the context of war powers, there are a variety of interbranch configurations and relationships that satisfy at least some of the goals of separated powers; thus, different cases need to be assessed on their own terms. The 1991 Gulf War prompted a sustained and far-reaching congressional discussion of constitutional war powers and otherwise suggested some aspects of an engaged Congress. In contrast, as Ryan Hendrickson has argued, Congress demonstrated little interest in asserting its constitutional prerogatives when President Clinton deployed 20,000 troops in Bosnia, even though political conditions were seemingly ripe for non-deferential behavior.<sup>176</sup> Throughout this conflict, Hendrickson argues, “congressional deference remained the norm.”<sup>177</sup> Thus, in contrast with some of the Court’s own pronouncements (sometimes identifying the war powers area as part of the political questions doctrine), we believe that these conditions make a case for greater judicial monitoring of decisions about war.<sup>178</sup>

### B. *The Intergovernmental Lobby*

As noted previously, contemporary scholars frequently examine federalism largely as an administrative arrangement for the implementation of federal policy. This emphasis is obviously incomplete, and we attempt in the following section to fill out our broader perspective, one that views federalism as a constitutional separation of power with a concomitant set of intergovernmental checks and balances.<sup>179</sup> Our specific case examines the “intergovernmental lobby,” the designation we attach to the major

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although Congress has the power to declare war, the President has the power to take military action in certain instances).

176. See Ryan C. Hendrickson, *War Powers, Bosnia, and the 104th Congress*, 113 POL. SCI. Q. 241, 256 (1998) (discussing Congress’s avoidance of a constitutional debate with the President regarding his military deployments in Bosnia, eventually failing to take any formal position on U.S. involvement in such activities).

177. *Id.* at 255.

178. For an abbreviated discussion of some of the conditions we associate with greater judicial involvement in separation of powers cases, see *supra* notes 144-149 and accompanying text.

179. See THE FEDERALIST NO. 46, at 295 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (comparing “the federal and State governments [and] the disposition and the faculty they may respectively possess to resist and frustrate the measures of each other”). Hamilton’s catalogue of these means includes an assortment of legislative, administrative, and even military means. *Id.*

political and lobbying associations of subnational public officials in the United States.

The “negative” or checking aspects of federalism as a separation of power have been amply described by students of state-federal relations. Prior to the New Deal era, federalism was viewed primarily as a constitutional principle that justified restrictions on federal action.<sup>180</sup> This idea was embodied in doctrines variously described as nullification, interposition, and states’ rights, which all generally held that state governments had substantial constitutional authority to resist what they perceived as federal encroachments on their authority.<sup>181</sup> But others have noted that this scholarly (and often judicial) emphasis on the clashing divisions of state and federal authority has been greatly misplaced, and that American federalism has in fact historically been typified by a great deal of shared authority and cooperative activity between state governments and the national government.<sup>182</sup>

As the following discussion of the intergovernmental lobby should make clear, these different scholarly approaches make important contributions to our understanding of intergovernmental checks and balances, and, despite appearances to the contrary, they are not incompatible. The following case study tries to show the benefits and possibilities of “unifying” separation of powers scholarship by illustrating how approaches that characterize federalism through

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180. See, e.g., Corwin, *supra* note 61, at 2 (maintaining that since the New Deal era, the federal system “has shifted based in the direction of a consolidated national power”).

181. See generally FREDERICK C. DRAKE & LYNN R. NELSON, STATES’ RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY 139-221 (1999) (chronicling the struggle between states’ rights and federal authority); Frederick W. Brune et al., *Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions*, in WE THE STATES: AN ANTHOLOGY OF HISTORIC DOCUMENTS AND COMMENTARIES THEREON, EXPOUNDING THE STATE AND FEDERAL RELATIONSHIP 367, 375-76 (1964) (urging the Supreme Court to exercise judicial restraint and to discontinue its forays into policymaking, especially in relation to the states); James J. Kilpatrick, *The Case for States’ Rights*, in A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM 88-105 (Robert A. Goldwin ed., 1961) (arguing for a limited federal government). We note that these doctrines differ from the “new federalism” of the 1970s and 1980s which was frequently driven by federal (rather than state) public officials and often involved state power that complemented and expanded upon federal protections and processes rather than directly undermining federal authority.

182. See DI IULIO & KETTL, *supra* note 81, at 2 (stating that the federal government and the states are not and never were constitutionally or politically independent of one another); DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL COOPERATION IN THE NINETEENTH-CENTURY UNITED STATES (1962) (proposing that federal, state, and local governments have fundamentally been a cooperative partnership since the early days of the Republic); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 3-16 (1966) (arguing that the different functions of the American government are shared between the levels of government).

core constitutional principles can complement the work of those emphasizing federal-state relations as a means to policy administration.

The intergovernmental lobby is the label applied to the major associations of subnational public officials in the United States.<sup>183</sup> The most important of these are the National Governors' Association (NGA), the National Conference of State Legislatures (NCSL), the National Association of Counties, the U.S. Conference of Mayors, the National League of Cities, International City/County Management Association, and the Council of State Governments.<sup>184</sup> While these organizations exist for many purposes (such as the sharing of ideas about "best practices" among officials from different states or localities), they also maintain offices in Washington, D.C. and lobby Congress and administrative agencies across a broad spectrum of policy concerns.<sup>185</sup>

To the extent that the membership and staffs of these organizations succeed in altering the course of national policymaking, they fulfill negative and positive separation of powers functions. Negatively, state officials acting through the NGA or NCSL are often able to persuade members of Congress, the President, or other federal policymakers to eliminate or alter provisions in federal legislation that would adversely affect state governments.<sup>186</sup>

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183. HAIDER, *supra* note 95, at x.

184. There are a number of other elements to the intergovernmental lobby that will not be discussed here. These include the regional governors' associations (such as the Western Governors' Association), the individual state offices that about two-thirds of the nation's governors maintain in Washington, D.C., and several hundred associations of state and local officials, such as the National Association of State Budget Officers, the National Association of State Highway and Transportation Officials, and the National Association of State Boating Law Administrators. Among the seven largest organizations of the intergovernmental lobby, the National Governors' Association and the National Conference of State Legislatures are the strongest forces lobbying on behalf of state-governmental prerogatives. *See generally* John D. Nugent, *Federalism Attained: Gubernatorial Lobbying in Washington as a Constitutional Function* 117-67 (1998) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with the American University Law Review) [hereinafter Nugent, *Federalism Attained*].

185. *See generally* ANNE MARIE CAMMISA, *GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM* 117-31 (1995) (commenting on the intergovernmental lobby since 1979); HAIDER, *supra* note 95, at 308 (analyzing the effectiveness of the intergovernmental lobby); WILLIAM K. HALL, *THE NEW INSTITUTIONS OF FEDERALISM: THE POLITICS OF INTERGOVERNMENTAL RELATIONS, 1960-1985* 58-78 (1985) (focusing on the role of several of the most important intergovernmental lobbying organizations); John Dinan, *State Governmental Influence on the National Policy Process: Lessons from the 104th Congress*, 27 *PUBLIUS* 129, 139-40 (1997) (discussing the use of lobbying by governors and the increased role they play in the national political process); Nugent, *Federalism Attained*, *supra* note 184, at 127-43 (describing the lobbying practices of the National Governors' Association).

186. *See* CAMMISA, *supra* note 185, at 151 (focusing on case studies of the

Historically, these efforts have focused on such matters as unfunded mandates, restrictive conditions on the expenditure of federal grants-in-aid and strict deadlines and penalties for not meeting them, and measures that preempt existing state laws.<sup>187</sup> While state officials obviously do not possess anything like a “states’ veto” over federal legislation, they often succeed in persuading Congress that certain provisions of federal law impose on state governments requirements or restrictions that are overbroad, inappropriately onerous, or too expensive.<sup>188</sup>

Viewed positively, intergovernmental lobbying allows state officials to participate constructively in deliberations with members of Congress and the executive branch about what form federal legislation should take. This participation may take the shape of testimony before congressional committees by governors or state legislators, informal meetings or discussions between state and national officeholders and their staffs, and even the actual participation of state officials in the national lawmaking process.<sup>189</sup> For example, in 1988, then-Governor Bill Clinton (D-AR), who was the chairman of the NGA that year “sat with the Ways and Means staff during the subcommittee mark-up” of the 1988 welfare reform bill.<sup>190</sup>

Clinton answered questions about how specific provisions of the bill would affect the states. According to a respondent, “Bill Clinton sat at the table with the committee. They ran all the amendments by him, they discussed what the governors would and would not find acceptable in terms of amendments that were being offered.”<sup>191</sup>

While this sort of direct participation is quite rare, the general pattern of state officials’ involvement in the legislative process via the intergovernmental lobby is the norm when, for example, Congress

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intergovernmental lobby’s involvement in child care, housing policy, and welfare reform).

187. *Id.*

188. *See id.* at 124-27 (detailing the areas in which state and local groups were able to lobby Congress effectively); Nugent, *Federalism Attained*, *supra* note 184, at 205-77 (discussing examples of gubernatorial influence in the passage of general revenue sharing, welfare reform legislation in 1988 and 1996, and the reauthorization of the Safe Drinking Water Act in 1996).

189. *See* Dinan, *supra* note 184, at 136 (arguing that “in the course of the 104th Congress, [state officials] developed two new mechanisms for advancing their interests through the political process”); *The National Governors’ Association Welfare Reform Proposal: Hearing Before the Subcomm. on Human Res. of the House Comm. on Ways and Means*, 104th Cong. (1996) [hereinafter *National Governors’ Association Welfare Reform Proposal*] (containing the testimony of three governors testifying on behalf of the National Governors’ Association at hearings that set the stage for ultimate passage of welfare reform legislation in 1996).

190. CAMMISA, *supra* note 185, at 101.

191. *Id.*

considers legislation with implications for state governments. Although they wield fewer formal and direct powers over members of Congress than they did in the past,<sup>192</sup> state officials command some degree of respect in Washington by dint of their status as elected leaders and their role as implementers and enforcers of a great many federal programs.<sup>193</sup> If a federal policy is simply not working well at the “ground level,” state officials will be the first to know, and the intergovernmental lobbying organizations provide the institutional means to transmit such information to federal politicians.

For example, the *New York Times* reported that a survey conducted by the NGA and the American Public Human Services Association concluded that the Bush Administration’s proposals for the reauthorization of the 1996 welfare reform law were unrealistic and unworkable.<sup>194</sup> A week later, the *Times* reported that “[b]owing to criticism from state welfare officials, House Republicans said today that they would adopt work requirements more flexible and less stringent than those proposed by President Bush when they extend the 1996 welfare law later this year.”<sup>195</sup> It is important to emphasize that state officials frequently do *not* get what they want out of federal policymakers, at least not in the original form in which the request was made.<sup>196</sup> It should also be remembered, however, that this is the nature of separation of powers contests in general. Moreover, solely focusing on interest realization or frustration misses other ways in which federal-state interactions can promote the goals of the separation of powers emphasized in this Article.

It is tempting to view the intergovernmental lobby as nothing more than a congeries of interest groups whose members happen to be elected subnational officials. Indeed, nearly all of the scholarly literature concerning the intergovernmental lobby evaluates its

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192. Prior to the 17th Amendment, state legislators selected U.S. Senators. See U.S. CONST. amend. XVII.

193. See DI IULIO & KETTL, *supra* note 81, at 11-12 (explaining the process of “devolution” and the increasing de-federalization of federal programs); see also DAVID C. NICE, FEDERALISM: THE POLITICS OF INTERGOVERNMENTAL RELATIONS 32-33 (1987) (demonstrating how the intergovernmental lobby benefits from the geographic diversity of its elected officials).

194. See, e.g., *Study by Governors Calls Bush Welfare Plan Unworkable*, N.Y. TIMES, Apr. 4, 2002, at A18 (noting that the proposed law would force many people to take “make work” jobs rather than jobs in the private sector).

195. *House G.O.P. Softens Bush Welfare Plan*, N.Y. TIMES, Apr. 10, 2002, at A23.

196. See, e.g., DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 325 (2000) (arguing that the intergovernmental lobby typically loses its battles with the federal government); Troy Smith, What Safeguards of Federalism? The Exceptions Rule 1 (2000) (unpublished manuscript, on file with the American University Law Review) (arguing that the intergovernmental lobby generally fails to defend state-governmental interests against federal encroachments).

activities as interest group behavior while ignoring its constitutional implications as an actuator of intergovernmental checks and balances. While lobbying by subnational officials obviously occurs in the context of specific policy debates, the ongoing participation of the intergovernmental lobby in the federal policymaking process contributes to our understandings of the boundaries of the respective spheres of state and federal authority, which we can expect to be relatively stable, yet far from immutable.<sup>197</sup> Perhaps more accurately, because those spheres of governmental authority overlap in so many respects today, our understanding of the separation of powers should also explain how those shared powers are constructed and exercised, because the interesting aspects of the separation of powers come not from the separation per se but rather from the overlap.

While members of the intergovernmental lobby use many of the same techniques as lobbyists representing more conventional “special interests,” there are important qualitative differences.<sup>198</sup> Lobbyists for, say, the NGA, track dozens of issues across many policy areas simultaneously, and are long-term, repeat players in the legislative process.<sup>199</sup> Moreover, the intergovernmental lobby’s organizations represent elected officials whose constituencies overlap those of members of Congress. (The constituencies of a state’s governor and U.S. senators are identical.) The NGA takes pains to act in a bipartisan fashion, and recent history has shown that members of Congress tend to listen when the nation’s governors reach bipartisan agreement on contentious political issues.<sup>200</sup> To the extent that state governments retain some measure of sovereignty, elected state officials have a strong claim to being articulators of the “corporate” interests of their state governments.<sup>201</sup>

Intergovernmental lobbying thus exemplifies the mechanics of federalism as a separation of power on the policymaking, institutional, and constitutional levels. In the context of specific

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197. See WILSON, *supra* note 123, at 173-74.

198. See generally Beverly A Cigler, *Not Just Another Special Interest: Intergovernmental Representation*, in INTEREST GROUP POLITICS 131-51 (Allan Cigler & Burdette Loomis ed., 4th ed. 1995).

199. See Nugent, *Federalism Attained*, *supra* note 184, at 127-43 (outlining the lobbying practices of the National Governors’ Association).

200. See *National Governors’ Association Welfare Reform Proposal*, *supra* note 188, at 4 (quoting the committee chairman Rep. Clay Shaw calling the National Governors’ Association’s welfare reform proposal “a great bipartisan achievement” and noting that “the Nation owes these leaders [the governors] a great deal”).

201. See Cigler, *supra* note 198, at 132 (arguing that public officials join intergovernmental lobbying associations “not only to advance policy positions, but also to promote core political-system values: responsiveness, representativeness, accountability, equity, efficiency, and effectiveness”).

policy debates, members of Congress, subnational officials, the President, and other public officials negotiate and renegotiate the character of the federal system by assigning and reassigning legal authority, responsibilities, and discretion.<sup>202</sup> While the Supreme Court joins these debates periodically by upholding or striking down particular federal decisions that have been challenged on federalism grounds,<sup>203</sup> Congress and the President serve as the primary national architects of federalism given their authority over the federal purse and their power to create or alter federal programs to be carried out in conjunction with state agencies.<sup>204</sup>

In terms of constitutional development, one can view the intergovernmental lobby as an extra-constitutional response by state officials to the general failure of the U.S. Senate to serve as a forum for protecting the full range of state-governmental prerogatives both before and after the Seventeenth Amendment initiated the popular election of senators.<sup>205</sup> We can deem the emergence of intergovernmental groups as a healthful development in the state-federal separation of powers to the extent that they “provide another form of political representation at the national level, one founded not on functional lines or shifting congressional boundaries but on representation of interests based essentially on geopolitical units—states, counties, and municipalities.”<sup>206</sup> Thus, as Donald Haider concludes:

These groups constitute a kind of “third house” of elected representatives at the national level as well as an institutional interface between the President and Congress . . . . They indeed have become a significant counterbalance in the

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202. See generally SCHEBERLE, *supra* note 59, at 10-38 (discussing the working relationships that develop between state and federal officials in the making and implementation of environmental policy); SARAH F. LIEBSCHUTZ, *BARGAINING UNDER FEDERALISM: CONTEMPORARY NEW YORK* (1991) (presenting case studies illustrating the give-and-take through which New York interacts with the federal government in various policy areas).

203. See generally WALTENBURG & SWINFORD, *supra* note 61, at 25-26 (discussing the effect of post-1968 Republican Supreme Court appointments on the Court’s federalism jurisprudence); Massey, *supra* note 61, at 432 (explaining the Rehnquist Court’s activist decisions in this area).

204. See Massey, *supra* note 61, at 443 (noting that Congress and the President can function “tyrannically” over the states if left unchecked).

205. See ELAINE K. SWIFT, *THE MAKING OF AN AMERICAN SENATE: RECONSTITUTIVE CHANGE IN CONGRESS, 1787-1841* 149 (1996) (describing the development of the pre-Civil War U.S. Senate such that “the people—not state legislatures—were the chamber’s primary constituents”); William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 469 (1955) (discussing the general dominance of the federal government and the lack of “peripheralizing federalism”).

206. HAIDER, *supra* note 95, at 306.

federal system to the rising influence of the national government, which pervades all of American life.<sup>207</sup>

State-federal relations are thus much more dynamic and complex than one might assume from listening to overheated rhetoric about the size and reach of federal authority today. State governments do not win all of their battles with the federal government, but they do not lose them all either.<sup>208</sup>

Attempts to evaluate the health of American federalism today are facilitated in several respects by the theory of separation of powers outlined in this piece. First, simply viewing federalism as a separation of power implies that we should expect the precise separation to assume a variety of forms over time. It comes as little surprise to most observers that the relative balance of power between the Congress and the President varies over time, but there have been few scholarly efforts directed at explaining how the state-federal balance of power has developed historically, particularly through nonjudicial means.

Second, this analysis implies that a range of state-federal relationships exist that contribute to the separation of powers scheme and that these ought to be catalogued and examined as thoroughly as possible.<sup>209</sup> Intergovernmental lobbying is only one of the effective and often subtle means by which state officials influence their federal counterparts today.<sup>210</sup>

We anticipate some criticism of our claim that federalism is a core element of separated powers, analogous in important ways to traditional aspects of this system. Some observers may resist equating intergovernmental lobbying with the formal checks and balances that the Constitution outlines. Given the relatively few formal intergovernmental checks specified in the Constitution, however, we believe that it is essential to consider the informal means of mutual influence available to state and federal officials if one is to get a clear sense of how the respective boundaries of state and federal authority are contested over time.

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207. *Id.*

208. *See supra* notes 188-189 and accompanying text. *See also* POSNER, *supra* note 123, at 2 (assessing legislation that reflects a “renewed commitment to restoring states’ authority in our system” and arguing that the passage of the Unfunded Mandates Reform Act “signals recognition of the need to hold federal officials more accountable for the intergovernmental consequences of national actions”).

209. *See, e.g.,* Kramer, *Putting the Politics Back*, *supra* note 58, at 224 (arguing that relationships between state and federal officials are facilitated through institutions, such as political parties and interlocking administrative bodies).

210. *See* HAIDER, *supra* note 95, at 305 (noting the importance of special interest groups).

*C. The Presidential Veto*

A number of features of the presidential veto make it an especially suitable subject for illustrating this Article's claims about the neglected features of the separation of powers and their significance. The veto is a good example of a constitutional device designed to provide both negative and positive elements to policymaking and institutional competition. During the formulation and early use of the veto, the measure was vigorously defended on the grounds that it would provide an otherwise weak executive branch with some capacity to not only block "unjust and unconstitutional" action by Congress, but also to improve legislation.<sup>211</sup> The idea that the veto power could be used creatively to alter and refine (and not just impede) legislation finds expression throughout the constitutional convention and ratification debates, from the extensive reference to the veto as a "revisionary power" to suggestions that it would provide a correction to legislation produced through carelessness or the influence of factions. By inserting the distinctive, national perspective of the executive into the lawmaking process, the veto was supposed to not only block legislative encroachments on the powers of the other branches, but to serve the constructive purpose of "guard[ing] 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."<sup>212</sup>

Why, exactly, is this supposed to occur? Ostensibly, in vetoing a bill, a President pits him or herself against a congressional majority that is attempting to advance some representation of the national interest. Therefore, Presidents are likely to have more incentive to veto when they can make a plausible case that the rejected legislation either does not genuinely reflect a national consensus, or compromises some other value that society is prepared to recognize,

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211. 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 81 (Max Farrand ed., 1966); *see* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 139 (Max Farrand ed., 1966) (describing the original debate about separation of powers); THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining the "propensity" of the legislature to usurp the power of other branches of government).

212. THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *cf.* Whittington & Carpenter, *supra* note 29 (noting that the American President is relatively weak compared to executives in similar systems). Interestingly—and consonant with this Article's synthesis of federalism and the separation of powers—during the Constitutional Convention, Madison defended the veto as a way to supplement functions that might not always be provided by the states. "It was an important principle in this & in the State Constitutions to check legislative injustice and incroachments [sic]. The Experience of the States had demonstrated that their checks are insufficient" and therefore that a veto power was needed. 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 pt. 2, 587 (Max Farrand ed., 1966).

such as constitutional principles, including, but not limited to presidential prerogatives and individual rights.<sup>213</sup> As Alexander Hamilton argued in *The Federalist*, “the primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chance in favor of the community against the passing of bad laws, through haste, inadvertence, or design.”<sup>214</sup>

While we do not assume that the presidency is insulated from the same basic forces of pluralism that affect Congress, we do contend that the executive branch will often have different constituencies than the legislature. Attending to the interests of these groups might prompt Presidents to promote a more consensual form of politics.<sup>215</sup> After all, the veto does not terminate the lawmaking process—it directly sets up a new round of potential accommodation and compromise.<sup>216</sup> The constitutional requirement in Article I, Section 7 that presidential vetoes be returned with objections to the house which originated the rejected measure, seemingly affirms both the legislature’s unique capacity as a deliberative body and the iterative features of separated powers emphasized earlier.<sup>217</sup> Understood in this light, the veto not only requires a supermajority in Congress for measures not approved by the President, but it actually attempts to mandate a new round of debate and deliberation.<sup>218</sup> Finally, we are open to the argument offered by some scholars that the presidency represents a “unified” branch in a way distinct from the Congress. To the extent this argument has merit, it suggests that Presidents will use the veto power to develop visions of the public good that can evade

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213. See CAMERON, *supra* note 88, at 16-18 (discussing the President’s incentives to veto). As James Madison argued at the Convention, “[t]he object of the [veto] power is . . . to defend the Executive Rights.” Jefferson argued that the veto served as a special constitutional “shield” to protect the President, the judiciary, and the states against legislative encroachments. THOMAS JEFFERSON, WRITINGS 420-21 (Merrill D. Peterson ed., 1984).

214. THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

215. For our discussion of the consensus-building features of separated powers, see *supra* notes 74-76 and accompanying text.

216. See ROBERT J. SPITZER, THE PRESIDENTIAL VETO: THE TOUCHSTONE OF THE AMERICAN PRESIDENCY 18-19 (1988) (arguing that the veto power was constructed deliberately as a qualified rather than absolute power in an attempt to give it more “creative capacity,” as opposed to simply making it a checking power).

217. See BESSETTE, *supra* note 79, at 182 (noting that the President contributes to the deliberative process through recommending legislation and the veto power).

218. As Alexander Hamilton argued in defending the veto, “[t]he oftener [a law] 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.” THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

the legislature. In this way, the veto can facilitate some of the specialized institutional perspectives we associate with the separation of powers framework.<sup>219</sup>

In addition to these points, the presidential veto shows the operation of the separation of powers at three of the interconnected “levels” we have previously delineated. To begin with, the veto power seems to represent a clear case of the blending of primary powers of governance.<sup>220</sup> While lawmaking is largely a legislative function, the veto provides the President with opportunities to help shape the content and timing of legislation. The inclusion of the veto provision in Article I rather than Article II suggests the extent to which the veto is inherently legislative in nature,<sup>221</sup> and likely to promote interbranch disputes about its use.

Through its operation, the veto also functions at the “policy” level of the separation of powers, ensuring that the interests and perspective of the executive branch are expressed in the legislative outputs of government. At times, the President’s invocation of the veto also reflects what we have identified as the political-electoral separation of power. Historically, Presidents have justified their use of the veto by claiming that as the sole national representative of the people, they have special rationale for blocking congressional initiatives and protecting the public interest.<sup>222</sup> In his famous veto of legislation to recharter the Bank of the United States, for example, Andrew Jackson made a direct institutional appeal to the nation as a whole.<sup>223</sup>

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219. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 74 (Max Farrand ed., 1966) (explaining that the veto was also desirable for “the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes”).

220. See, e.g., CAMERON, *supra* note 88, at 20 (arguing that the President can use the veto to shape legislation in three different ways: 1) to terminate legislation, 2) to encourage Congress to write “veto proof” legislation, or 3) to have Congress rewrite legislation that has already been vetoed).

221. See SPITZER, *supra* note 216, at 18 (explaining that the founders followed the British model, which regarded the veto as legislative in character).

222. In urging the Pennsylvania ratifying convention to support the Constitution, James Wilson argued that the President would have the most overarching perspective on the national interest, and would stand at a special institutional pivot in collecting information about foreign and domestic affairs and from the federal government as a whole. Wilson argued that he would not merely be a “tool of the Senate.” 2 DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 512 (Jonathan Elliot ed., 1937).

223. ANDREW JACKSON, VETO MESSAGE (July 10, 1832), *reprinted in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576-89 (James D. Richardson ed., 1897); *see also* SPITZER, *supra* note 216, at 34 (pointing out that all of Jackson’s vetoes had constitutional justifications); *cf.* JOHN TYLER, VETO MESSAGE OF SEPT. 9, 1841 *reprinted in* S. MISC. DOC. NO. 53, 49TH CONG., 2D SESS. at 163-64 (arguing that the President is authorized to

The historical use of the veto also provides support for our claims about the capacity of the political branches to surface and resolve separation of powers disputes absent judicial intervention. Throughout the eighteenth and nineteenth centuries, basic questions about the proper functioning of the veto power were resolved through executive-legislative give and take and sometimes outright conflict.<sup>224</sup> Core questions about the veto's operation and purposes, such as what constitutes a quorum for the purposes of securing a congressional override, precisely how long Congress has to veto a bill, whether the legislature was obligated to cast an override vote, what could be the substantive basis for rejecting a measure, and whether a President could recall a veto, were among the issues considered and "settled" by elected officials.<sup>225</sup>

Finally, and consistent with our broader claims, the executive veto points to what are arguably political problems distinctly associated with dysfunction in the separation of powers. For example, the greater willingness of the judiciary to intercede in resolving interbranch disputes about the purposes and appropriate operation of the veto has had the effect of nearly eradicating what was once a significant political power: the pocket veto.<sup>226</sup> While the pocket veto was historically used frequently and in a variety of contexts (*viz.*, during intersession adjournments, at the end of Congresses, and, rarely, during intrasession recesses), Court rulings imply that it can only be utilized when Congress has adjourned at the very end of a session. As a result, a power that was used over 1,000 times prior to the 1970s has now been employed only twice since 1992.<sup>227</sup>

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protect the Constitution of "the whole people of the United States" from the "will of a mere representative majority").

224. See FISHER, *POLITICS OF SHARED POWER*, *supra* note 86, at 28 (noting Congress's indignation at a veto threat from President Monroe in 1817); Peabody, *Recovering the Political Constitution*, *supra* note 54, at 127-34 (providing examples of unilateral and interbranch constructions of the veto power).

225. See CARLTON JACKSON, *PRESIDENTIAL VETOES, 1792-1945* 14 (1967) (explaining that both constitutionalism and expediency can be independent bases for vetoing a piece of legislation); see also EDWARD C. MASON, *THE VETO POWER: ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES, 1789-1889* 137 (1890) (pointing out that the line-item veto was first proposed by President Hayes after his struggle with Congress over the attaching of riders to appropriation bills).

226. See CAMERON, *supra* note 88, at 61 (discussing usage of the pocket veto).

227. See generally *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (holding that the Court could not rule on the validity of the bill because it had expired, rendering the issue moot); *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated by Burke v. Barnes*, 479 U.S. 361 (1987); *Barnes v. Carmen*, 582 F. Supp. 163 (D.D.C. 1984), *rev'd by Barnes v. Kline*, 743 F.2d 45 (D.C. Cir. 1984); *Kennedy v. Jones*, 412 F. Supp. 353, 356 (D.D.C. 1976) (holding that Senator Kennedy had standing to challenge pocket vetoes because he voted for the bills in dispute); *Kennedy v. Sampson*, 364 F. Supp.

Moreover, the changing content of presidential veto messages further suggests that some aspects of the separation of powers scheme set out in this paper may no longer function as they once did, with deleterious consequences for our political life. Whereas Presidents used to invoke constitutional arguments with great frequency and salience in their explanations for vetoing bills, this is a relatively rare occurrence today, as elected officials simultaneously respond to increased policy expectations<sup>228</sup> and defer to the Supreme Court's supreme authority to decide constitutional questions.<sup>229</sup> To the extent that one believes constitutional values ought to infuse our political life generally—and not just in the context of individual judicial disputes—these developments are likely to be of some concern.

#### CONCLUSION

Several scholars have discussed federalism and the separation of powers amongst the national branches of government as a single, interconnected system.<sup>230</sup> This Article has attempted to take this characterization seriously, by thinking through the many theoretical, structural, and functional similarities between the vertical and horizontal separations of powers. We have also outlined other elements of our system of separated powers that tend to be neglected

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1075, 1086-87 (D.D.C. 1973), *aff'd*, 511 F.2d 430 (D.C. Cir. 1974) (avoiding the contentious debate as to when a pocket veto can be used); *see also* RICHARD WATSON, *PRESIDENTIAL VETOES AND PUBLIC POLICY* 196 (1993) (advocating the position that the pocket veto should only be used at the end of the entire two-year Congress); Fisher, *Separation of Powers*, *supra* note 10, at 69 (pointing out that Congress sought to restrict the use of the pocket veto during the 101st Congress); Peabody, *Recovering the Political Constitution*, *supra* note 54, at 149 (providing that the judiciary's intervention resulted in the marginal use of the pocket veto).

228. *See generally* GLEN S. KRUTZ, *HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS I* (2001) (discussing the increased complexity and volume of legislation as factors conducive to the rise of omnibus legislation).

229. From the period from 1789 to 1885, Presidents cited distinctively constitutional reasons in almost sixty percent of their veto messages. Between 1897 and 1988, only about ten percent of these messages contained some reference to constitutional reasons for vetoing a bill. During the same time, presidential veto messages exhibited a greater interest in policy concerns—especially economic policy. *See* Peabody, *Recovering the Political Constitution*, *supra* note 54, at 119, 137.

230. *See* Brian E. Bailey, Note, *Federalism: An Antidote to Congress's Separation of Powers Anxiety over Executive Order 13083*, 75 *IND. L.J.* 333, 333-34 (2000) (describing the Executive Order issued by President Clinton that put limits on the states' ability to control federal policy and the resulting conflict between the President and Congress); Bradford R. Clark, *The Separation of Power as a Safeguard of Federalism*, 79 *TEX. L. REV.* 1321, 1323 (2001) (arguing that recent innovations in federal law, including large delegations of legislative authority, implicate both separation of powers and federalism issues); W. William Hodes, *Congressional Federalism and the Judicial Power: Horizontal and Vertical Tension Merge*, 32 *IND. L. REV.* 155, 156 (1998) (noting that powers wielded by the federal government through the states, must be thought of within the context of federalism and traditional separation of powers).

by scholars, politicians, and citizens, and we have spoken to the importance and implications of all of these features.

While we stop short of claiming that the paradigm set out in this piece can already serve as a “unifying” theory of the separation of powers—a cohesive framework on which cognate scholarship can be usefully mapped and compared—we believe our approach is consistent with such efforts and at least suggestive of the benefits a more fully realized synthesizing project might yield. More specifically, we identify three basic summary points we think future separation of powers scholars should be able to employ in their particular research endeavors and in seeking to bring together their diverse subfields.

First, we hope that this Article has pointed to the importance (and intellectual promise) of achieving a rich descriptive account of separated powers. Achieving nuance and clarity in this endeavor enables researchers to better identify their objects of inquiry, compare research, and argue about problems (and possible solutions) in governance. Speaking well about what the separation of powers entails is an indispensable step to identifying what this system ought to be and how well it is functioning.

Second, this project illustrates several ways in which constitutional theory—including efforts to unify separation of powers scholarship—must be practical, understood as rooted in politics itself. Basing our studies of the separation of powers on political practice and behavior reminds and exposes us to the perils and opportunities of modern governance—at a minimum, helping scholars to construct a list of priorities for research.<sup>231</sup> In addition, by keeping the world of praxis in sight, separation of powers scholars are likely to be more sophisticated theoreticians, forever brought back to our constitutive principles and basic questions about what a polity needs to survive and thrive.

Finally, we imagine that future work on separated powers (including other projects that attempt to bring together far-flung research) can build upon our efforts to think through the complex purposes and interplay of different institutional roles. Identifying these roles is important not just for preventing them from being encroached upon by tyrannical leaders or institutions, but for

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231. See, e.g., Mark Tushnet & Jennifer Jaff, *Why the Debate over Congress' Power to Restrict the Jurisdiction of the Federal Courts is Unending*, 72 GEO. L.J. 1311, 1329 (1984) (arguing that congressional measures seeking to prevent the judiciary from reviewing certain substantive areas do not pose constitutional problems because they are inert politically).

discerning the preconditions for securing and adapting these responsibilities. Stated somewhat differently, our separation of powers helps our leaders, and the citizenry, to identify appropriate tasks and goals. As we see it, in addition to asking the famous political query of “who gets what, when, and how,” scholars and the electorate need to ask a different set of questions of their officials: “Who are you? What are you doing? Why are you doing it?”<sup>232</sup>

We recognize that we have taken a position that is perhaps unusually agnostic concerning what the respective balances of power between the states and the federal government and the three branches of government *ought* to be at any given time. But we believe that by eschewing an explicitly prescriptive orientation on this question, we advance our understanding of the separations of powers in at least three ways. First, we avoid what Jeffrey Tulis has called “institutional partisanship,” which is the tendency of scholars of the Congress, the presidency, or the judiciary to view the American political system narrowly, from the single perspective of that institution.<sup>233</sup> Federalism scholars similarly tend to argue as partisans of the states or the federal government rather than outlining the merits of a process-based view of the separation of powers, which may generate political or institutional outcomes over time that do not comport with their own political preferences. In all of these cases, we believe that clear thinking about the constitutional system as a whole is impeded by this sympathy towards a particular unit of governance. Second, we avoid simply locating our analysis squarely within one of the four contending scholarly “camps” described at the outset of this piece, and restating existing arguments. Rather, we have attempted, no doubt imperfectly, to draw upon each of these camps when we think they shed light on understanding the separation of powers in a more systemic fashion. Finally, we believe that our approach frames horizontal and vertical separation of powers disputes as processes through which constitutional meaning is contested and typically settled, at least temporarily, by political actors motivated by competing understandings of the Constitution.

The separations of powers in this country can and do take a variety of forms over time, and, while some can be said to be better than

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232. See Martin Diamond, *The Federalist*, in HISTORY OF POLITICAL PHILOSOPHY 673 (Leo Strauss & Joseph Cropsey eds., 1987) (“Separation of powers gives . . . a framework within which to press the people to seek wisdom and virtue in their rulers . . . [it] present[s] the executive and judiciary (and the Senate) as having, so to speak, a list of job specifications, qualities which are necessary to the performance of the functions and which approximate wisdom and virtue.”).

233. TULIS, *supra* note 36, at 9-13.

others when judged against the standards we have provided, we also believe that the spectrum of acceptable or “healthful” configurations of the separation of powers is broader than most scholars and other observers typically contend. We hope that future research will test and build upon the arguments and analysis offered in this piece as a means of exploring whether further inroads to creating a “unifying” theory of separated powers are possible.