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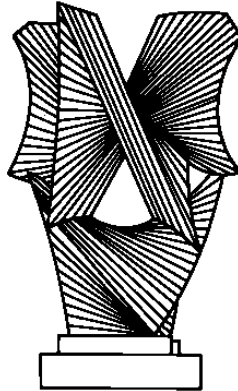
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# CHICAGO

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## COASEAN BARGAINING OVER THE STRUCTURAL CONSTITUTION

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## Coasean Bargaining over the Structural Constitution

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Aziz Z. Huq<sup>\*</sup>

### Abstract

*The Constitution allocates entitlements to individuals and also institutions such as states and branches. It is familiar fare that individuals' entitlements are routinely deployed not only as shields against unconstitutional action, but also as bargaining chips when negotiating with the state. By contrast, the possibility that branches and states could bargain over structural entitlements has largely escaped scholarly or judicial attention. Yet institutional negotiation over federalism and separation-of-powers interests is both endemic and unavoidable. To ascertain when such negotiation should be allowed, this Article develops a general theory of negotiated structural arrangements by leveraging doctrinal, economic and political theory insights. Negotiated structural outcomes, the Article concludes, should be deemed constitutional absent a clear demonstration of negative externalities or paternalism-warranting 'internalities.'*

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## Introduction

The Constitution vests individuals and institutions alike with entitlements. It is familiar fare that individuals can invoke those rights not only as shields, but also as chips in bargaining with the state. Accepting a plea bargain, negotiating a regulatory exaction to zoning rules, and accepting speech restrictions as a condition of government funding: All these are familiar deals with the state involving the trade of a constitutional right. A voluminous literature addresses the permissible scope of such deal making.<sup>1</sup>

No parallel literature, however, explores the analogous possibility that *institutions* such as states or branches might bargain over their constitutional entitlements. The lacuna is puzzling. For individuals are hardly alone in striking constitutional deals. Consider how many landmarks of structural constitutionalism concern the results of bargaining over institutional interests:

- Article I of the Constitution vests the executive with exclusive veto power over legislation.<sup>2</sup> During the twentieth-century, presidents have repeatedly transferred to Congress a portion of that veto power in exchange for greater regulatory discussion, first over executive branch reorganizations, and then more generally.<sup>3</sup> The practice ended in 1983 only after high court intervention.<sup>4</sup>
- In the 1980s and 1990s, Congress enacted statutes singling out state officials to comply with administrative responsibilities set forth in federal statutes.<sup>5</sup> Taking to the courts, states parried successfully by claiming an inalienable entitlement not to have administrative capacity

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<sup>1</sup> Classic treatments include RICHARD EPSTEIN, *BARGAINING WITH THE STATE* (1993); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). These works are almost exclusively concerned with bargaining with individuals, not institutions.

<sup>2</sup> U.S. CONST. art. 1, §7, cl.2.

<sup>3</sup> See *infra* text accompanying note 108.

<sup>4</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>5</sup> See, e.g., 18 U.S.C. §§ 922, 924, 925A (provisions of the Brady Handgun Violence Prevention Act).

commandeered by federal law.<sup>6</sup> Now, states cannot be commandeered, but they can trade that entitlement for federal funds.<sup>7</sup>

- Congress is the constitutionally designated first mover on fiscal matters.<sup>8</sup> But legislators face serious collective-action problems, rendering them prone to excessive deficit spending.<sup>9</sup> In response, legislators attempted to bind themselves by directing the Comptroller General to sequester funds when the federal budget exceeded designated annualized ceilings.<sup>10</sup> Delegating to the Comptroller General, Congress sought to alienate a portion of its Article I patrimony to an entity that could act without bicameralism and presentment—a novation found subsequently to violate the Constitution.<sup>11</sup>

These examples are not outliers. Institutional deal-making populates the constitutional order as densely as trading over individual rights. Conditional spending enactments, cooperative federalism programs, and even preemptive legislation provide potent venues for federal-state exchange. Congress and the executive have also long experimented with diverse permutations of the law-making process, including the legislative veto, fiscal sequester mechanisms, line-item vetoes, and presidential budgeting. Institutional bargaining then is hardly the exception; it is often the rule.

This Article presents a theory of institutional bargaining and its limits.<sup>12</sup> The theory draws upon economic theories of bargaining between

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<sup>6</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>7</sup> *New York v. United States*, 505 U.S. 144, 167 (1992) (endorsing the use of federal funds to “influence a State’s legislative choices”).

<sup>8</sup> See, e.g., U.S. CONST. art. 1, §7, cl.1.

<sup>9</sup> John F. Cogan, *The Dispersion of Spending Authority and Federal Budget Deficits*, in *THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING* 26–27 (John F. Cogan et al. eds., 1994).

<sup>10</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>11</sup> *Id.*

<sup>12</sup> Previous studies tend to focus on single federal authorities, such as the spending power, see, e.g., Samuel Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 GEO. L. J. 861 (2013); Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1995); Thomas McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85; or the Eleventh Amendment, see Daniel Farber, *The Coase Theorem and the Eleventh Amendment*, 13 CONST. COMMENT. 141 (1996), or commandeering doctrine, see Erin Ryan, *Federalism at the ‘Cathedral’: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1,2 (2010) [hereinafter Ryan, ‘Cathedral’]. A recent piece argues for “federalism bargaining” via secondary markets and auctions. F.E. Guerra-Pujol, *Coase and the Constitution: A New Approach to Federalism*, 14 RICH. J.L. & PUB. INT. 593, 599–604 (2011). This proposal is both unnecessary (as

individuals to model the permissible space for institutional deals. The basic intuition is simply expressed. Private bargaining is typically viewed as augmenting social welfare through Pareto-efficient trades.<sup>13</sup> The apotheosis of that perspective is the Coase theorem. This predicts that private parties will bargain to efficient results regardless of how the law assigns initial entitlements if transaction costs are zero.<sup>14</sup> Of course, transaction costs are rarely zero. Initial allocations of rights<sup>15</sup> and the law's election between property and liability rules<sup>16</sup> will often have welfare effects. Moreover, private law theorists have identified conditions under which bargaining should be prohibited via inalienability rules.<sup>17</sup> Drawing on these law-and-economic tools, as well as political science and doctrinal insights, I propose a default rule for structural constitutional deals and two circumstances in which the default can be overcome: Simply put, I argue that the outcomes of intermural bargaining should be immune from constitutional assault absent a substantiated concern about negative externalities or paternalism-warranting internalities.

Institutional bearers of vested constitutional interest, to be sure, do not necessarily behave like individuals. It is thus not sufficient to translate in mechanical fashion the legal and normative frameworks for private bargaining to the institutional context. Rather, my aim in this study is to demonstrate—not to assume—that private bargaining provides a useful model for the structural constitutional context. As a threshold matter, we might note that some key differences between institutions and individuals

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intermural bargains happen without markets or auctions) and implausible. The one more ambitious work I have identified is still narrowly focused on the scope of departmentalist interpretive authority. John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequences of Rational Choice in the Separation of Powers*, 56 L. & CONTEMP. PROBS. 293 (1993). McGinnis's useful work develops a powerful set of reasons for expecting that endogenous interbranch settlements by bargaining and accommodation will be pervasive, *id.* at 295–99, but does not develop an account of their proper boundaries. My account of bargaining not only rests on different normative grounds, but also identifies its limits.

<sup>13</sup> See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521 (1945).

<sup>14</sup> R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 8 (1960).

<sup>15</sup> For example, in incomplete contracts. See, e.g., Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L. J. 729, 729 n.1 (1992) (collecting citations to literature).

<sup>16</sup> A property rule means that property can only be transferred with the owner's consent; a liability rule allows transfer without consent but with compensation determined by a third party. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972).

<sup>17</sup> Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 934–35 (1985).

render bargaining *more* salient for institutional than individual holders of constitutional entitlements. Branches of the federal government and states, unlike individuals, cannot exit from undesirable constitutional arrangements by physically departing a jurisdiction.<sup>18</sup> Further, changing the constitutional dispensation through textual amendment is often practically impossible given Article V's rigidity.<sup>19</sup> At the same time, institutional bargaining might well have higher stakes than individual bargaining over constitutional entitlements. The Framers believed structural rules would be pivotal to the Constitution's design.<sup>20</sup> Negotiated compromises of architectural principles might undermine the Constitution's central aims of fostering democratic accountability and producing national public goods.

To date, scholars and jurists have employed either formalist or functionalist approaches to these structural constitutional problems.<sup>21</sup> But neither formalist nor functionalist lenses has proved capable of generating stable, coherent solutions.<sup>22</sup> Rather than seeking answers in inconclusive constitutional texts, open-ended historical evidence, or abstract conceptual analysis, the theory of intermural relations herein developed directs attention to a central mechanism through which institutions interact. By modeling this mechanism's outcomes, the theory provides a simple,

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<sup>18</sup> See Adam Cox & Adam Samaha, *Unconstitutional Conditions Questions Everywhere: Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 63 (2013) ("Exit generates unconstitutional conditions questions by making every government imposition at least nominally optional."). State secession is now illegal. *Texas v. White*, 74 U.S. 700, 724–25 (1869) ("What can be indissoluble if a perpetual Union, made more perfect, is not?").

<sup>19</sup> See Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. -- (forthcoming 2014) [hereinafter "Huq, *Function of Article V*"]; see also *infra* text accompanying notes 220 to 222.

<sup>20</sup> See, e.g., THE FEDERALIST NO. 84, at 476 (Alexander Hamilton) (I. Kramnick ed., 1987) (explaining that bills of rights "would contain various exceptions to powers which are not granted: and ... would afford a colorable pretext to claim more than were granted").

<sup>21</sup> See, e.g., Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000) (demonstrating historical equivocation between formalist and functionalist modes of analysis); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions--A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

<sup>22</sup> Work by Elizabeth Magill in the separation-of-powers context is especially useful; her conceptual analyses of balance and structural equilibrium has obvious translation to the federalism context. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1194–97 (2000) [hereinafter "Magill, *Real Separation*"] ("We do not know what 'balance' means, and we do not know how it is achieved or maintained."); accord M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001).



transubstantive framework for analyzing a wide spectrum of novel institutional arrangements.

The study's primary aim is accordingly to limn a general framework for dissecting structural constitutional dilemmas. That framework is perhaps most directly meant to illuminate and guide the behavior of political-branch actors taking frontline decisions about when to enter institutional bargains, and to facilitate public evaluation and criticism of "departmentalist" legal judgments underwriting intermural deals.<sup>23</sup> The theory has secondary relevance to judicial doctrine. When officials decline to enter intermural deals, courts lack a justiciable controversy to resolve. Even when a deal is struck courts' comparative epistemic weakness in predicting structural change's effects undermine the case for broad judicial superintendence.<sup>24</sup> Exceptional judicial caution therefore should be exercised prior to invalidating a novel structural arrangement.

The argument proceeds in four parts. Part I defines the concept of 'bargaining' for the purposes of my inquiry. It then summarizes the dominant theories of bargaining in private law. Turning to structural constitutionalism, Part II demonstrates the pervasiveness of institutional bargaining by documenting the practice in both separation of powers and federalism contexts. The ensuing taxonomy suggests that the Court's current doctrine lacks coherence. The balance of the Article accordingly develops an alternative normative evaluation of the practice building on Coasean principles. First, Part III defends a positive default rule for institutional bargains parallel to the default rule used in the ordinary marketplace. Part IV then specifies two limiting conditions—externalities and paternalism-warranting internalities—also drawn by analogy from the private law context.<sup>25</sup> In concluding, I reassess the role of judicial enforcement of this framework.

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<sup>23</sup> For studies of departmentalist practice, *see, e.g.*, Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005).

<sup>24</sup> For skeptical treatments of judicial competence in structural constitutional questions, *see, e.g.*, Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013) [hereinafter "Huq, *Standing*"]; Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013) [hereinafter "Huq, *Removal*"].

<sup>25</sup> A threshold point about terminology: In this Article, I use the phrases intermural bargaining, institutional bargaining, and structural constitutional negotiation interchangeably to refer to the same phenomenon. Variation in vocabulary is employed for the purely stylistic reason of avoiding leaden prose. Unless otherwise noted, nothing except for stylistic felicity rests on my terminological election at any given instant.

## **I. Bargaining over Individual Entitlements in Public and Private Law**

This Part defines bargaining for the purposes of this study. It explores how courts analyze bargaining over individual entitlements in both private and public law contexts. In both domains, bargaining is permitted absent an argument from externalities or paternalism. This intuition provides a potent starting point for analyzing structural constitutional deals.

### **A. What is Bargaining?**

This Article is concerned with instances in which institutions actively negotiate the allocation of entitlements created by the Constitution. What, though, counts as a negotiated bargain over an entitlement, constitutional or otherwise? According to the Restatement (Second) of Contracts, a bargain is “an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.”<sup>26</sup> The Restatement elaborates that “a performance or a return promise [is] bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”<sup>27</sup> Bargains thus embody “reciprocal ... inducement.”<sup>28</sup>

In harmony with this approach, I focus here on a class of intermural bargains with the following characteristics: (1) a stable equilibrium (2) respecting the allocation of institutional authority between states or branches that (3) is the outcome of interbranch or intergovernmental negotiation between officials acting in their official capacity. This definition does not resolve all boundary disputes (e.g., how long must an institution endure before it counts as stable? when are officials acting in an official, as oppose to partisan capacity?). But it is sufficiently precise to pick out a class of phenomena—e.g., the line-item veto, the budget lockbox, and the office of the independent counsel—for the purpose of analysis here. Further, the definition is sufficiently capacious that it reaches both bargains that are instantiated in the form of law or regulations and bargains distilled

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<sup>26</sup> RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

<sup>27</sup> *Id.* § 71.

<sup>28</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 293-94 (Dover Publications, Inc. 1991) (1881); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981) (“In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement.”).

into informal or conventional agreements enforced through a tacit threat of future retaliation.<sup>29</sup>

This definition seems to elide the possibility that institutions can be coerced such that an agreement should be ranked as involuntary. There is a large literature about coercion in both private and public law.<sup>30</sup> Most of that work focuses on individuals rather than institutions.<sup>31</sup> Its extension to institutions raises complex evaluative puzzles. For example, it is not immediately clear what it means to say that a corporate entity ‘feels’ coerced. Nor is it clear that there is any way of determining when an institution has been ‘wronged’ by a coordinate institution’s promise or threat, such that the latter counts as coercive.<sup>32</sup> My argument does not depend on contestable claims about institutional psychology or the rights of corporate entities. Instead, I develop in what follows a broadly welfarist account of the boundaries to permissible bargains based on the likely effects of such bargaining upon values the Constitution aims to promote, including democratic accountability and the provision of national public goods.

## **B. Individual Bargaining in Theory and Practice**

### *1. Bargaining in Private Law*

In private law contexts, bargaining is typically viewed as a desirable mechanism for realizing social welfare gains. Starting with Ronald Coase, law and economics scholars have argued that a resource will be assigned to its highest value use via private ordering in the absence of transaction costs.<sup>33</sup> “Assuming parties are rational,” the theory suggests, they will trade until a resource is assigned to its highest value use, and then “agre[e] upon

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<sup>29</sup> Cf. Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 297 (1987).

<sup>30</sup> See, e.g., Jeffrie G. Murphy, *Consent, Coercion and Hard Choices*, 67 VA. L. REV. 79 (1981); Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD 440 (Sidney Morgenbesser et al. eds., 1969).

<sup>31</sup> For an exception, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L. J. 1 (2001).

<sup>32</sup> In recent work, Professor Berman has developed the possibility that institutions can be compelled, even if they lack the requisite psychological states to fairly be described as being coerced, because legal actors may have legal or moral duties toward institutions. See Mitchell N. Berman, *Conditional Spending and the (General) Conditional Offer Puzzle* (2013) (manuscript on file with author). Even if Berman’s claim about duties toward institutions is correct, I do not assume here any exogenously given account of such duties. Rather my aim is to develop that account from first principles.

<sup>33</sup> Coase, *supra* note 14, at 8; accord Calabresi & Melamed, *supra* note 16, at 1097.

terms that maximize their joint surplus.”<sup>34</sup> Given bargaining’s welfare enhancing effects, scholars posit that states should strive to create and administer property entitlements and enforcement regimes to facilitate bargaining.<sup>35</sup> This often entails an inquiry into how law should craft interests—e.g., as property or liability rules<sup>36</sup>—to maximize welfare.<sup>37</sup> In structural constitutional law, however, where most interests are protected with property rules rather than liability rules, this is not the best place to begin an inquiry.<sup>38</sup> Instead, I propose starting with a second, more relevant line of private-law scholarship concerning the reasons for prohibiting bargains.<sup>39</sup> That work provides a basic framework for thinking about the limits to autochthonic ordering in public law contexts.

Within the dominant welfarist approach to private bargaining, limits to freedom of contracting are usually justified based on either the presence

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<sup>34</sup> Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 397 (2009).

<sup>35</sup> For the classic statement, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); see also Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J. L. & ECON. S77, S95 (2011) [hereinafter “Merrill & Smith, *Coasean Property*”] (“[P]roperty rights assume the form they do in significant part to conserve on transaction costs.”).

<sup>36</sup> See *supra* note 16 (defining property rules and liability rules).

<sup>37</sup> See Ian Ayres, *Valuing Contract Scholarship*, 112 YALE L. J. 881, 891 (2003) (“In models with incomplete information, the efficiency loss of choosing an inefficient rule can greatly exceed the nominal private costs of contracting around a default.”); Robert C. Ellickson, *The Case for Coase and Against “Coaseanism,”* 99 YALE L. J. 611, 624 (1989) (explaining that “the prime normative objective should be to minimize the sum of transaction costs and deadweight losses” due to insurmountable transaction costs). *But see* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L. J. 829, 834 (2003) (noting in the contract law context that “determinate models omit important variables, but including these variables makes them indeterminate, or, in some cases, unrealistic, because they place too great a burden on courts”).

<sup>38</sup> This is not to say that the choice between property and liability rules is irrelevant. For example, the Court’s commandeering doctrine might be understood as motivated by a preference for a property rule over a politically enforced liability rule. See Roderick Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 817 (1998) [hereinafter “Hills, *Cooperative Federalism*”] (arguing that “the federal government should not confiscate the property or conscript the services of nonfederal governments ... [but] should purchase such services through a voluntary intergovernmental agreement”).

<sup>39</sup> This is also a literature that examines non-welfarist justifications for limiting private bargaining. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1907 (1987) (developing a “personhood” theory of inalienability); accord Rose-Ackerman, *supra* note 17, at 932–33. Deontological values of the kind Radin marshals do not translate well into the institutional context.

of a negative externality or a recognized species of paternalism.<sup>40</sup> First, “contracts are optimal ... only if the contracting parties bear the full costs of their decisions and reap all the gains.”<sup>41</sup> But when there are “adverse effects on third parties,” i.e., externalities, the presumption of optimality fails.<sup>42</sup> Under standard welfarist assumptions,<sup>43</sup> the default response to an externality is to require the “internalizing [of] the externality through fees or taxes, [or] subsidizing the provision of information.”<sup>44</sup> Mandatory terms are deployed only when these fail. For example, it has been argued that negative externalities can justify the absolute prohibitions of usury law, which prevents overconsumption of social security.<sup>45</sup> Neither fees nor disclosure solve this externality. Only a mandatory rule will work.

The second exception, paternalism, is a more fluid concept.<sup>46</sup> Loosely defined, paternalism is the law’s “intervention in a person’s

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<sup>40</sup> Calabresi & Melamed, *supra* note 16, at 1111–15 (also noting that distributional motives may lie behind asserted paternalistic reasons); Rose-Ackerman, *supra* note 17, at 938; accord Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 88 (1989). Michael Trebilcock offers a broader range of exceptions, but includes paternalism and externalities. MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 58–77, 147–163 (1993).

<sup>41</sup> Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1436 (1989). Some scholars also point to distributive goals as justifications for limits on bargaining. See, e.g., *id.* at 1434 (noting the possibility that regulations can be mechanisms for “income transfer”). Distributive justifications can be reframed as concerns about the distribution of social power. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 571–72 (1982) (“The decision maker operating from distributive motives changes the groundrules so as to change the balance of power between the various groups in civil society.”). Even framed in terms of power, distributive arguments have no safe perch in the structural constitutional context absent some agreement about which institution needs empowerment.

<sup>42</sup> Easterbrook & Fischel, *supra* note 41, at 1436. Externalities can also be defined in relation to the competitive equilibrium resulting from a Walrasian auction. TREBILCOCK, *supra* note 40, at 59.

<sup>43</sup> I set aside here the hard question of what counts as an adverse externality in private law. See TREBILCOCK, *supra* note 40, at 61–64.

<sup>44</sup> Rose-Ackerman, *supra* note 17, at 938.

<sup>45</sup> Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom To Contract*, 24 J. LEGAL STUD. 283 (1995).

<sup>46</sup> Cf. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L. J. 763, 765 (1983) (“It would be a mistake ... to assume there is a single principle that best explains every paternalistic restriction in our law of contracts ...”).

freedom aimed at furthering her own good.”<sup>47</sup> Its etiologies are diverse. Paternalists search for internalities, or “problems of self-control and errors in judgment that harm the people who make those very judgments. [I]nternalities ... occur[r] when we make choices that injure our future selves.”<sup>48</sup> A large literature mines behavioral law and economics for such internalities.<sup>49</sup> Another related literature asks how individual preferences should be “laundered” to eliminate adaptive and otherwise distorted preferences.<sup>50</sup> Obviously, paternalism arguments based on individual “human behavior” or “human error”<sup>51</sup> cannot be directly transposed to the institutional context. Errors that infect individual decision-making may not occur in collective decision-making. Other internalities, however, do not rely on theories of human psychology. For example, paternalism in contract law may rest on accounts of second-order preferences, or preferences over preferences.<sup>52</sup> *Mutatis mutandi*, the idea of second-order preferences might be extended to the institutional context. For example, an institutional interest held common by a group of individuals—say, several states or numerous legislators—might be degraded by free-riding. When a collectivity suffers from this sort of collective action dilemma, intervention might be justified to solve the ensuing ‘internality.’

The private law approach to bargaining, in short, is simple. A permissible default position is combined with exclusionary rules when triggered by negative externalities and paternalism-warranting internalities.

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<sup>47</sup> Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 236 (1998); see also TREBILCOCK, *supra* note 40, at 147 (asking whether “parties present preferences” equate to “their own best interests”).

<sup>48</sup> Cass R. Sunstein, *Behavioral Economics and Paternalism*, 122 YALE L. J. 1826, 1844–45 (2013) [hereinafter “Sunstein, *Behavioral Economics*”]. One example is limits on cross-collateralization in consumer contracts, barred because purchasers tend to discount their likelihood of default. DOUGLAS G. BAIRD, RECONSTRUCTING CONTRACTS 139 (2013).

<sup>49</sup> For a summary of the relevant literature, see generally Sunstein, *supra* note 48, at *passim*; DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

<sup>50</sup> See Robert Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 81–86 (J. Elster & A. Hylland eds. 1989) (listing five potential grounds for laundering preferences). For a careful analysis of the relevance of adaptive preferences to rational-choice consequentialism, see Jon Elster, *Sour grapes—utilitarianism and the genesis of wants*, in UTILITARIANISM AND BEYOND 219 (A. Sen & B. Williams, eds. 1982).

<sup>51</sup> Sunstein, *supra* note 48, at 1832.

<sup>52</sup> Zamir, *supra* note 47, at 242.

## 2. *Bargaining over Individual Constitutional Rights*

Bargaining over constitutional rights raises issues absent from the private law context. Constitutional law is characterized by pervasive worries about government infringement on individual choice.<sup>53</sup> Worries about unequal bargaining power that might be diffuse in the private contracting context<sup>54</sup> come into crisp focus when one party's wealth is sourced through taxes on the other party.<sup>55</sup> Government also possesses a monopoly on the use of legitimate force that allows it to bargain not merely with dollars,<sup>56</sup> but also under the shadow of licit coercion. Wielding either the purse or the sword, government can use its overwhelming resources to "divide and conquer"<sup>57</sup> potential adversaries among civil society, thereby degrading important political liberties.

Nevertheless, the basis framework developed in private-law contexts can be discerned in the complex jurisprudence concerning bargaining over individual rights. The Court has developed two sets of rules for noncriminal and criminal procedural rights respectively. In both domains, bargaining is generally permitted with exceptions roughly tracking the externalities and paternalism exceptions.

Consider first the rules for noncriminal contexts. When government offers money in exchange for the exercise or nonexercise of a constitutional right (e.g., speech), it can purchase the latter in the same way it can buy any other good.<sup>58</sup> Government thus routinely purchases private speech.<sup>59</sup> It

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<sup>53</sup> This is the lesson of state action doctrine. Cf. Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967) ("It is not too much to have said that the state action problem is the most important problem in American law.").

<sup>54</sup> In economic terms, bargaining power depends on plural factors, including bargaining procedures, parties' relative costs of delay and relative patience, outside options, and more. MARTIN J. OSBORNE & ARIEL RUBINSTEIN, *BARGAINING AND MARKETS* 50–55 (1990).

<sup>55</sup> Kreimer, *supra* note 1, at 1296 ("The greatest force of a modern government lies in its power to regulate access to scarce resources.").

<sup>56</sup> See Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (Hans Gerth & C. Wright Mills eds.) (1948).

<sup>57</sup> See Eric A. Posner, Kathryn E. Spier & Adrian Vermeule, *Divide and Conquer*, 2 J. LEGAL ANALYSIS 417, 426–27 (2010) (modeling divide and conquer strategies as, inter alia, a Stag Hunt game, and explaining how third-party bribes can yield suboptimal outcomes for participants).

<sup>58</sup> See, e.g., *United States v. American Library Assn., Inc.*, 539 U.S. 194, 212 (2003) (plurality opinion); *Rust v. Sullivan*, 500 U.S. 173, 195 (1991).

cannot, however, purchase supererogatory “conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”<sup>60</sup> This limit on contractual conditions might be explained by a worry about “the indoctrinating effect of a monopolized marketplace of ideas” created when government buys out vocal participants through conditional funding—i.e., it is a limit motivated by concern about negative externalities.<sup>61</sup> A different rule applies in Taking Clause cases. Imposing regulatory exactions, the state may extract only conditions with “an essential nexus and rough proportionality” to the “impacts of a proposed development.”<sup>62</sup> The limit to regulatory takings is sometimes justified by vague grumbling about “extortionate” government action.<sup>63</sup> It is more cogently explained by a concern that landowners as a group cannot resist government “extortio[n]” through the political process, because individually they are vulnerable to “divide and conquer” tactics.<sup>64</sup> This is an argument from paternalism-warranting internalities.

Different rules apply to bargaining over criminal procedure entitlements.<sup>65</sup> The Court has tended to police “mistake or overt

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<sup>59</sup> This usually is addressed through the government speech doctrine. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550 (2005). Government can also effectively purchase the Fourth Amendment rights of government employees. *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

Government likely cannot purchase religious observance.

<sup>60</sup> *Agency for Intern. Development v. Alliance for Open Society Intern., Inc.*, 133 S. Ct. 2321, 2328 (2013).

<sup>61</sup> David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675, 680 (1992).

<sup>62</sup> *Koontz v. St Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); *accord Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

<sup>63</sup> *Koontz*, 133 S. Ct. at 2549–50.

<sup>64</sup> *See* Posner, Spier & Vermeule, *supra* note 57, at 426–27 (modeling divide and conquer strategies as, inter alia, a Stag Hunt game, and explaining how third-party bribes can yield suboptimal outcomes for participants).

<sup>65</sup> The regulation of bargaining over criminal penalties, however, must be distinguished from the possibility of unilateral waivers, which have become increasingly frequent. *See, e.g., Salinas v. Texas*, 133 S. Ct. 2174, 2180 (2013) (Alito, J., plurality op.) (holding that suspects must expressly invoke the Fifth Amendment in noncustodial interrogations to preclude later use of silence in criminal trial); *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2012) (holding in the context of post-*Miranda* silence that a defendant failed to invoke his Fifth Amendment right to cut off police questioning when he remained silent for two hours and 45 minutes).



deception”<sup>66</sup> but otherwise assumes that pleas reflect Pareto-optimal compromises.<sup>67</sup> Hence, threats by prosecutors to bring charges that would not otherwise be lodged render a plea “no less voluntary than any other bargained-for exchange.”<sup>68</sup> Recent shifts in Sixth Amendment jurisprudence, however, narrow that gap by imposing new obligations related to defense-side representation in plea bargaining.<sup>69</sup> These new Sixth Amendment rules have been justified as correcting a flawed assumption that “good information” on defendants’ part generally enabled them to “rationally forecast probabilities” of conviction and sentences.<sup>70</sup> The new rules instead reflect the reality that defendants will rarely be fully informed, but rather plagued by internalities of “psychological biases and heuristics.”<sup>71</sup> Hence, in the criminal context, like noncriminal contexts, constraints on bargaining with the state are grounded on internalities concerns.

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This brief survey of bargaining over individual rights reveals a parallel basic architecture in both private and public law: An affirmative default rule is fenced in concerns about by third-party externalities and paternalism. In the institutional context, paternalist justifications include the desire to protect collective entities from their own inability to overcome the

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<sup>66</sup> William Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 763 (1989); see also *Bousley v. United States*, 523 U.S. 614, 619 (1998).

<sup>67</sup> See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L. J. 1969, 1970–71 (1992).

<sup>68</sup> *Ricketts v. Adamson*, 483 U.S. 1, 9 n.5 (1987) (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)). Criminal procedure rights are thus less protected than other rights. Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1045–46 (2006).

<sup>69</sup> See *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012) (holding that the Sixth Amendment can be violated by counsel’s advice to reject a plea deal if a trial leads to a worse outcome); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (“[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”); see also *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (requiring advice about the immigration consequences of pleas).

<sup>70</sup> Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1126 (2011).

<sup>71</sup> *Id.* Another internalities-based argument against plea bargaining suggests that prosecutors exploit a collective action problem among defendants to secure convictions on charges defendants would never have faced in the first instance. Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners’ (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 743 (2009).

transaction costs of group action. The question now is whether these basic insights can be translated over to the structural constitutionalism context.

## **II. The Varieties of Institutional Bargaining**

The Constitution vests a rich menu of institutional entitlements in the branches of the federal government and the several states. Dynamic interaction between these institutions creates opportunities for bargains in which an entitlement held initially by one institution is voluntarily transferred to another institution to realize a policy benefit. Intermural bargaining occurs between Congress and the executive over elements of the national lawmaking process. States and the federal government, by contrast, negotiate over regulatory jurisdiction (i.e., the power to set rules for a certain population) and the enforcement-related infrastructure. By taxonomizing observed bargains, this Part demonstrates that voluntary deal-making over institutional entitlements is a pervasive feature of the current constitutional dispensation. This motivates the normative analysis of Parts III and IV.

### **A. Bargaining Between Branches**

#### *1. The Constitution's Allocation of Lawmaking Interests*

Article I of the Constitution partitions lawmaking power between the two Houses of Congress—each has the right to a separate vote on a bill—and the President—he or she has the right to sign, veto, or pocket veto that enrolled bill.<sup>72</sup> Article II contains no explicit grant of legislative-like authorities<sup>73</sup> (although presidents do exercise de facto decree power<sup>74</sup>). This asymmetry is amplified in the fiscal domain. To begin with, revenue-raising measures must “originate” in the House of Representatives, not the Senate.<sup>75</sup> Executive fiscal authority is also tightly limited. Absent an

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<sup>72</sup> U.S. CONST. art. 1, §7, cl.2.

<sup>73</sup> Where the President's constitutional authority seems at an apogee, the Constitution's text cuts in the other direction. Hence, even if the President is “Commander in Chief of the Army and Navy of the United States,” U.S. CONST. art. II, §2, cl.1, Congress still can make “Rules for the Government and Regulation of the land and naval Forces,” Art. I, §8, cl.14.

<sup>74</sup> See Brian R. Sala, *In Search of the Administrative President: Presidential 'Decree' Powers and Policy Implementation in the United States*, in EXECUTIVE DECREE AUTHORITY 254-73 (John M. Carey & Matthew Soberg Shugart eds., 1998).

<sup>75</sup> U.S. CONST. art. I, §7, cl.1.

“[a]ppropriato[n] made by Law,” the Treasury cannot disburse funds.<sup>76</sup> Military appropriations also cannot last more than two years.<sup>77</sup> The Constitution thus reposes the “power of the purse’ ... in the Congress” alone, with particular care to ensure legislative control over military power that (to eighteenth-century eyes) might provide a basis for plenary executive control.<sup>78</sup> Pursuant to this authority, Congress created in 1974 a complex set of procedures<sup>79</sup> for discretionary and direct spending organized around its longstanding committee structures.<sup>80</sup>

What the Constitution proposes, though, politicians dispose. Observed deviations from the text’s modular disposition are typically “consensual arrangements among the branches, not unilateral action by one branch.”<sup>81</sup> When these deals are challenged in federal court, the ensuing jurisprudence illuminates the landscape of interbranch bargaining over structural entitlements.<sup>82</sup>

## 2. *Bargaining over Rulemaking Authority*

For more than a century after the Constitution’s ratification, the textual division of law-making authority between Congress and the President endured without much controversy. As late as 1892, the Supreme

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<sup>76</sup> U.S. CONST. art. I, §9, cl.7 (also requiring regular publication of “a regular Statement and Account of the Receipts and Expenditures of all public Money”); *see also* 31 U.S.C. §§ 1341(a), 1350 (2006) (imposing criminal penalties of up to two years’ imprisonment and \$5,000 in fines upon federal officials engaging in the knowing expenditure of funds absent a legislative appropriation). The President’s authority to issue new debt is constrained by statute. *See* 31 U.S.C. § 3101(b) (Supp. IV 2011) (providing the statutory debt limit), *amended by* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

<sup>77</sup> U.S. CONST. art. I, §8, cl.12.

<sup>78</sup> Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 278 (1977).

<sup>79</sup> Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 and 31 U.S.C.).

<sup>80</sup> *See* Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L. J. 1555, 1563, 1568–80 (2007) (describing current congressional budgeting structures).

<sup>81</sup> Jacob R. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 356 (2010).

<sup>82</sup> In addition to the species of bargaining discussed below, it is possible to think of statutes amending the House’s or the Senate’s internal procedures as an interbranch bargain. Aaron-Andrew P. Bruhl, *Using Statutes To Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346–47 (2003) (describing “statutized rules”). Bruhl analyzes these bargains in light of entrenchment concerns. *Id.* at 372–76 (anticipating my analysis of negative externalities); *see infra* Part IV.A.

Court could assume that no interbranch delegation of such legislative authority was permissible.<sup>83</sup> An “intelligible principle” was required to guide any exercise of executive branch discretion.<sup>84</sup> Although the Court permitted executive clarification of statutes through rulemaking by the early twentieth century,<sup>85</sup> it remained committed to the nondelegation doctrine. In 1935, the Justices invalidated two early New Deal regulatory regimes on nondelegation grounds.<sup>86</sup> In effect, Article I entitlements were protected with an inalienability rule.

Since 1935, however, the Court has permitted Congress and the executive to negotiate broad delegations of rulemaking authority to federal administrative agencies. Delegation is now “the dynamo of modern government.”<sup>87</sup> The political branches conspire in “virtually complete abandonment” of nondelegation constraints.<sup>88</sup> Even scholars critical of this development perceive “no serious real-world legal or political challenges” to it.<sup>89</sup> Now, “there just is no constitutional nondelegation rule” and whispers thereof are “nothing more than a local aberration.”<sup>90</sup> As a result, “[t]he bulk of our federal law now derives from agency rules, guidances, opinion letters, manuals, and websites.”<sup>91</sup> Litigated efforts to rekindle the nondelegation doctrine sputter.<sup>92</sup> In a limited number of cases, to be sure,

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<sup>83</sup> *Marshall Field & Co v Clark*, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”).

<sup>84</sup> *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>85</sup> *See, e.g., United States v Grimaud*, 220 U.S. 506, 521 (1911) (“(T)he authority to make administrative rules is not a delegation of legislative power.”).

<sup>86</sup> *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>87</sup> LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 33 (1965).

<sup>88</sup> *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994).

<sup>89</sup> *Id.* Justice Thomas, however, has indicated his willingness to “reconsider [the Court’s] precedents on cessions of legislative power.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

<sup>90</sup> Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002).

<sup>91</sup> Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1730 (2010); accord Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L. J. 1463, 1469 (1992).

<sup>92</sup> *See, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222–23 (1989) (finding “no support . . . for [the] contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases

the Court imposes “nondelegation canons,” but these tend to enforce discrete values such as federalism and individual rights external to Article I.<sup>93</sup> What once was subject to an inalienability rule is now regulated through a property rule.<sup>94</sup>

The ensuing transfer of Article I authority was amplified in 1983 with *Chevron U.S.A. v. Natural Resources Defense Council*, in which the Court invoked expertise and democratic accountability grounds to defer to some executive-branch interpretations of ambiguous statutes.<sup>95</sup> Provided a statute adequately signals congressional intent to vest the executive with gap-filling authority, delegation is packaged post-*Chevron* with new-rule-making authority.<sup>96</sup> Indeed, even a “general delegation to the agency to administer the statute will often satisfy the court that Congress has delegated interpretive authority over the ambiguity at issue.”<sup>97</sup> *Chevron* deference matters here because one important way for Congress to control ex post executive branch policy-making is by constructing “fire alarms for constituents to sound when wronged by bureaucrats.... Congress gives private groups standing to challenge administrative decisions.”<sup>98</sup> Judicial deference to agency interpretations renders this strategy less effective. Courts operating within a deferential regime are less likely to heed “fire alarms” sounded by private citizens. *Chevron* therefore not only transfers

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where Congress delegates discretionary authority to the Executive under its taxing power”); see also *Touby v. United States*, 500 U.S. 160 (1991) (same for criminal statutes).

<sup>93</sup> Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

<sup>94</sup> When Congress overrides a presidential veto to delegate authority to the federal government, it is hard to describe the outcome as consensual. Delegation instead is a (legitimately) forced transfer.

<sup>95</sup> 467 U.S. 837, 843, 865 (1984) (arguing that because “[j]udges are not experts in the field, and are not part of either political branch of the Government,” they should defer to reasonable agency rules unless Congress has directly spoken to the issue).

<sup>96</sup> See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (identifying this threshold problem as “*Chevron Step Zero*”).

<sup>97</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1884 (2013) (Roberts, C.J., dissenting); accord *id.* at 1871 (Scalia, J., majority op.). But judicial deference is not stably allocated. See Jud Matthews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1352–53 (2013) (arguing that administrative agencies face a “‘deference lottery’ when they advance a statutory interpretation in a notice-and-comment rulemaking or formal adjudication”).

<sup>98</sup> See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984). When an agency’s ideal point is closer to Congress’s than private litigants’, judicial deference does not undermine congressional control.

Article I rule-making authority, but also handicaps an important instrument of legislative control.<sup>99</sup>

The demise of the nondelegation doctrine hence enabled an intragovernment market for law-making authority. Once, if Congress could not overcome its own veto-gates and attain policy outcomes by specifying those preferences in textual form first to be engrossed, then enrolled, it was out of luck. Now, Congress has another option: it can bargain with the executive over an open-ended delegation of rulemaking authority coupled to vague goals as a way to achieve policy change.<sup>100</sup> Dollars may not be the coin of this marketplace, but it nonetheless has a transactional character. Congress is not merely waiving its Article I prerogatives. It is engaged in deliberate and reciprocal deals in which legislative authority is alienated *in order to* secure policy goods legislators could not otherwise obtain. Delegation is a negotiated deal, in short, in which power is traded for discretion.

Alternatively, interbranch transfers of regulatory authority are achieved through customary interbranch accords. In military and foreign affairs matters, the Court permits unilateral executive action based not only on a present legislative delegation, but also on prior congressional action. The Court has held that a historical interbranch consensus can operate as a “gloss” on ambiguous Constitution text.<sup>101</sup> In *Dames & Moore v. Regan*, for example, the Court endorsed executive power to create unilaterally a supranational claims tribunal through an agreement with Iran on the ground that previous “Congress[es] ha[d] implicitly approved the practice.”<sup>102</sup> The holding rested on the principle that “a practice by one branch of government

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<sup>99</sup> Cf. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1769 (2007) (observing that “fire-alarm” oversight “is efficient because it shifts to third-parties the cost of gathering and processing information”).

<sup>100</sup> See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST APPROACH TO POLICY-MAKING UNDER SEPARATE POWERS* 197 (1999) (arguing that as the complexity, difficulty, and enactment costs of legislative specificity rise, legislators will tend more and more to delegate decisions rather than resolving hard questions themselves).

<sup>101</sup> See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (relying on “historical glosses” on executive power); see also *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (citing the absence of historical practice as one ground for denying congressional standing).

<sup>102</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 680, 686 (1981); accord Jefferson Powell, Essay, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 539 (1999) (“Agreement between the political branches on a course of conduct is important evidence that the conduct should be deemed constitutional.”).

that implicates the prerogatives of another branch gains constitutional legitimacy only if the other branch can be deemed to have ‘acquiesced’ in the practice over time.”<sup>103</sup> More recently, the D.C. Circuit relied on “post-ratification” practice to hold that Presidents have exclusive power to recognize foreign sovereigns.<sup>104</sup> Like formal interbranch transfers of authority, the theory of historical gloss is a theory of interbranch agreements. It is not a constitutional analog to adverse possession. But the operative concept of agreement is ambiguous.<sup>105</sup> As a result, the historical gloss doctrine diminishes Congress’s leverage. It creates the possibility that acquiesced-in delegations will not be accompanied by reciprocal gains for legislators.<sup>106</sup>

A different regime, however, applies when an interbranch bargain slices up the law-making entitlement into something other than a cognizable delegation. In two notable cases, the Court has resisted new permutations of law-making authority by imposing inalienability rules. Its resistance echoes the private law *numerus clausus* principle, which directs that real property rights conform to certain standardized forms.<sup>107</sup>

The legislative veto is an instructive example. The idea of reserving a veto to either one or both Houses did not germinate on Capitol Hill, but “originated because presidents wanted it.... Presidents asked Congress to delegate additional authority and were willing to accept the legislative veto

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<sup>103</sup> Curtis Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 432 (2012).

<sup>104</sup> *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, -- F.3d --, 2013 WL 3799663, at \*12 (D.C. Cir. Jul. 23, 2013).

<sup>105</sup> See Bradley & Morrison, *supra* note 103, at 433–38 (canvassing various possible meanings of “acquiescence”).

<sup>106</sup> By analogy with custom, it could be argued that the scope of federal court jurisdiction is “the subject of an ongoing dialogue between [Congress and the judiciary].” Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 10 (1990). Indeed, in the course of the serial opinions over jurisdiction-stripping legislation respecting the Guantánamo detentions, the Court referred to itself as embedded within an “ongoing dialogue between and among the branches of Government.” *Boumediene v. Bush*, 553 U.S. 723, 738 (2008). Whether the outcome of this “dialogue” reflects the preferences of all branches, however, is quite another question. Cf. Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMM. 385, 402–05 (2010) (presenting empirical evidence to the effect that Supreme Court intervention in military detentions at Guantánamo has failed to have any significant libertarian effect).

<sup>107</sup> Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1, 4 (2000) (noting that *numerus clausus* means “the number is closed”).

that controlled the delegation.”<sup>108</sup> President Herbert Hoover, seeking broad authority from Congress to reorganize the federal executive, first proposed a legislative veto, and secured one in 1933 reorganization legislation.<sup>109</sup> Legislative vetoes were then incorporated into “hundreds” of statutes as the price of legislative delegations.<sup>110</sup> So indispensable did it become that in the sixteen months *after* the device’s judicial repudiation, Congress still enacted fifty-three legislative vetoes.<sup>111</sup>

*INS v. Chadha* was the occasion for the Court’s invalidation of the legislative veto.<sup>112</sup> It arose out of deportation proceedings in which the House of Representatives had exercised a legislative veto to evacuate relief from deportation granted to six noncitizens.<sup>113</sup> Chief Justice Burger reasoned that the House veto was “essentially legislative in purpose and effect” because it “had the purpose and effect of altering the legal rights, duties and relations of persons,” and hence could only be valid if passed through bicameralism and presentment.<sup>114</sup> Scholars quickly condemned the decision’s formalist character<sup>115</sup> and noted that it failed to recognize the realities of delegation in the post-New Deal regulatory state.<sup>116</sup>

Like the legislative veto, the line-item veto also endeavored to rearrange lawmaking authority between the branches. Unlike the legislative veto, but like delegation, it moved a quantum of congressional authority to the President. The 1994 Line Item Veto Act allowed the President to cancel “(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.”<sup>117</sup> Like the legislative veto, the line-item veto was a voluntary deal. It was proposed by the branch that lost power (Congress) at a time the other branch was led by a political

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<sup>108</sup> Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS., 273, 273–74 (1993).

<sup>109</sup> *Id.* at 278–79.

<sup>110</sup> William West & Joseph Cooper, *The Congressional Veto and Administrative Rulemaking*, 98 POL. SCI. Q. 285, 286 (1983).

<sup>111</sup> Louis Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705, 706 (1985).

<sup>112</sup> 462 U.S. 919, 930–31 (1983).

<sup>113</sup> *Id.* at 926–27.

<sup>114</sup> *Id.* at 951–52 (op. of Burger, C.J.).

<sup>115</sup> *See, e.g.*, Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 250 (2007).

<sup>116</sup> *See, e.g.*, Lawson, *supra* note 88, at 1252–53.

<sup>117</sup> 2 U.S.C. § 691(a) (1994 ed., Supp. III).



foe.<sup>118</sup> Legislators were under no illusions about what they had renounced. “Make no mistake about it,” prophesized Republican Sen. Jon Kyl (a supporter of the proposal), a line item veto “will shift a great deal of new power to ... President [Clinton].”<sup>119</sup> The policy good that Sen. Kyl and others received in exchange for alienating some of their Article I authority was a potential solution to a ‘tragedy of the commons’ problems facing the federal fisc. In this dynamic, each legislator wishing to maintain federal budgetary integrity but also shirking their role in the hope that other legislators would take up the slack.<sup>120</sup>

In *Clinton v. City of New York*, the Court invalidated the line-item veto on formalist grounds similar to *Chadha*’s.<sup>121</sup> Writing for the Court, Justice Stevens reasoned from the Presentment Clause to conclude that “constitutional silence” about unilateral Presidential action repealing or amending parts of duly enacted statutes should be “construe[d] ... as equivalent to an express prohibition.”<sup>122</sup> *Clinton* installed a distinction between “cancellation and modification delegations on the one hand and the familiar lawmaking delegations.”<sup>123</sup> That is, Congress can alienate regulatory authority but not fiscal authority. It is not clear the distinction is cogent. When Congress delegates regulatory discretion, it necessarily vests the executive with some discretion over the costs of administration and the enforcement of fines. Indeed, Justice Scalia in his *Clinton v. City of New York* dissent reasoned that Congress could achieve substantially the same effect as a line-item veto by alternative means; he thus condemned the Court for being “fak[ed] out” by the Act’s title.<sup>124</sup>

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<sup>118</sup> It was the newly elected Republican House majority in 1994 that proposed and pushed the line item veto, which most immediately empowered President Clinton. Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and The Line Item Veto Act*, 20 CARDOZO L. REV. 871, 872 (1999) [hereinafter “Garrett, *Accountability and Restraint*”]. This was not the first time a line item veto had been proposed in Congress. See Alan Morrison, *The Line Item Veto: Both Parties Want It, but Is It Constitutional? Yes: Unbundling Omnibus Bills Won't Work*, 81 A.B.A. J. 46, 46 (1995). When Hoover first proposed the legislative veto, by contrast, his fellow Republicans controlled both houses. *Id.*

<sup>119</sup> 142 Cong. Rec. S2978 (1996) (statement of Sen. Kyl).

<sup>120</sup> See H.R. Conf. Rep. No. 104-491, at 15 (1996), reprinted in 1996 U.S.C.C.A.N. 892, 892 (stating that the Act was intended to help reduce “run-away federal spending and a rising national debt”).

<sup>121</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>122</sup> *Id.* at 439.

<sup>123</sup> Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 4–5 (1998).

<sup>124</sup> *Clinton*, 524 U.S. at 468-69 (Scalia, J., dissenting).

### 3. *Bargaining over Fiscal Authority*

Congress and the President have agreed on a series of legislative enactments that move substantial fiscal authority between chambers and across the interbranch divide.<sup>125</sup> Some of these deals have been durable, others evanescent. Each embodies a negotiated reallocation of the fiscal authorities initially assigned by Article I of the Constitution.

Consider first shifting entitlements between legislative chambers. The Origination Clause allocates first-mover rights on fiscal matters to the House. But the Senate often “takes a revenue bill passed by the House ... strikes the language of the bill entirely, and replaces it with its own revenue bill unrelated to the one that began in the House.”<sup>126</sup> Further, the House lacks a constitutional role in drafting or enactment revenue-raising tax treaties, but these “have become an important and frequently used coordination device between countries, with the United States entering into nearly seventy such instruments.”<sup>127</sup> Through inattention or acquiescence, the House’s role in fiscal agenda-setting has thus waned.

Negotiated reworkings of constitutional authority over the federal fisc postdate World War I.<sup>128</sup> In 1919, the House Appropriations Committee established a Select Committee on the Budget that drafted a new framework, one that “vested responsibility for the preparation of the budget solely in the President and provided for the establishment in his office of a Bureau of the Budget to give him technical assistance.”<sup>129</sup> The ensuing 1921 law reallocated Congress’s right to set the fiscal agenda to the President.<sup>130</sup> The executive also gained authority to identify the baseline

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<sup>125</sup> See William G. Dauster, *The Congressional Budget Process*, in *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH to Budget Policy* 6–15 (E. Garrett et al. eds., 2008).

<sup>126</sup> Rebecca M. Kysar, *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*. 91 WASH. U. L. REV. – (forthcoming 2014) (draft at 3), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2271261](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271261).

<sup>127</sup> Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT’L L. 1, 2–3 (2013); *id.* at 29–31 (arguing that the Origination Clause should be read as a constraint on the Treaty Power to preserve the House’s role in fiscal matters).

<sup>128</sup> For the pre-twentieth century history, *see id.* at 5–6; *see also* Kate Stith, *Congress’ Power of the Purse*, 97 YALE L. J. 1343, 1364–77 (1988) (discussing the two major pieces of nineteenth century framework legislation to exercise control over budgeting).

<sup>129</sup> PAUL STUDENSKI & HERMAN E. KROOSS, *FINANCIAL HISTORY OF THE UNITED STATES* 323 (2d ed. 1963).

<sup>130</sup> *See* Budget and Accounting Act, 1921, Pub. L. No. 67-13, tit. II, 42 Stat. 20, 20-23 (granting greater budgetary powers to the President), *amended by* Reorganization Act of

against which proposed fiscal changes are measured.<sup>131</sup> The executive's agenda-setting authority is further amplified by an implicit delegation bundled into most appropriations measures. Congress no longer enacts line-by-line appropriations targeting discrete offices, but parcels out funds in agency-specific lump-sums denominated in the millions to hundreds of millions of dollars.<sup>132</sup> As a result, the President wields large influence on the intragovernmental and geographic distributions of federal dollars.<sup>133</sup>

Executive dominance of budgeting is not immutable. Between 1990 and 2002, for example, budgeting operated under the "PAYGO rules" negotiated between President George H.W. Bush and Congress, which required that a class of new tax cuts and spending programs be funded via revenue offsets.<sup>134</sup> When Congress failed to offset new covered spending, the President was empowered to issue a mandatory sequestration order.<sup>135</sup> PAYGO, however, expired in 2002, and has not since been renewed, ratcheting back the scope of authority delegated to the executive.<sup>136</sup>

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1939, Pub. L. No. 76-19, §201, 53 Stat. 561, 565 (expanding the President's budgetary control to include "any regulatory commission or board"). The suasive effect of the President's budget, nevertheless, is debated. *See* Dauster, *supra* note 125, at 17 ("Congress can and often does treat the president's budget as just so many suggestions.").

<sup>131</sup> For instance, after the enactment of temporary tax cuts, President George W. Bush proposed that those cuts be treated as permanent for subsequent budgeting purposes such that these extensions would be recorded as budget neutral. *See* Rebecca Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1028 (2011).

<sup>132</sup> *See* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593, 611 (1988) (noting that "appropriations legislation has generally contained less line-item detail than it did in the preceding 150 years [and] appropriations acts fund each broadly defined federal program or activity in one lump sum, termed a budget 'account'"). The use of lump-sum appropriations remains the norm in current and pending appropriations measures. *See, e.g.,* An Act Making Appropriations for the Department of Defense and the Other Departments and Agencies of the Government for the Fiscal Year Ending September 30, 2011, and for Other Purposes, H.R. 1, 112th Cong. (1st Sess. 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1eh/pdf/BILLS-112hr1eh.pdf>.

<sup>133</sup> *See* Christopher R. Berry, Barry C. Burden & William G. Howell, *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 786 (2010).

<sup>134</sup> *See* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Legislative Process*, 65 U. CHI. L. REV. 501, 507-14 (1998) (describing PAYGO).

<sup>135</sup> Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-580, tit. XIII, §13101, 104 Stat. 1388, 1388-574 to 1388-583 (codified as amended at 2 U.S.C. §900-903 (2000)).

<sup>136</sup> For an evaluation of PAYGO, *see* Elizabeth Garrett, *A Fiscal Constitution With Supermajority Voting Rules*, 40 WM. & MARY L. REV. 471, 481 (1999).

The Court has been largely absent from these negotiations.<sup>137</sup> Its only significant judicial intervention was *Bowsher v. Synar*, which invalidated elements of the Balanced Budget and Emergency Deficit Control Act of 1985.<sup>138</sup> This statute allocated sequestration authority to the Comptroller-General, who the Court found to be an agent of Congress.<sup>139</sup> Deploying a formalist logic parallel to *Chadha*'s, Chief Justice Burger explained that this allocation of sequestration authority “plac[ed] the responsibility for execution of the [law] in the hands of an officer who is subject to removal only by ... Congress,” which “in effect ... retained control over the execution of the Act and ... intruded into the executive function.”<sup>140</sup> Later cases gloss *Bowsher* in terms of a functionalist concern about congressional self-aggrandizement.<sup>141</sup> Indeed, Congress reacted to *Bowsher* by delegating sequestration authority to the (executive-branch) Office of Management and Budget.<sup>142</sup> But *Bowsher*, like *Chadha* and *Clinton*, can equally be understood in terms of a constitutional *numerus clausus* principle: Congress can delegate fiscal discretion wholesale, but it cannot unbundle that discretion to reserve a meaningful veto at the margin.

## B. Bargaining between the States and the Federal Government

The Constitution bifurcates regulatory jurisdiction between the several states and the federal government. Efforts to police the ensuing line occupy an inordinate share of judicial bandwidth.<sup>143</sup> Despite the vigor and persistence of judicial invigilation, however, the federal–state border is still characterized by vigorous trading. This section documents diverse forms of regulatory exchange between the federal government and the states to

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<sup>137</sup> In 1975, the Court declined to find implied presidential impoundment authority without statutory authorization. See *Train v. City of New York*, 420 U.S. 35, 44–46 (1975). This occurred at a time of great political controversy over President Nixon’s employment of impoundment, see LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 133–34 (4th ed. 1997), and so might be tallied in the ranks of judicial intrusions into fiscal institutional design. The Court has allowed private litigants to bring Origination Clause challenges, but adopted a narrow view of the Clause’s reach. *United States v. Munoz-Flores*, 495 U.S. 385, 400–01 (1990).

<sup>138</sup> 2 U.S.C.A. §§ 901-922 (West Supp. 1986).

<sup>139</sup> *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986).

<sup>140</sup> *Id.* at 734.

<sup>141</sup> *Morrison v. Olson*, 487 U.S. 654, 684–85 (1988).

<sup>142</sup> Dauster, *supra* note 125, at 11.

<sup>143</sup> For a survey of relevant doctrine, see Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 586–611 (2013).

suggest that the common image of a static “federal balance”<sup>144</sup> elides operational realities.

### 1. *The Constitution’s Distribution of Regulatory Powers*

The Constitution’s central strategy for dividing federal and state domains hinges on the textual enumeration of national governmental authorities.<sup>145</sup> This strategy is less successful than the Constitution’s interbranch allocation of responsibilities over law-making. Due to the constitutional text’s underspecification and ambiguity, judicial responsibility for drawing the margins of national authority has taken on large significance.<sup>146</sup> With great responsibility, however, comes great divisiveness. The Justices not only differ on how to construe the Constitution’s grants of national power, but also on how to read its general rule of construction, which is contained in the Necessary and Proper Clause.<sup>147</sup> Divisive public and judicial disagreement about federalism may be so pervasive that it might fairly be ranked as a distinctive, identifying trait of American constitutionalism.

Federal regulatory power rests centrally on the Commerce Clause, which licenses broad superintendence over the national economy and its

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<sup>144</sup> *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

<sup>145</sup> See, e.g., *National Federation of Independent Business (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2576 (2012) (Roberts, C.J.) (“[R]ather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers.... The Constitution’s express conferral of some powers makes clear that it does not grant others.”).

<sup>146</sup> Cf. Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM & MARY L. REV. 1733, 1748–49 (2005) (“The open-textured nature of the Constitution’s structural commitments calls for judicial implementation through doctrine: There is simply no way to administer our federal system without developing rules to flesh out the allocation and balance of authority.”). The era in which it was plausible to imagine dual, mutually exclusive sovereignties is long passed. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

<sup>147</sup> For example, in *United States v. Kebodeaux*, seven Justices voted to uphold a civil registration requirement for those who had been subject to conviction in a military court martial before the enactment of the relevant registration statute, with four Justices characterizing the case as straightforward. 133 S. Ct. 2496, 2502–05 (2013). Chief Justice Roberts and Justice Alito both concurred, registering disapproval of the majority’s method for resolving the scope of Necessary and Proper-related powers. *Id.* at 2505–08 (Roberts, C.J., concurring); *id.* at 2508–09 (Alito, J., concurring). Given that dissenting Justices Scalia and Thomas offered slightly different accounts of the Necessary and Proper Clause, it would seem that there are (at least) four different doctrinal accounts of that central constitutional provision on the Court.

constituent parts.<sup>148</sup> Proper invocation of the Commerce Clause permits Congress to preempt contrary state laws or regulations.<sup>149</sup> This regulatory jurisdiction is plenary if licitly exercised.<sup>150</sup> When a federal law is presented in state court, state judicial officials have no option but to respect the federal preferences embodied therein.<sup>151</sup> In addition to its enumerated regulatory authorities, the national government also can draw on its power to collect taxes and expend funds for “the common Defense and the general Welfare,”<sup>152</sup> a power unbounded by other restraints on national regulatory authority.<sup>153</sup> Congress can accordingly offer subsidies to subnational governments upon the condition that they undertake other policies.

The Court has also imposed two significant constraints on the deployment of most (but not all) enumerated powers that have the effect of creating intergovernmental markets over regulation. First, when a federal law singles out state legislative or executive officials with a legal obligation that does not fall on private actors, it violates an “anti-commandeering” principle.<sup>154</sup> Because “[s]tate sovereignty is not just an end in itself,” but a means to promoting individual liberty, the Court held that “departure[s] from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”<sup>155</sup> Nevertheless, the federal government can “purchase the

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<sup>148</sup> U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States”).

<sup>149</sup> For an introduction to the Court’s preemption jurisprudence, see Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253.

<sup>150</sup> One example is a state law that is preempted is “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

<sup>151</sup> See *Testa v. Katt*, 330 U.S. 386 (1947) (holding that a Rhode Island state court must entertain a federal claim arising under the Emergency Price Control Act); see also Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1027 (1995) (exploring the scope of this obligation).

<sup>152</sup> U.S. CONST. art. 1, § 8, cl.1.

<sup>153</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 718 n.1 (5th ed. 1891) (opining that Congress’s taxation and spending powers are “not limited . . . to cases falling within specific powers enumerated in the Constitution”).

<sup>154</sup> See *Printz v. United States*, 521 U.S. 898, 918-25 & n.13 (1997) (holding that “[o]ur system of dual sovereignty” is incompatible with the commandeering of state executive officials to implement the gun control and registration provisions of the Brady Bill); *New York v. United States*, 505 U.S. 144, 162 (1992) (explaining that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern [i.e., legislate] according to Congress’ instructions”).

<sup>155</sup> *New York*, 505 U.S. at 121–82.

services of state and local government” in the same way it purchases private services.<sup>156</sup> Accordingly, state administrative capacities are subject to a “modified property rule” under which the right may be sold, but not given away.<sup>157</sup>

Second, glossing the Eleventh Amendment, the Court has directed that the federal government cannot use any of its 1787 powers to oust directly the states’ sovereign immunity from individual litigants’ damages actions in state or federal court.<sup>158</sup> Such ouster, however, is permitted under the Reconstruction Amendments.<sup>159</sup> Moreover, the federal government can purchase compliance through a conditional grant to the states, provided that the legislation in question articulates with heightened precision the scope of the immunity waiver.<sup>160</sup>

Although explained as vindications of states’ rights, the anti-commandeering and sovereign immunity doctrines both create property rules rather than inalienability rules. That is, they do not immunize state regulatory jurisdiction, but instead facilitate its trade. This contrasts sharply with the Court’s approach in separation of powers jurisprudence, where inalienability rules dominate. In the balance of this section, I accordingly show how this basic framework is employed in intergovernmental bargaining. First, I show that preemptive national laws can be sites for bargaining both pre- and post-enactment. I then consider two special cases—when a federal law is the result of interstate bargaining outside Congress and cooperative federalism programs. Finally, I examine conditional federal spending as a bargain.

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<sup>156</sup> Hills, *Cooperative Federalism*, *supra* note 38, at 819.

<sup>157</sup> Rose-Ackerman, *supra* note 17, at 947.

<sup>158</sup> See also *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress could not abrogate the States’ immunity for suits in state court); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (not allowing ouster of state sovereign immunity under Article I powers). Oddly, bankruptcy is another exception. *Central Va. Community Coll. v. Katz*, 546 U.S. 356 (2006).

<sup>159</sup> See, e.g., *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 737 (2003) (permitting money damages action under the family-care provision of the Family and Medical Leave Act); see also *Tennessee v. Lane*, 541 U.S. 509, 532–33 (2004) (upholding applications of Title II of the Americans with Disabilities Act that implicated fundamental rights, such as the right of access to courts).

<sup>160</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

2. *Federal Law as Intergovernmental Bargain: Pre-enactment and Post-Enactment Bargaining*

Even though states have no formal voice in national lawmaking,<sup>161</sup> federal laws still reflect the interests of both the federal government and the several states. Rather than preemptively repudiating states' sovereign interests, in consequence, it is possible to rank some federal laws as the outcomes of intergovernmental negotiation within Congress.

Even in the absence of any constitutional entitlement, states have both a stake in and an influence on legislated bargains. States have an incentive to participate in the federal legislative process because they stand to gain when national public goods are realized. Alternatively, they might seek federal legislation to muffle interstate competition and protect their own inefficient rules.<sup>162</sup> States' voice in Congress is credible for four reasons. First, state officials control access to electioneering and get-out-the-vote resources that are vital to federal politicians.<sup>163</sup> Second, vocal public opposition of state officials may be politically costly for federal officials, making negotiation more desirable than confrontation. Third, states' governance infrastructure—while immune from direct federal takeover as a consequence of the anti-commandeering rule<sup>164</sup>—may be needed for operationalizing a law.<sup>165</sup> There are also limits to what the federal government can practically compel even when it does have legal authority to dictate state action. For example, the 2005 REAL ID's mandatory federal standards for state-issued identification sparked protests and ultimately noncompliance by states, ultimately forcing the Secretary of Homeland Security to defer that final implementation.<sup>166</sup> Finally, states can force federal legislative action by forging ahead in a new policy domain

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<sup>161</sup> The Seventeenth Amendment eliminated the possibility of direct transmissions of preferences between state and federal legislatures. See U.S. Const., Amdt. 17.

<sup>162</sup> Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 110 (2001) (defining horizontal aggrandizement).

<sup>163</sup> Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 279–84 (2000) (emphasizing the role that local and state parties have in national elections).

<sup>164</sup> See cases cited *supra* in note 154.

<sup>165</sup> Cf. Heather Gerken, *Of Sovereigns and Servants*, 115 YALE L. J. 2633, 2635 (2006) (“The power of the servant thus stems mainly from dependence: The fact that the higher authority needs the servant to perform a task creates space not just for discretionary decision-making, but also for bureaucratic pushback.”).

<sup>166</sup> See National Conference of State Legislators, *The History of Federal Requirements for State-Issued Drivers Licenses and ID Cards*, available at <http://www.ncsl.org/Default.aspx?TabId=13581>.



before the national government can act.<sup>167</sup> In these ways, states set the agenda and influence the contents of national law.

States further have institutional means to achieve such influence. An important channel for such bargaining is states' lobbying organizations.<sup>168</sup> Since the turn of the twentieth century, states have cultivated a powerful "intergovernmental lobby" of organizations such as the Council of State Legislators and the National Governors' Association to represent their interests in Congress.<sup>169</sup> This lobby ensures that states' interests are at least raised prior to a law's enactment.<sup>170</sup> The states' lobby's many successes<sup>171</sup> include aspects of the Affordable Care Act that were modified to account for states' concerns.<sup>172</sup>

Nor need bargaining cease once federal law is enacted. Federal laws, even when preemptive in general effect, sometimes assign property interests to states allowing vetoes of federal regulatory efforts. For instance, the Coastal Zone Management Act imposes a prerequisite of state certification prior to any federally funded activity.<sup>173</sup> The Federal Clean Water Act also allows states to condition their certification of covered projects upon any limitations deemed necessary by the state to ensure compliance with state water quality standards.<sup>174</sup>

Such entitlements may be prophylaxis against anticipated constitutional challenges. In *Arizona v. Inter Tribal Council of Arizona*, for example, the Court held that a provision of the National Voter Registration

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<sup>167</sup> See E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON & ORG. 313, 327, 330 (1985) (developing example of the Motor Vehicle Pollution Control Act of 1965).

<sup>168</sup> JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 70–74 (2009) (documenting "several ways" in which state officials participate in congressional lawmaking); Jane G. Gravelle & Jennifer Gravelle, *How Federal Policymakers Account for the Concerns of State and Local Governments in the Formulation of Federal Tax Policy*, 60 NAT'L TAX J. 631, 631 (2007).

<sup>169</sup> See Samuel Beer, *Political Overload and Federalism*, 10 POLITY 5, 11 (1977) (describing diverse forms of state pre-enactment lobbying).

<sup>170</sup> John P. Pelissero & Robert E. England, *State and Local Governments' Washington "Reps"—Lobbying Strategies and President Reagan's New Federalism*, 19 STATE & LOCAL GOV'T REV. 68, 68 (1987).

<sup>171</sup> See NUGENT, *supra* note 168, at 146–67 (cataloging successes).

<sup>172</sup> John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 PUBLIUS 1, 13 (2011).

<sup>173</sup> 16 U.S.C. § 1456(c)(1)(A).

<sup>174</sup> See, e.g., *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 711–12 (1994).

Act (NVRA)<sup>175</sup> requiring states to “accept and use” a federally produced voter registration form preempted an Arizona statutory provision that required proof of citizenship to register to vote by mail.<sup>176</sup> The Court responded to Arizona’s argument that such preemption impinged upon its sovereign authority to establish voting qualification by explaining that “no constitutional doubt is raised” when an “alternative means of enforcing [the state’s] constitutional power to determine voting qualifications remains open to Arizona.”<sup>177</sup> The Court noted that the NVRA allowed states to petition the federal Election Assistance Commission to change the mandated registration template.<sup>178</sup> Post-enactment exercise of a statutory veto, that is, mitigated federalism concerns. But a future federal failure to respond to such a request, cautioned Justice Scalia pointedly, might lead to a constitutional order.<sup>179</sup> Hence, the state’s statutory entitlement under the NVRA is rendered more credible, even necessary, by the shadow of constitutional law.

### 3. *Federal Law as Intergovernmental Bargain: The Case of Bargaining Outside The National Legislative Process*

Intergovernmental negotiation need not occur within the precincts of the national legislative process. Examination of the seminal anti-commandeering case, *New York v. United States*,<sup>180</sup> reveals that federal law can emerge out of bargaining between states outside the Beltway. The federal Low-Level Radioactive Waste Policy Act (LLRWPA)<sup>181</sup> imposed a federal regime respecting the production and disposal of radioactive waste. It sought to mitigate a status quo ante in which disposal sites were concentrated in a handful of states, which threatened to close their facilities

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<sup>175</sup> 42 U.S.C. § 1973gg *et seq.*

<sup>176</sup> 133 S. Ct. 2247, 2251 (2013).

<sup>177</sup> *Id.* at 2260.

<sup>178</sup> *Id.* at 2259 (discussing 42 U.S.C. § 1973gg–7(a)(2)).

<sup>179</sup> *Id.* at 2260 n.10. A further wrinkle in the *Inter Tribal* case is that the Election Assistance Commission lacked a quorum to function, and a concurrent D.C. Circuit Court of Appeals ruling precluded the White House from using recess appointments to fill the post. See *Canning v. NLRB*, 705 F.3d 490, 499–512 (D.C. Cir. 2013), *cert granted* 2013 WL 1774240 (Jun 24, 2013) (No. 12-1281) (identifying U.S. Const. Art II, §2, cl. 3 as basis of challenge). Hence, a seizure in interbranch bargaining may well lead to a breakdown in intergovernmental bargaining—an example of entanglement between the two species of negotiation discussed in this Part.

<sup>180</sup> 505 U.S. 144 (1992).

<sup>181</sup> Pub. L. No. 96-573, 94 Stat. 3347 (1980), *amended by* Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (current version at 42 U.S.C. §§ 2021b-2021j (2006)).

entirely.<sup>182</sup> Its mandate “resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem.”<sup>183</sup> The LLRWPA thus was an intermural bargain between states to alienate a portion of their regulatory suzerainty so as to solve a collective action problem. Application of the anti-commandeering rule to negate this bargain did not serve the interests of the states as against federal overreaching. Instead, it enabled one state (New York) to continue imposing costs without internalizing a share of the collective burden. New York, that is, could continue imposing costs on others that were generally perceived as disproportionate or unfair.<sup>184</sup> From this perspective, the Court’s choice to frame its analysis about the question whether New York was “estop[ped]” from challenging its earlier agreement as a violation of state sovereignty is question begging.<sup>185</sup>

This analysis suggests that a federal statute that ‘commandeers’ a state’s executive or legislative process can have diverse explanations. On the one hand, a federal law that engages in commandeering may be a malignant effort by Congress to impose unfunded mandates on the states while taking credit for downstream policy achievements.<sup>186</sup> On the other hand, commandeering may also be a signal that the states and the federal government have reached a welfare-enhancing deal that solves collective action problems among the several states.<sup>187</sup> Such deals might build on what the long history of federal legislative ratification of interstate deals in territorial disputes.<sup>188</sup> Hence, the anti-commandeering rule installed in *New York* and *Printz v. United States* may have democratic and fiscal

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<sup>182</sup> Ryan, ‘Cathedral’, *supra* note 12, at 42.

<sup>183</sup> *New York*, 505 U.S. at 189–90 (White, J., dissenting).

<sup>184</sup> The LLRWPA, however, contained other punitive mechanisms that waste importing states might have employed.

<sup>185</sup> *New York*, 505 U.S. at 183 (“That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation.”).

<sup>186</sup> In *Printz v. United States*, however, the Court suggests in passing that the anticcommandeering rule would also apply to mandatory commandeering with offsetting federal subsidies. 521 U.S. 898, 914 n.7, 930 (1997).

<sup>187</sup> See Neil Siegel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1660-64 (2006) (arguing that in thwarting the state-based solution, the Court’s decision in *New York* was ultimately more destructive to state sovereignty interests than would have been a decision to uphold the take-title provision). In addition, commandeering may be preferable to a voluntary program with cash transfers because the latter would be vulnerable to moral hazard problems. See Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 NW. U. L. REV. 351, 353-54 (1999).

<sup>188</sup> Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. -- (forthcoming 2014) (draft at 6, 31–39).

justifications (albeit only if the federal government cannot secure unfunded mandates by other means<sup>189</sup>), but it also stifles a potent source of future deal-makings among states and the national government.<sup>190</sup>

#### 4. *Cooperative Federalism as Bargaining*

Congress can employ its Article I, section 8 enumerated powers to establish a “cooperative federalism” program. Narrowly defined, cooperative federalism encompasses “programs in which the federal government establishes minimum standards that states may opt to implement through programs that are no less stringent.”<sup>191</sup> In such programs, “nonfederal governments help implement federal policy in a variety of ways: by submitting implementation plans to federal agencies, by promulgating regulations, and by bringing administrative actions to enforce federal statutes.”<sup>192</sup> Cooperative federalism programs “see[k] to exploit economies of scale by establishing national ... standards while leaving their attainment to state authorities subject to federal oversight.”<sup>193</sup> These efforts are typically created through conditionally preempting legislation.<sup>194</sup> State agencies are invited, but not required, to participate.<sup>195</sup> In effect, these deals reflect the exercise of a modified liability rule vested in the federal government: The latter can regulate directly if it pays the costs of administration, or it can allow the state to maintain administrative primacy, albeit in pursuit of federal aims.

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<sup>189</sup> See Siegel, *supra* note 187, at 1646–60 (exploring the existence of alternatives to commandeering).

<sup>190</sup> Interstate compacts may provide an incomplete substitute because of constraints on their enforceability. See, e.g., *Alabama v. North Carolina*, 130 S. Ct. 2295, 2305–13 (2010) (declining to penalize state that opted out of an interstate compact respecting radioactive waste).

<sup>191</sup> Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L. J. 179, 188–204 (2005) (also providing examples from the environmental domain); accord Philip J. Weiser, *Cooperative Federalism, Federal Common Law, and The Enforcement of the Telecom Act*, 66 N.Y.U. L. REV. 1692, 1696 (2001).

<sup>192</sup> Hills, *Cooperative Federalism*, *supra* note 38, at 815.

<sup>193</sup> Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1148–78 (1995).

<sup>194</sup> See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288–89 (1980) (“If a state does not want to submit a ... program that complies ... the full regulatory burden will be borne by the Federal Government.”); see generally DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* (2d ed. 2000).

<sup>195</sup> See, e.g., Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 19 (1999) (describing operation of cooperative federalism under the 1996 Telecommunications Act).

Studies of cooperative federalism schemes suggest that despite its preemptive authority, the national government does not hold all the cards. Instead, “states can continue to exert influence through enforcement of federal law.”<sup>196</sup> The practical effect of the constitutional structure is to assign to states a set of regulatory resources that can be leveraged to secure shifts to federal policies. Most importantly, state governments tend to have “local expertise [and] ... boots on the ground [and] perceived legitimacy” necessary for programs’ implementation that the federal government lacks.<sup>197</sup> Indeed, the federal government may be unable to achieve national public goods without state officials’ voluntary cooperation.<sup>198</sup> States also use their monopoly on implementation resources to negotiate alternatives to policy calibrations initially specified by the federal government. On one view, “local tailoring” of this kind is a central benefit of cooperative federalism.<sup>199</sup> Some federal programs even formalize this possibility by including explicit waiver provisions that allow state opt-outs from certain conditions.<sup>200</sup> For example, as of April 2013, thirty-three states had secured waivers from 2002 No Child Left Behind mandates.<sup>201</sup>

Alternatively, states might deploy their discretionary authority under cooperative federalism programs to adopt policies at odds with federal goals.<sup>202</sup> In one striking example from the early 1980s, Congress amended the Social Security Act in June 1980 to compel increased scrutiny of beneficiaries’ disability status—a priority of the Reagan Administration—

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<sup>196</sup> Margaret Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 703 (2011); *see also* Weiser, *supra* note 195, at 1732 (“[C]ooperative federalism statutes give state agencies considerable discretion to address interstitial matters left open by federal agencies.”).

<sup>197</sup> Ryan, *Negotiated Federalism*, *supra* note 12, at 90.

<sup>198</sup> *Cf.* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137, 2139 (2002) (noting federal need for state and local police).

<sup>199</sup> Weiser, *supra* note 195, at 1699.

<sup>200</sup> *See* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 275–85 (2013) (providing examples of waiver provisions in cooperative federalism programs concerning education and social welfare).

<sup>201</sup> *Id.* at 280–81.

<sup>202</sup> *See* Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1258, 1281–82 (2009) (supplying examples); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181, 187–88 (1998) (narrating how states obtained changes to federal welfare policy in the 1960s through resistance to executive positions in Congress).

but state resistance brought the initiative to a halt.<sup>203</sup> In this way, the exercise of enforcement-related discretion can operate as a chip with which states can bargain to influence and alter the direction of putatively nationalized policies. Cooperative federalism is therefore properly viewed as an invitation to, not an absolute ousting of, intergovernmental bargaining.

##### 5. *Conditional Spending as Bargaining*

Congress's conditional spending power not only allows it to purchase anti-commandeering and sovereign immunity entitlements, but also to buy state legislation that cannot be preempted.<sup>204</sup> Congress commonly uses its spending power to offer states "bargains ... in which the federal government negotiates to extend its regulatory reach into zones otherwise constitutionally reserved to the states."<sup>205</sup> To the extent the Court recognizes policy "areas such as criminal law enforcement or education where States historically have been sovereign,"<sup>206</sup> such recognition marks the beginning of intergovernmental negotiation, not its terminus.

Conditional spending legislation is "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."<sup>207</sup> The 2002 No Child Left Behind, or NCLB, exemplifies such an intervention into a domain of traditional state control.<sup>208</sup> Notwithstanding the take-it-or-leave-it character of spending power deals, states still possess "unappreciated power" to resist the federal government.<sup>209</sup> To begin with,

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<sup>203</sup> MARTHA DERTHICK, *AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT* 36–39 (1990).

<sup>204</sup> See, e.g., *Oklahoma v. U.S. Civil Serv. Comm'n.*, 330 U.S. 127, 143 (1947) (holding that Congress could condition an offer of federal funds to the states on the latter's curtailing of certain officials' partisan political activities even though "the United States ... has no power to ... regulate local political activity as such of state officials").

<sup>205</sup> Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 37 (2011) [hereinafter Ryan, *Negotiating Federalism*].

<sup>206</sup> *United States v. Lopez*, 514 U.S. 549, 564 (1995); *id.* at 577 (Kennedy, J., concurring) (expressing concern at federal takeover of "entire areas of traditional state concern"); accord *United States v. Morrison*, 529 U.S. 598, 611 (2000).

<sup>207</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("Congress may fix the terms on which it shall disburse federal money to the States.").

<sup>208</sup> Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301-7941 (2006)); see James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939–44 (2004) (summarizing key provisions). The other important federal intervention on education, Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1482 (2006)), is also conditional spending legislation.

<sup>209</sup> Ryan, *Negotiated Federalism*, *supra* note 205, at 89–90.

states' lobbies are actively involved in lobbying over the content of conditional spending enactments, "asking for either ... unconditional grants... or grants with conditions that, as a practical matter, are already consistent with the states' own spending priorities."<sup>210</sup> States can also decline federal funding, holding out for a better deal. Since the Supreme Court limited the Medicaid expansion in the 2010 healthcare law, for example, fourteen states have rejected health funding totaling about \$8.4 billion covering roughly 3.6 million of their citizens.<sup>211</sup> Once grants are made, states draw on political resources in Congress to "bargain with the national government over how stringently the national government will enforce the conditions ostensibly attached to the national funds."<sup>212</sup> Outcomes achieved through conditional spending, in short, are bargained for all the way down.

Judicial doctrine nevertheless imposes two constraints on intergovernmental bargaining over conditional spending. First, the Court requires that conditions be unambiguous and "[r]elated" to the federal interest in particular national projects or programs.<sup>213</sup> This ensures that "the State voluntarily and knowingly accepts the terms of the 'contract.'"<sup>214</sup> Second, notice and nexus requirements have recently been supplemented by an inchoate anti-coercion rule. The Court thus partially invalidated the Medicaid expansion contained in the 2010 healthcare legislation on coercion grounds.<sup>215</sup> Unlike earlier Spending Clause enactments considered by the Court, the 2010 Affordable Care Act tied new funding to an ongoing funding stream in a way that attached "significant ... new conditions ... to continued participation in an entrenched and lucrative cooperative program" in a way that the Court deemed objectionable.<sup>216</sup> The Court's opaque formulation of its anti-coercion rule renders its precedential force

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<sup>210</sup> Hills, *Cooperative Federalism*, *supra* note 38, at 859.

<sup>211</sup> Carter Price & Christine Eibner, *For States that Opt out of Medicaid Expansion: 3.6 Million Fewer Insured and \$8.6 Billion Less in Federal Payments*, 32 HEALTH AFF. 1030, 1030 (2013).

<sup>212</sup> Hills, *Cooperative Federalism*, *supra* note 38, at 861; *see also* MARTHA DERTHICK, THE INFLUENCE OF FEDERAL GRANTS 196 (1970) (noting variance in enforcement strength); John E. Chubb, *The Political Economy of Federalism*, 79 AM. POL. SCI. REV. 994, 1008-11 (1985) (describing influence of congressional delegations).

<sup>213</sup> *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). The *Dole* Court also required that conditions be in furtherance of the general welfare and not independently barred by another constitutional provision. *Id.* But these conditions do no meaningful work and can safely be ignored here.

<sup>214</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)

<sup>215</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601-09 (2012) (Roberts, C.J.).

<sup>216</sup> Bagenstos, *supra* note 12, at 870-71.

uncertain.<sup>217</sup> But the new rule does not foreclose bargaining, but rather raises its cost by introducing a new form of uncertainty.

### C. The Pervasiveness of Intermural Bargaining

In her majority opinion in *New York v. United States*, Justice O'Connor ventured that "[t]he Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment."<sup>218</sup> Whatever its merit as judicial aspiration, her observation falls short as an account of current constitutional practice. Intermural bargaining to reallocate institutional entitlements created by the Constitution is the norm, not the exception. On the separation of powers side, Congress is allowed to alienate lawmaking power. It cannot, however, reserve a quantum of such authority to itself. The elected branches are also free to rearrange fiscal decision-making provided the resulting arrangements do not reserve to the president any line-item authority. Yet if the executive employs its large delegated powers to achieve fiscal effects (either by, say, spending less or by more aggressively enforcing federal tax laws), no constitutional concern is raised. Adding additional suppleness to fiscal arrangements, the House can relinquish its right to originate revenue bills through shell legislation or tax treaties, apparently with impunity.

On the federalism side, the Court has favored bargaining, albeit within constraints. It has thus created entitlements in the form of the anti-commandeering rule, state sovereign immunity, and exclusive domains of state regulation. Given Congress's conditional spending authority, states can bargain away these entitlements in exchange for federal funds. More mundanely, the passage and implementation of federal laws supply ample opportunities for intergovernmental bargaining.

However pervasive intermural bargaining is in contemporary constitutional law, it is not well theorized. Both the Court and commentators tend to view intermural bargaining in piecemeal fashion, not as a coherent singular phenomenon. Accordingly, it is simply unclear whether the Court has permitted the optimal amount or distribution of

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<sup>217</sup> See *id.* at 864–65 (offering a relatively restrained reading); Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 582 (2013) (analyzing *Sebelius*'s application to education statutes and predicting that the latter would survive judicial review).

<sup>218</sup> *New York v. United States*, 505 U.S. 144, 182 (1992).



structural constitutional bargaining. The Court may have erred in either direction by allowing too much or too little bargaining. Ascertaining whether there is sufficient or excessive bargaining requires a framework for evaluating its downsides and rewards. The next two Parts take up that task.

### **III. The Default Rule for Intermural Bargaining**

When representatives of institutions negotiate mutually beneficial deals to reallocate roles in the lawmaking process, elements of regulatory authority, or enforcement and administrative capacity, should federal judges, office holders in other branches, and the public accede to the ensuing deals? That is, should the approbatory presumption employed in the private law context apply here too? In this Part, I argue for a presumption in favor of intermural bargaining. The presumption, along with the exceptions developed in Part IV, should primarily guide officials and their constituents, and secondarily should provide a basis for judicial deference to intermural deals.

I develop this claim in two steps. First, I examine and find wanting three potential grounds for taking Justice O'Connor at her word and flatly prohibiting all intermural bargaining.<sup>219</sup> Accounting for textual, historical and consequential concerns, I conclude that a generalized suspicion of all interbranch and intergovernmental deals is unwarranted. Second, I identify positive consequences flowing from institutional deal-making, amplifying further the case for an affirmative default. The Court, I conclude, has correctly declined in practice to view intermural bargains with suspicion *pace* Justice O'Connor's dictum.

#### **A. The Weak Case for a Categorical Rule against Intermural Bargaining**

I first develop and evaluate two arguments to the effect that intermural bargaining should never be permitted. These rest on the definition of a constitution, and the core functions of a constitution. Neither argument, in my view, yields a reason to adopt a presumption against institutional bargaining.

##### *1. Entrenchment as a Defining Feature of the Constitution*

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<sup>219</sup> *Id.*

A common feature of constitutions, including the U.S. Constitution, is entrenchment beyond change via the ordinary procedures of quotidian democracy.<sup>220</sup> Entrenchment so defined is more than mere endurance.<sup>221</sup> It also requires procedural rules that make constitutional change more onerous than the mine run of lawmaking action. Article V of the Constitution does so by setting forth a two-stage procedure of proposal and ratification that makes textual amendment to the Constitution inordinately hard.<sup>222</sup> If entrenchment beyond ordinary politics is a necessary aspect of constitutionalism, as Article V might suggest, then the prospect of intermural bargaining should seem deeply troubling: How can foundational entitlements—the basic building blocks of our nation’s democracy—be lightly frittered away by transient office holders in exchange for mere policy advantages? Perhaps a “working [c]onstitution” is one that political actors treat as “not subject to abrogation or material alteration.”<sup>223</sup> On this view, a strong presumption against bargaining is implied in the definition of a constitution. A reading of the Constitution that permitted such bargaining would defeat the purpose of adopting a constitution. This argument might be framed not only in definitional terms, but also developed as a claim about the original public meaning of a constitution as a legal norm meant to stand beyond ordinary politics.

This argument from entrenchment, whether pitched in definitional or originalist terms, is less persuasive than it first appears for three reasons. First, not all nations’ constitutions are entrenched beyond ordinary politics; accordingly, there is no definitional link between constitutionalism and entrenchment. Many other nations’ constitutions, in contrast to the United States’, invite constitutional amendment through procedures that resemble those of ordinary politics. Israel, for example, employs ordinary Knesset

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<sup>220</sup> Cf. David Fontana, Comment, *A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States*, 35 CONN. L. REV. 35, 44 (2002) (“To believe in the Constitution means believing in ... fundamental principles, and to believe in the Constitution means that you cannot believe in changing these principles.”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 111–14 (3d ed. 2000) (discussing entrenchment).

<sup>221</sup> See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 702–03 (2011) (criticizing definitions of constitutional entrenchment that rely solely on endurance).

<sup>222</sup> See U.S. CONST., art. V; see also Huq, *Function of Article V*, *supra* note 19, at – (discussing amendment procedures and documenting consensus view that Article V is very resilient to change).

<sup>223</sup> K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 28–29 (1934); accord Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L. J. 408, 426 (2007).

procedures and voting rules for adopting new Basic Laws.<sup>224</sup> The Columbian constitution of 1886 allows the legislature to amend it after three readings and a supermajority vote in a subsequent legislative session.<sup>225</sup> Closer to home, “some fourteen American states to this day require the people to be consulted on a regular basis by the legislature as to whether to call a constitutional convention.”<sup>226</sup> In effect, these state constitutions invite the electorate, as a matter of routine politics, to renegotiate questions of perceived constitutional magnitude. If entrenchment is not a necessary feature of constitutions as a whole, it is hard to see why it should be required in respect to discrete elements of a constitution, such as the location of lawmaking or regulatory entitlements.

Second, it is not clear that the Constitution’s text mandates a prohibition, or even a presumption, against institutional bargaining. It may be tempting to assume that the textual vesting of entitlements should be glossed as inviolate, so that Congress could never bargain away a sliver of legislative power, the executive could not trade on its veto, and the states could not negotiate away fragments of their sovereignty. But the text of the Constitution contains no plainly stated rule barring any and all bargaining over institutional powers. Nothing in the text, that is, directs that institutional entitlements should be read as inalienable as opposed to default assignments.<sup>227</sup> To the contrary, Madison’s proposal to the first Congress that the Constitution’s distribution of power among the branches be read as exclusive, precluding any innovations by later generations, was never adopted.<sup>228</sup> That Madison saw a need for such a proposal, and that the first Congress rejected the idea powerfully suggests that the Constitution’s textual distribution of institutional authorities should be read as a set of default entitlements subject to alteration by later political branch negotiation.

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<sup>224</sup> Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 468 (2012). Amendments to existing Basic Laws, however, are subject to a more onerous supermajority procedure. *Id.*

<sup>225</sup> ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 101 (2009).

<sup>226</sup> *Id.* at 13.

<sup>227</sup> See McGinnis, *supra* note **Error! Bookmark not defined.**, at 295 (suggesting that “the initial distribution of [branches’] rights” may be “merely a baseline”).

<sup>228</sup> See 1 Annals of Cong. 435–36 (June 1789). The amendment would have provided that the “Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.” *Id.* .

The Framers were familiar with default rules. They employed a default rule in respect to the size of Article III. The Constitution's text requires only the creation of one Supreme Court staffed with solely one Justice.<sup>229</sup> In what came to be known as the Madisonian compromise, the decision whether to depart from this default state was assigned to Congress.<sup>230</sup> It left a central element of interbranch design and intergovernmental relations to postratification legislators' discretion. Federal jurisdiction, in consequence, became a "battlefield" on which "the sometimes-ill-defined scheme of federal government" was fought out between the national government and the states.<sup>231</sup> Once created, moreover, Article III tribunals complement, and also compete with, state tribunals. Congress can award federal courts exclusive jurisdiction over certain subject matters.<sup>232</sup> Or it might allow removal as a tool for disciplining state tribunals.<sup>233</sup> The scope of jurisdictional optionality, moreover, may be even greater than the Madisonian compromise if Article III, Section 2, Clause 2 is read to enable Congress to move grants of jurisdiction freely between the Supreme Court's original and appellate wings. Of course, the Supreme Court famously held otherwise in 1803.<sup>234</sup> *Marbury v. Madison's* conclusion that Congress could not add to the Court's enumerated original jurisdiction, though, has been powerfully challenged.<sup>235</sup> There is no reason, moreover, to think the Constitution's use of default rules is limited to Article III. Article I, for example, uses defeasible defaults in respect to the

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<sup>229</sup> U.S. CONST. art. III, §1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

<sup>230</sup> See Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990) (describing the Madisonian compromise).

<sup>231</sup> ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 177 (2010).

<sup>232</sup> See, e.g., 28 U.S.C. § 1338(a) (granting federal courts exclusive jurisdiction over cases "arising under any Act of Congress relating to patents").

<sup>233</sup> See, e.g., *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013) (framing the removal question as follows: "Does the 'state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities?") (quoting *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005)).

<sup>234</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803); see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1484–87 (2000) (exploring *Marbury's* distinction).

<sup>235</sup> See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1, 9–33. It may that *Marbury's* grip on the American legal imagination causes us to see mandates too often where the Framers installed defaults.

first congressional apportionment and the timing of Congress's first meeting.<sup>236</sup>

Finally, original public meaning does not furnish any basis for a per se bar on institutional deals. Conventional originalist analysis instead incorporates the outcomes of interbranch negotiation into its hermeneutical matrix. As one leading advocate of originalism has explained, political actors fashion “constitutional constructions ... in the context of political debate, but to the degree that they are successful [such constructions] constraint future political debate.”<sup>237</sup> For example, one much-analyzed question concerns the President's authority to remove certain executive branch officials as pursuant to Article II.<sup>238</sup> Such power arguably lies at the cusp of the President's power to “take Care” that the laws are enforced,<sup>239</sup> and Congress's horizontal “Necessary and Proper” power<sup>240</sup> to structure other branches of the federal government.<sup>241</sup> To resolve this dispute, leading originalists focus not just on the constitutional text (which at best is indeterminate), but instead find definitive resolution in the post-ratification bargain reached by the First Congress and President Washington over the first cabinet departments of War, Foreign Affairs, and Treasury.<sup>242</sup> If it is feasible to use post-ratification intermural settlements as a *source* of constitutional meaning, it follows that there is no necessary incongruity under originalist accounts of Constitution and intermural bargaining.

To be sure, the application of originalist tools to specific institutional entitlements might generate the conclusion that specific bargains lie out of constitutional bounds. For example, there is a vigorous debate on whether delegations of Article I rulemaking authority to

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<sup>236</sup> U.S. CONST. art. I, § 4, cl. 2.

<sup>237</sup> KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 6 (1999).

<sup>238</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L. J.* 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1153 (1992).

<sup>239</sup> U.S. CONST. art. II, § 3.

<sup>240</sup> U.S. CONST. art. I, §2, cl. 3 & § 8, cl. 18.

<sup>241</sup> Cf. Patricia Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 *GEO. WASH. L. REV.* 1371, 1382–88 (2012) (analyzing the removal power question by taking these two provisions as defining landmarks).

<sup>242</sup> See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *CORNELL L. REV.* 1021, 1029–34 (2006).

administrative agencies are consistent with the original understanding.<sup>243</sup> Without seeking to settle that intractable debate, it suffices here to say that no version of originalism in circulation today rejects all interbranch bargains. Indeed, one of the leading originalist accounts of Article I allows for intermural bargaining over legislative power. Developed by Professor Thomas Merrill, this account suggests that “Congress has the power to vest executive and judicial officers with authority to act with the force of law, including the authority to promulgate legislative regulations functionally indistinguishable from statutes” but “executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law.”<sup>244</sup> Hence, even in respect to core Article I entitlements, there is a plausible originalist reading of the Constitution consistent with a broad scope for interbranch deal-making.

In sum, the entrenchment-based argument against intermural bargaining fails whether framed as a matter of definitional logic or historical meaning. The Constitution contains a mix of default and mandatory rules. The text contains no simple instruction about how to gloss each entitlement. Rather than categorically resisting intermural bargaining, it accordingly makes more sense to analyze specific institutional entitlements on a retail basis.

## 2. *Entrenchment and the Functions of Constitutionalism*

A second argument against intermural bargaining under any circumstances might rest on functional grounds. A categorical bar might be justified, that is, if the deals that result undermine core, irreducible functions of a constitution. Jon Elster has posited that “[t]he purpose of entrenched clauses [in a constitution] . . . is to ensure a reasonable degree of stability in the political system and to protect minority rights.”<sup>245</sup> If stability is a central good produced by constitutions, the Constitution’s initial distribution of institutional entitlements might provide an institutional

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<sup>243</sup> Compare Gary Lawson, *Delegation and Nondelegation*, 88 VA. L. REV. 327 (2002) (no), with Posner & Vermeule, *supra* note 90, at 1721 (yes). While pitched in originalist, historical terms, the nondelegation debate is entangled with contemporaneous questions about the desirability of the federal regulatory state.

<sup>244</sup> Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2101 (2004).

<sup>245</sup> Jon Elster, *Intertemporal Choice and Political Thought*, in CHOICE OVER TIME, 35, 38 (Jon Elster & G. Loewenstein, eds., 1992); see also Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376 (1997) (noting “the settlement and coordination functions of law”).

grammar for future politics that stabilizes expectations and permits the development of democratic norms and traditions.<sup>246</sup> Institutional stability might enable specific public goods such as accountability through regular elections. Further, it might enable the cultivation of private goods by allowing long-term planning to achieve slow-growing investments and life projects.<sup>247</sup> On this view, an “important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done.”<sup>248</sup> Intermural bargaining should therefore be rejected because it unsettles expectations of what law is, where law comes from, and how law changes—and hence robs federal law and institutions of beneficial stability.

The argument from stability, if not without force, does not justify a categorical bar on institutional bargaining. To begin with, even accepting the proposition that institutional stability is required to secure public and private goods, it is not clear this warrants a bar on intermural bargaining. American constitutional history, as Part II demonstrated, is characterized by nontrivial levels of intermural bargaining, with concomitant shifts in responsibility for policies ratcheting between branches or rattling up and down between ladder between the national government and the states. If the basic stabilizing functions of a constitution were impeded by institutional bargaining, then the 1787 organic document would have failed to enable democratic norm development or effective private investment. The evidence, however, suggests otherwise for a number of reasons.

First, it is hardly plain that some quantum of intermural bargaining is inimical to institutional stability. To be sure, if trades between institutions were sufficiently dense and frequent, voters might have difficulty determining how to allocate blame or praise for policy outcomes. Unable to predict which institutions would be responsible for regulation or taxation, long range planning would also be handicapped. Intermural bargaining,

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<sup>246</sup> STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS: THE THEORY OF LIBERAL DEMOCRACY* 163 (1995) (comparing constitutional rules to grammatical rules, which “do not merely retrain a speaker” but also “allow interlocutors to do many things they would not otherwise have been able to do or even have thought of doing”); *see also* Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 *TEX. L. REV.* 1985, 1995 (2003) (describing the Constitution as a “blueprint for democratic” governance).

<sup>247</sup> For a related idea, although specified with less detail, *see* LAWRENCE G. SAGER, *JUSTICE IN PLAINSCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 164 (2004) (arguing that “the Article V requirements for the amendment of the Constitution are an attractive part of the pragmatic justice-seeking quality to our constitutional institutions”).

<sup>248</sup> Alexander & Schauer, *supra* note 245, at 1377.

however, does not in fact occur at such a rapid clip. There is no reason to think voters are unable to understand the mechanics of stable, long-standing arrangements such as the administrative state or cooperative federalism. Second, even though the institutional locus of policymaking might shift over time, the existence of a stable national party system dampens the degree of policy oscillation by defining and limiting the field of policy contestation.<sup>249</sup> Third, and relatedly, voters rely on partisan proxies and other heuristics in determining how to act at the ballot box.<sup>250</sup> Democratic accountability is preserved so long as those proxies remain effective at aggregating information. There is no reason to think intermural bargaining generally undermines the epistemic value of democratic proxies.

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In summary, categorical objections to institutional bargaining, either derived from a definition of constitutionalism or an account of the Constitution's functions, ought to be rejected. At a high level of generality, there is no per se objection to institutional trades.

## **B. The Inevitability of Institutional Bargaining**

Whereas the previous section dispatched arguments against intermural bargaining, this section offers a positive case for the practice. I contend that bargaining of some sort is both inevitable and desirable for two reasons. *First*, the absence of complete specification of constitutional entitlements and spillover effects make bargaining unavoidable. *Second*, the Constitution is not a homeostatic system, but an evolutionary one. The inevitable translation of constitutional concepts forward in time against the backdrop of shifting institutional, social, and economic circumstances necessarily generates intermural conflicts even if the initial text has been

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<sup>249</sup> Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2324-25 (2006) (“[T]he political interests of elected officials generally correlate more strongly with party than with branch.... [P]arty is likely to be the single best predictor of political agreement and disagreement.”).

<sup>250</sup> See Christopher Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 366 (2013) (noting that “political science has revealed certain mechanisms through which a low-information electorate may behave as if reasonably well informed,” most importantly, political parties). The positive epistemic effects of such heuristics, however, are not evenly distributed through the population. Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 955 (2001).



completely specified. Bargaining is needed to resolve these conflicts in the first instance.

### 1. *Spillovers between Constitutional Entitlements*

The Constitution is an incomplete contract in the sense that it does not resolve all potential questions concerning the allocation of endogenously defined entitlements.<sup>251</sup> Like real property, questions about how to assign the costs of mitigating spillover effects arise. Unlike the real property context, the allocation of spillover-related costs will often lack a natural and intuitive answer. Instead, their resolution is best achieved through intermural bargaining.

To see why the development of *some* mechanism for settling institutional boundary dispute questions that arise under the Constitution is inevitable, it is helpful to return to Ronald Coase's examples of how ambiguity in real property entitlements arise:

[A] confectioner ... used two mortars and pestles in connection with his business (one had been in operation in the same position for more than 60 years and the other for more than 26 years). A doctor then came to occupy neighboring premises (in Wimpole Street). The confectioner's machinery caused the doctor no harm until, eight years after he had first occupied the premises, he built a consulting room at the end of his garden right against the confectioner's kitchen. It was then found that the noise and vibration caused by the confectioner's machinery made it difficult for the doctor to use his new consulting room.<sup>252</sup>

Coase explained that the doctor secured an injunction against the noise, but then observed that this property entitlement could be bargained away if the confectioner's use was more valuable. Further, had the case been resolved in favor of the confectioner, precisely the same kind of bargaining might

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<sup>251</sup> Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L. J. 729, 730 (1991) (noting that the term "incomplete contract" can refer either to (1) obligational incompleteness, where a term (such as price or quantity in the ordinary contracting context) is not included, and (2) insufficient state contingency, because of a failure to fully realize the potential gains from trade in all future states of the world").

<sup>252</sup> Coase, *supra* note 14, at 8–9 (discussing *Sturges v. Bridgman*, 11 Ch. D. 852 (1879)).

also have occurred, with the entitlement still ending up in the hands of the party that valued it.<sup>253</sup> This symmetry of outcomes under disparate legal rules yielded a lesson: In many cases in which the use of one entitlement has a spillover effect on the use of another entitlement, there is no obvious or natural or inevitable way to parcel out the entitlements. It is simply “not useful to speak of one party to an externality as being the cause of any problem of incompatible demands.”<sup>254</sup>

Spillover effects of the kind Coase identified are not limited to doctors and confectioners. There are many instances in which one institution’s exercise of a structural entitlement will interact with another institution’s exercise of an entitlement, and where the “default package of entitlements” described in the constitutional text provide no obvious or natural benchmark for resolving the conflict.<sup>255</sup> In such spillover cases, something more than mere excavation of the constitutional text is required to justify an outcome. Intermural negotiation, similar to the sort that Coase predicts arising between the doctor and the confectioner, provides an obvious means of resolving the context and allocating the disputed right to its highest value user. In these spillover cases, intermural bargaining provides a device for allocating interests.

The existence of intermural spillovers in the absence of any such intuitive or obvious default disposition can be illustrated with examples from both federalism and separation of powers domains. Spillover effects are pervasive in a geographic federation in which member states are contiguous with each other and jurisdictional lines are porous. The Court’s Dormant Commerce Clause case law, which targets state enactments that dampen the flow of interstate commerce, is an effort to manage trade-

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<sup>253</sup> *Id.* For Coase, a simple social welfare function determined the right’s optimal assignment. *Id.* at 27 (“What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.”).

<sup>254</sup> Merrill & Smith, *Coasean Property*, *supra* note 35, at S91. Merrill and Smith point out that the situation is arguably different in the real property context, because in rem property rights are “goods against the world” and so have “a built in asymmetry.” *Id.* at S92. (And so the judges thought in *Sturges*. See A.W.B. Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 90 (1996)). Their epistemic transaction-cost justification for this position, however, does not translate into the public law context. Put otherwise, there is no public law analog to the “strongly locational nature of the parties’ rights” in real property law. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1001–02 (2004).

<sup>255</sup> Thomas W. Merrill, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1861 (2007).

related spillovers between states and to maintain a national market.<sup>256</sup> Similarly, the Privileges and Immunities Clause is a mechanism for citizens of one state to remedy disabilities imposed by citizens of another.<sup>257</sup>

Spillovers effects also occur between states and the federal government. The constitutional text's failure to provide any simple rule for allocating spillover costs between the states and the national government was at issue in *Arizona v. Inter Tribal Council of Arizona*.<sup>258</sup> At issue there, as noted previously, was a provision of the NVRA requiring states to "accept and use" federal voter registration forms.<sup>259</sup> Although Justice Scalia's majority opinion resolved the case on statutory interpretation grounds, the nub of the case involved a conflict between two constitutional entitlements. On the one hand, Congress's authority pursuant to the Elections Clause allows it to "make or alter" any state law concerning the "Times, Places and Manner of holding Elections for Senators and Representatives."<sup>260</sup> On the other hand, the states maintain authority to determine "the composition of the federal electorate."<sup>261</sup> Intergovernmental frictions arise because time, place, and manner regulations—such as the NVRA's streamlined framework for by-mail voter registration—necessary alter the composition of the voting electorate by lowering or raising the cost of accessing the polls. Less costly registration enlarges the pool of expected voters, and vice versa. The Constitution distinguishes between federal laws that regulate the time, place, and manner of voting, and state laws concerning the composition of the electorate as if these were hermetically

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<sup>256</sup> See Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L. J. 1117, 1121 (2012) (arguing that "the criterion separating successful and unsuccessful Commerce Clause challenges is whether the contested law implicates only economic externalities, meaning effects on private parties, or implicates political externalities, meaning effects on the laws of other states"). For an argument that some of the case law can be explained as an effort to realize positive network externalities, see Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 112–15 (2004). Of course, Dormant Commerce Clause jurisprudence may fail to give a full account of all relevant spillovers. See, e.g., Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L. J. 785, 798 (2001) (arguing for a need to theorize better "state regulation of cross-border externalities").

<sup>257</sup> See Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1584 (2005) (explaining that the Clause "counteract[s] the political malfunction of spillover effects").

<sup>258</sup> 133 S. Ct. 2247 (2013).

<sup>259</sup> See *supra* text accompanying notes 175 to 179.

<sup>260</sup> U.S. CONST. art. 1, § 4, cl. 1.

<sup>261</sup> 133 S. Ct. at 2257–58 (quoting U.S. CONST. art. 1, § 2, cl. 1).

sealed categories. As the NVRA shows, that boundary is elusive. Like Coase's doctor and confectionary, the national government and the states are locked in a bilateral relationship in which plenary employment of one party's powers necessarily impinges on plenary employment of others' authorities.

Similar ambiguities in the boundaries between different institutions' constitutional entitlements can be found in separation of powers contexts. For example, the Court's removal jurisprudence is animated by the overlap of the President's power to take care laws are enforced and Congress's power pursuant to the horizontal component of the Necessary and Proper Clause to structure the executive branch.<sup>262</sup> To analyze removal disputes as raising solely the powers of one or the other elected branch is to gloss over the question of how institutional borders are to be drawn when the text engenders overlap.<sup>263</sup> It is to assume, rather than reason out, an answer.

Spillovers also underlie cases such as *Chadha v. INS*<sup>264</sup> and *Bowsher v. Synar*.<sup>265</sup> As framed by the Court, both cases hinged on a conceptual distinction between legislative functions and executive functions. In *Chadha*, the Court characterized the "altering [of] legal rights, duties and relations" as "essentially legislative in purpose and effect."<sup>266</sup> In *Bowsher*, it stated that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law,"<sup>267</sup> and hence a task for Article II authorities alone. A spillover arises because interpreting a law often necessarily means changing rights and duties. Hence, the (forbidden) application of the legislative veto against Mr. Chadha is also an interpretation of the immigration statute. The budgetary reductions that would have been effected by the Comptroller General under the 1985 Balanced Budget and Emergency Deficit Control Act also altered "rights, duties and relations" by changing the fiscal entitlements of diverse federal grantees. At least as defined by the Court in those cases, putatively

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<sup>262</sup> See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3165 (2010) (Breyer, J., dissenting) (noting that removal cases arise at "the intersection of two general constitutional principles," the Take Care Clause and the Necessary and Proper Clause).

<sup>263</sup> Hence, Chief Justice Roberts's opinion in *Free Enterprise Fund* begins with Take Care clause, and then never fairly accounts for the Necessary and Proper Clause. *Id.* at 3146.

<sup>264</sup> 462 U.S. 919 (1983).

<sup>265</sup> 478 U.S. 714 (1986).

<sup>266</sup> 462 U.S. at 951–52.

<sup>267</sup> 478 U.S. at 733.

mutually exclusive core functions of the legislature and the executive overlap.<sup>268</sup>

The concepts of ‘legislative’ and ‘executive’ cannot be applied to the complexities of observed governance in ways that yield resolving clarity.<sup>269</sup> As Justice Stevens recognized in *Bowsher*, “governmental power cannot always be readily characterized with only one of ... three labels.”<sup>270</sup> To be sure, there are other ways of reconciling *Bowsher* and *Chadha*. Both cases, the Court later noted, disapprove congressional self-aggrandizement.<sup>271</sup> But that reconciliation does not undermine my point here: Efforts by the Court to determine whether and how to separate government functions have dominated debates in constitutional theory since the Founding. But absent some even deeper account decomposing those elementary particles yet further, boundary disputes will remain pervasive.<sup>272</sup>

These examples demonstrate that constitutional entitlements, like real property, generate spillover problems that can be characterized as either A’s interference with B or B’s interference with A. This would have not surprised the Framers. James Madison, most famously, prophesized that the Constitution would be “more or less obscure and equivocal, until [its] meaning be liquidated and ascertained by a series of particular discussions

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<sup>268</sup> This is not a new observation. Magill, *Real Separation*, supra note 22, at 1141–42 (2000); H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 DUKE L. J. 1171, 1199 (1998).

<sup>269</sup> See Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 343 (1989) (“[R]igid categories of branch power simplistically disregard the real complexities of government structure as we know it ....”).

<sup>270</sup> *Bowsher*, 478 U.S. at 749 (Stevens, J., concurring in the judgment); see also *id.* at 750 (noting that “[t]he powers delegated to the Comptroller General by §251 of the Act... have a... chameleon-like quality”).

<sup>271</sup> As indeed the Court did. See *Morrison v. Olsen*, 487 U.S. 654, 694 (1988) (characterizing both cases as involving congressional self-aggrandizement); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1238 (1995).

<sup>272</sup> Such accounts often rest on controversial claims about the original public meaning of Article II. See, e.g., Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 216–17 (2005) (“Congress lacks a generic right to reallocate or tamper with presidential powers.”). Without recapitulating the extensive debate about such claims, it suffices here to say that they are nonobvious, methodologically controversial, and hence hardly as crisp in their resolution as their proponents would like to think. For every originalist assertion in favor of Article I, the non-originalist reader might indeed posit a natural law demanding an equal and opposition on behalf of Article II. Or, if one prefers, originalism largely works by bypassing the definitional enterprise of *Chadha* and *Bowsher* to raid the ice box of history for useful boundary lines.

and adjudications.”<sup>273</sup> As Madison’s dictum suggests, some mechanism for resolving boundary disputes is inevitable. At least to date, the elected branches and the states have principally resorted to bargaining as an expeditious and inexpensive means to resolve disputes. Absent some reason to think that this tradition has always been wrong-headed or misguided, the persistence of spillover problems provides a threshold reason for accepting intermural bargaining as a legitimate constitutional practice.

## 2. *The Myth of Constitutional Homeostasis*

Bargaining is useful for a second reason. Even if the Constitution perfectly specified institutional entitlements, ambiguity in boundaries would remain unavoidable due to institutional, social, and economic change over time. Bargaining is a logical, and historically tested, mechanism for dealing with the changes thereby wrought to institutional boundaries.

The Constitution, unlike the human body, is not homeostatic.<sup>274</sup> Its internal shifts are invisible vectors that over generations thrust into conflict previously isolate institutions. That “changed circumstances” might alter structural constitutional relations is, of course, a familiar idea.<sup>275</sup> The national economy, for example, has transformed itself—dilating westward, congealing into new corporate forms, molting with each rise and fall of a new transportation or communication technology—belying the idea of a delimited Commerce Clause power.<sup>276</sup> As the nation’s geopolitical aspirations have swelled with shifting ideologies and aspirations,<sup>277</sup> and the United States has shifted “from inwardness and isolation into the dominant world power,”<sup>278</sup> so the balance of power between the executive and Congress has recalibrated. New external pressures alter not just the interbranch balance, but also the national government’s relations with the

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<sup>273</sup> THE FEDERALIST 37, at 244–45 (James Madison) (I. Kramnick, ed. 1987).

<sup>274</sup> Cf. ARTHUR C. GUYTON & JOHN E. HALL, TEXTBOOK OF MEDICAL PHYSIOLOGY 7-8 (10th ed. 2000) (“Each functional structure provides its share in the maintenance of homeostatic conditions .... Extreme dysfunction leads to death, whereas moderate dysfunction leads to sickness.”).

<sup>275</sup> Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 132 (1995); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 453–72 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

<sup>276</sup> MICHAEL LIND, AN ECONOMIC HISTORY OF THE UNITED STATES (2012).

<sup>277</sup> GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 (2011).

<sup>278</sup> G. JOHN IKENBERRY, LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND TRANSFORMATION OF THE AMERICAN WORLD ORDER 1 (2011).

states.<sup>279</sup> Nor have the background assumptions of democracy remained constant. Rather, the (long delayed) entrance of women and people of color into the polity have transformed the electorate beyond early republican recognition.<sup>280</sup> Even the background assumptions of constitutional order are subject to sub rosa transformations: Recent scholarship suggests that basic assumptions about federalism’s inherent logic were not immutable through even the early Republic.<sup>281</sup>

All these changes impact the scope and operation of structural constitutional entitlements. It is standard to assume that subsequent constitutional interpreters should seek “to restore the status quo” out of fidelity to the original design.<sup>282</sup> But it is not clear this is so. It may be that original institutional equilibria cannot be recreated without minatory social costs. For example, narrowing Congress’s Commerce power to antebellum dimensions might cripple the national economy. The national regulatory state also cannot be undone without large economic disruption. The task of resolving new institutional conflicts, in short, is not well described as an exercise in fidelity. Rather, as exogenous historical change presses into conflict institutional entitlements that previously stood apart, resolution of those conflicts must attend not only to historical warrants but also to present social goods. As Part II demonstrated, it has been intermural bargaining that has played the critical role in efforts to maintain the Constitution as a going concern.

Intermural bargaining is an especially salient channel for institutional dispute resolution given the preclusive difficulty of

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<sup>279</sup> See Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723 (2013) (developing the claim that external geopolitical forces are an important determinant of structural constitutional outcomes).

<sup>280</sup> See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

<sup>281</sup> See, e.g., Wesley J. Campbell, *Commandeering and Constitutional Change*, 112 YALE L. J. 1104, 1171–81 (2013).

<sup>282</sup> Orin S. Kerr, *An Equilibrium-adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 492 (2011); accord Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 23 (2009) (explaining that translation theory recommends that “the original meaning of the Constitution’s structure might best be preserved by departures from the specific original understandings of the founding generation”); accord Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 129 (1994). But see David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 860–61 (2009) (identifying doctrinal areas in which the Court has tried to “moderniz[e]” doctrine in response to perceived public opinion).

constitutional change through Article V.<sup>283</sup> Unable to adjust the text through Article V without exorbitant transaction costs, institutions have strong incentives to bargain among themselves to reach stable outcomes. Paradoxically, negotiated change may stabilize the overall constitutional dispensation by staving off economic or social crisis. On this view, stability under conditions of social, economic, and geopolitical flux is not obtained by resisting new institutional arrangements. Rather, it is secured by allowing elected officials to experiment with new governance mechanisms.

### C. Judicial Review as a Substitute for Bargaining

The fact that intermural boundaries inevitably overlap, generating conflicts with no obvious resolution, does not lead inexorably to the conclusion that bargaining is the optimal resolution mechanism for the ensuing disputes. An alternative institutional mechanism might dominate bargaining in terms of cost and accuracy. An obvious contender is judicial review. A case for judicial primacy in resolving intermural disputes might start with the observation that federal courts sooner or later do confront and adjudicate the constitutionality of many, if not all, institutional boundary questions that might otherwise be resolved by intermural bargaining.<sup>284</sup> Why not then just cut to the chase? Prioritization of judicial action might be grounded on comparative institutional competence grounds. Federal courts lack an institutional stake in many structural constitutional disputes. Courts' impartiality makes them especially well-situated to act as arbiters in interbranch or intergovernmental conflicts.<sup>285</sup> Further, judicial review does not suffer from a potential distortion manifested in intermural bargaining. Institutions trade over constitutional entitlements in the absence of the thick array of buyers and sellers commonly thought necessary to well-functioning markets.<sup>286</sup> As a result, bargaining failures and difficulties in valuing institutional assets might prevent socially desirable transfers from occurring.

This section considers and rejects the possibility that courts should be favored forums for resolving intermural boundary disputes. It develops

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<sup>283</sup> See *supra* text accompanying notes 220 to 222.

<sup>284</sup> See generally *supra* Part II.

<sup>285</sup> For a similar claim, see *Committee on the Judiciary v Miers*, 558 F Supp. 2d 53, 56, 76, 96, 103, 107 (D.D.C. 2008) (referring to the judiciary as the “ultimate arbiter” of executive privilege claims).

<sup>286</sup> Cf. Lee Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1438 (2009) (describing the problem of the “‘thin market’ in which transactions must occur, if at all, between specific parties”).



four reasons for rejecting the primacy of judicial resolution. These arguments will be supplemented in Part IV, which argues further that courts are ill-positioned to determine whether the conditions for resisting intermural negotiation are satisfied in respect to particular deals. To be clear, my claim here is *not* that courts should have no role at all. The use of courts as backstopping venues for the resolution of some constitutional questions is deeply embedded in our constitutional disposition. I focus here instead on reasons for relegating courts to a distinctly second tier.

As a threshold matter, Article III of the Constitution has been read to bar federal courts from acting in the absence of a concrete dispute.<sup>287</sup> To obtain a judicial resolution in the absence of bargaining, therefore, one institution would have to infringe on another's putative prerogatives to precipitate a justiciable dispute. But despite Corwin's famous dictum, the separation of powers is not in practice an "invitation to struggle."<sup>288</sup> Instead, "[v]iolations of separation of powers principles tend to occur with the consent of two branches rather than unilateral incursion by one."<sup>289</sup> No mechanism in the Constitution ensures that the transient, elected occupants of federal or state offices will be empire-builders keen to extend their demesnes.<sup>290</sup> Accordingly, a mechanism for resolving institutional ambiguities that relies on aggressive intramural incursions as a necessary predicate for clarification would founder on incentive compatibility grounds. Further, requiring branches and states to instigate contentious border disputes may create more litigation-related and frictional costs that bargaining obviates. There is no obvious reason why those costs should be incurred in every case, as opposed to solely those cases in which intermural bargaining breaks down.

Second, the tools that courts employ to resolve institutional border disputes may be clumsy, costly, and prone to manipulation—and so not necessarily superior to institutional bargaining. Rather than conducing to uncertainty, their persistent deployment may destabilize expectations of institutional behavior. As this Part has demonstrated, many institutional

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<sup>287</sup> See *Federal Election Com'n v. Akins*, 524 U.S. 11, 20–21 (1998) (noting that “courts will not ‘pass upon ... abstract, intellectual problems’” (citation omitted)).

<sup>288</sup> Corwin was only talking about foreign policy. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 201 (Randall W. Bland et al. eds., 5th ed. 1984).

<sup>289</sup> Gersen *supra* note 81, at 356 n.147.

<sup>290</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920 (2005) (arguing that officials often act based on personal and political incentives that do not entail defending institutional powers and prerogatives of the branch that employs them).

border disputes arise when neither constitutional text nor original understanding provide univocal answers. As a result, judicial resolution of intermural border disputes tends to pivot on contentious, highly controverted theories of constitutional interpretation. In *Arizona v. Inter Tribal Council of Arizona*, for example, Justice Thomas suggested that an appropriate default rule could be deduced from the anti-central logic of the Founding moment.<sup>291</sup> On Justice Thomas's account, that resolving default rule arises not from the text but from a contested historical account of the federal government's formation and a highly controversial political theory of divided sovereignty. In an earlier case, Justice Stevens had set forth an alternative theory of the Constitution's implicit political theory (one that is perhaps no less controversial) that would yield different answers to the boundary question.<sup>292</sup>

It is by no means clear that recourse to grand constitutional theory is a superior decisional procedure to bargaining. Disputes that turn on historical evidence and constitutional theory will tend to be expensive to litigate. Ex ante, they produce uncertainty. There is also no guarantee that dueling grand theories of constitutional design yield anything other than a "draw."<sup>293</sup> On the contrary, observed patterns of ideological voting on the Supreme Court may raise a concern that the wide array of historical, theoretical, and precedential material from which answers can be derived leaves large free rein for judges' priors.<sup>294</sup> As a result, reliance on grand theory to settle institutional border disputes might undermine the predictability of dispute resolution. Judicial resolution, in short, is not necessarily a stabilizing force.

Third, if intermural settlements of institutional boundary disputes are largely consensual (as appears to be the case), it may well be that those who challenge them in court are either disgruntled defectors<sup>295</sup> or third

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<sup>291</sup> See 133 S. Ct. 2247, 2263–64 (2013) (Thomas, J., dissenting); accord *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 864–65 (1995) (Thomas, J., dissenting).

<sup>292</sup> *Thornton*, 514 U.S. at 798–805 (Stevens, J.).

<sup>293</sup> Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995).

<sup>294</sup> For empirical evidence of ideological voting, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).

<sup>295</sup> Such as New York state in respect to the LLRWPA. See *supra* text accompanying notes 181 to 185.

parties with an ulterior agenda.<sup>296</sup> Rather than selecting for cases in which an institutional settlement is most troubling, the ensuing pattern of challenges to intermural bargains will result in challenges against institutional fixes from defectors or rent-seeking private litigants. In this way, litigation is most likely to occur when a structural fix has resulted in relatively large welfare gains by eliminating significant rent-seeking. Litigation is least likely to be observed, by contrast, when an institutional fix has had negligible effects, or it has welfare-dampening effects and potential spoilers have been bought off.

Therefore, in cases in which an intermural bargain is an effort to extract rents, say from the general populace, it will be possible to buy off all internal defectors and hostile interest groups with a portion of those rents. By contrast, when an intermural settlement is beneficial to the public at large, there will likely not be resources freed up to pay for bribes to head off hostile law suits. But if courts are most likely to pick off those institutional settlements that are most valuable, and least likely to deal with normatively troubling deals, we might fairly doubt that they are the optimal site for resolution of institutional boundary disputes in constitutional law. Again, this suggests courts' role should be a secondary one.

Fourth, the comparative epistemic competence case in favor of judicial primacy is hard to sustain. On the one hand, judges' impartiality is easy to exaggerate. Federal courts do not stand in perfect equipoise between Congress and the executive. Of course, Congress has authority to recalibrate the scope of federal-court jurisdiction and judicial budgets. But this does not guarantee a level interbranch playing field.<sup>297</sup> Empirical studies confirm that the identity of the appointing President has an outsize influence on judges' subsequent voting behavior.<sup>298</sup> So great is the "predictive success of

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<sup>296</sup> See Huq, *Standing*, *supra* note 24, at -- (analyzing the political economy of standing in structural constitutional cases to suggest that individual litigants will often have ulterior agendas at odds with social welfare).

<sup>297</sup> Congress cannot, however, disturb final judgments. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–25 (1995).

<sup>298</sup> Susan W. Johnson & Donald R. Songer, *The Influence of Presidential Versus Home State Senatorial Preferences on the Policy Output of Judges on the United States District Courts*, 36 LAW & SOC. REV. 657, 666 (2002) (expecting to find "that the practice of senatorial courtesy might lead to judicial appointments consistent with the views of home state senators" but discovering that "presidential preference is more than twice as influential as home state senatorial preferences"). This is hardly surprising. See Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1071 (1999) ("Given the Court's key role in setting public policy, the president will want a Court that shares his

the presidential-appointment measure of [judicial] ideology,” that many studies use it without detailed comment.<sup>299</sup> In addition to this ex ante bias in favor of the appointing President, the executive has important ex post opportunities to influence judges. For example, federal courts rely on the President and his or her officials for enforcement of their orders.<sup>300</sup> Judges may also be cognizant of the power that the President has to veto jurisdiction-stripping proposals, and otherwise to protect the institutional and fiscal resources of the courts.<sup>301</sup> Given that these ex ante and ex post pressures both tilt toward the executive and away from other branches, it seems fair to ask why one would expect federal courts to be neutral as between Congress and the White House. The same point can be made more parsimoniously respecting federalism: As their name suggests, the federal courts are not situated in equipoise between the states and the national government. Even the Justices’ occasional federalism enthusiasms can be traced back to changes in the preferences of national political actors.<sup>302</sup> Accordingly, there is no strong reason to anticipate consistent neutrality between levels of government on the part of Article III courts.

Any argument for preferring political branch bargaining over judicial settlement must also account for the strengths and weaknesses of nonjudicial settlement. In contrast to judicial resolution, intermural bargaining may function tolerably well in a significant proportion of cases. To be sure, the absence of a thick market and price mechanism for institutional bargaining may mean that some socially desirable bargains do not occur.<sup>303</sup> While this might justify reliance on judicial review as a

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ideology and thus will nominate someone who will bring the Court closer to his preferences.”).

<sup>299</sup> Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 279 & n.105 (2005).

<sup>300</sup> *But see Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801-02 (1987) (holding that courts can initiate their own contempt proceedings).

<sup>301</sup> See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250 (2012) (providing examples of cases in which presidents opposed jurisdiction-stripping measures).

<sup>302</sup> See Mitchell J. Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPECTIVES ON POL. 22 (2004).

<sup>303</sup> Institutional entitlements, to be sure, are incommensurable—but so too are many items subject to ordinary market transactions (think, for example, of the trade-off between marginal wages for longer working hours and time with family). Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 782–85 (1994) (illustrating the pervasiveness of incommensurability problems in valuing private market goods).

*complement* to institutional bargaining, it does not undermine the utility of observed intermural resolutions.

Further, there is no reason for categorical skepticism of elected actors' incentives. The practice of serious constitutionalism within elected bodies in the United States has a long historical pedigree. The first Congresses took the task of constitutional interpretation seriously without being hamstrung by institutional or partisan bias.<sup>304</sup> Today, this practice, which is known as departmentalism, has many academic defenders.<sup>305</sup> The robustness of that departmentalist tradition contrasts with the relatively recent vintage of claims to judicial supremacy.<sup>306</sup> Setting these two histories alongside each other, it becomes clear that the role of courts as neutral arbiters of intermural disputes is historically contingent, dating back to the Civil War.<sup>307</sup> The institutions originally vested with institutional entitlements by the Constitution managed to resolve intermural disputes for decades before the courts ever got involved. While the benefits of judicial involvement may be overstated, the costs of elected branch resolution also seem smaller than might first appear. Without resolving all of the hard normative questions raised by departmentalism, it is plausible to conclude that when there are multiple branches or governments bargaining over an entitlement, there is no reason to think that courts should be necessary forums for constitutional resolution because of their putative impartiality.

This evaluation of judicial settlement's limitations and intermural bargaining's advantages reflects contemporary constitutional adjudicatory practice. For while federal judges presently employ no systemic theory of intermural bargaining—indeed, they do not even recognize that the phenomenon cuts across transubstantive lines—they nonetheless tend to approach voluntary settlement of institutional boundary lines with a deferential attitude. The judicial posture of deference evinced toward such settlements—while rebuttable, as shown by cases such as *Chadha*,

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<sup>304</sup> See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997) (demonstrating breadth of constitutional interpretation by early Congresses).

<sup>305</sup> Aziz Z. Huq, *Enforcing (but not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1075–76 (2012) [hereinafter Huq, *Enforcing*] (collecting empirical evidence to that effect).

<sup>306</sup> See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1153–56 (2009) (noting recent vintage of such claims to judicial supremacy).

<sup>307</sup> See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579 (2012) (documenting historical patterns in judicial willingness to invalidate federal statutes on constitutional grounds, and showing large increase in such settlement after the Civil War).

*Bowsher*, and *Clinton*—appropriately reflects the epistemic and institutional constraints of judicial review, in addition to the merits of intermural settlement. To be sure, one cannot reason from observed practice to normative prescription without committing the naturalistic fallacy. Nevertheless, courts’ frequent deference to bargained-for institutional outcomes suggests that a regime of limited judicial superintendence does not produce intolerable outcomes.<sup>308</sup> Judicial deference instead reflects the well-founded view that “acquiesced-in government practices ... embody wisdom accumulated over time and are unlikely to threaten the basic balance of power between Congress and the Executive.”<sup>309</sup>

In sum, the limits of judicial capacity and the merits of intermural bargaining undermine the case for judicial exclusivity, even if they do not establish that courts should play no role at all. As a result, there is no reason to think that courts should always be preferred forums for the resolution of intermural boundary disputes. Instead, courts should treat the outcomes of such negotiation with at least a measure of deference in recognition of elected actors’ primacy.

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There is no cause to lament the fact that bargaining over institutional entitlements is inevitable. The Constitution’s textual specification of institutional entitlements is inevitably incomplete. Hydraulic pressures imposed by economic, institutional, and geopolitical change inexorably foster new institutional tensions. Nor is there reason to appeal to the judiciary as the default arbiter of institutional boundary disputes. To the contrary, the arguments marshaled in this Part suggest that intermural bargaining should be the default mechanism for renegotiating the boundaries between institutions vested with constitutional entitlements. Federal judges should review the outcomes of intermural bargaining only deferentially. Just as in the private market context, that is, Coasean bargaining should be approved as a favored means for identifying the optimal location of an entitlement.

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<sup>308</sup> Courts have also acquiesced wholesale to intermural settlements by installing the political question doctrine as a barrier to justiciability in many disputes about structural boundaries. See Huq, *Removal*, *supra* note 24, at 20–24.

<sup>309</sup> Bradley & Morrison, *supra* note 103, at 414. For the link between comparative institutional competence arguments and the Legal Process approach, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 696, 1009–10, 1111 (William Eskridge, Jr. & Philip P. Frickey eds., 1994).

#### IV. The Limits of Intermural Bargaining

A presumption in favor of intermural bargaining need not, though, be conclusive. Even if intra- or intergovernmental negotiation generates beneficial outcomes in the mine run of cases, it may nonetheless periodically yield socially undesirable results. This Part develops two criteria for determining whether a structural constitutional bargain should be prohibited and considers whether either criteria provides a platform for judicial review. In the first task, my argument here mines the private law framework sketched in Part I and applied in Part III. Using that body of rules as a template, I propose that the categories of negative externalities and paternalism can, *mutatis mutandi*, serve as limits on institutional bargaining. In the ordinary contracting context, both concepts are informed by models of individual behavior.<sup>310</sup> I do not assume these models mechanically translate into the institutional context, where psychological and decisional dynamics will be quite different. Rather, I endeavor to demonstrate that the same concepts furnish traction in the institutional context *given the nature of institutional decision-making*.

The identification of limits to permissible intermural negotiations again implicates the question whether courts should police bargains. Building on the discussion in Part III.C, I suggest reasons to be skeptical that courts will identify accurately instances in which institutional bargains go too far. I examine instances in which the Court has imposed inalienability rules, focusing on largely separation of powers cases where the Court has been most active in this regard.<sup>311</sup> Based on this analysis, I suggest that the inalienability rules should not have been imposed in leading cases such as *Chadha v. INS*,<sup>312</sup> *Bowsher v. Synar*,<sup>313</sup> and *Clinton v. New York*.<sup>314</sup> Moreover, courts have tended to assign excessive weight to shifts in regulatory entitlements achieved through custom or historical gloss. This track record again undermines courts' primacy in regulating intermural

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<sup>310</sup> See, e.g., Sunstein, *Behavioral Economics*, *supra* note 48, at 1838–42 (organizing discussion of paternalism around models of cognitive failure).

<sup>311</sup> Recall that in federalism cases, the Court has focused on defining property rights via the commandeering doctrine, the Eleventh Amendment, and sovereign immunity doctrine. See *supra* text accompanying notes 154 to 160. This jurisprudence is largely in harmony with the Coasean logic advanced in this Article, although it has been subject to criticism on other grounds. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998).

<sup>312</sup> 462 U.S. 919 (1983).

<sup>313</sup> 478 U.S. 714 (1986).

<sup>314</sup> 524 U.S. 417 (1998).

bargaining and reinforces the case for judicial deference. Accordingly, platforms for judicial intervention may exist, but they should be employed with care and deference.

### A. Negative Externalities

I first specify the possibility that limits on intermural bargaining might be justified by a concern about negative externalities, and consider whether courts are well-positioned to enforce such limits. Institutional frameworks established in the Constitution, such as the separation of powers and federalism, are justified in terms of their beneficial effects for citizens.<sup>315</sup> According to the Supreme Court, both of these structural principles engender individual liberty by minimizing the monopoly power of any one governmental entity.<sup>316</sup> By dispersing power between plural institutional sites, the Constitution diminishes the risk of tyranny and promotes limited government.<sup>317</sup> A first argument for limiting intermural bargaining would focus on the possibility that the ensuing deals compromised these positive externalities of the Constitution's architecture.

Note that this argument does not suggest that any perceived third-party harm justifies a constraint on intermural bargaining. It suggests rather that when a value that the Constitution specifically seeks to promote (such as accountability or liberty) is compromised by an institutional innovation, the innovation producing such an effect should be treated with suspicion. Sometimes, intermural deals can be struck precisely to assign economic harms in the most efficient manner way possible. The LLRWPA may be a good example of this.<sup>318</sup> Hence, the mere fact that some private parties are disadvantaged by a deal in some way is not sufficient to warrant its close

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<sup>315</sup> *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (“[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies.”); accord *New York v. United States*, 505 U.S. 144, 181 (1992).

<sup>316</sup> See, e.g., Richard A. Epstein, *Exit Rights under Federalism*, 55 L & CONTEMP. PROBS. 147, 149-50 (1992) (discussing how federalism checks state monopoly power by allowing exit rights); Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 878-79 (2009) (arguing that separation of powers jurisprudence aims to protect liberty by preventing “tyranny and legislative aggrandizement”).

<sup>317</sup> See, e.g., *Loving v. United States*, 517 U.S. 748, 756 (1996) (“Even before the birth of this country, separation of powers was known to be a defense against tyranny.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty.”).

<sup>318</sup> See *supra* text accompanying notes 180 to 185.



scrutiny. There must be reason to believe a *constitutional* value is compromised.

An externalities-based justification for placing certain institutional deals beyond bounds might start from the observation that some institutional deals redound to the detriment of the public as a result of elected representatives' misbegotten incentives. Agency slack leads faithless elected agents to endorse institutional deals with negative externalities. Those agents defect due to self-interest, divergent preferences, or a want of information or skill.<sup>319</sup> But democratic politics at both federal and state levels employ regular elections to cabin agency slack. Hence, an externalities-based argument for limiting intermural bargaining must also explain why elections insufficiently discipline officials in dealmaking with other institutions.<sup>320</sup>

The concept of negative externalities, in short, can be translated into the structural constitutional context. But how should it be enforced? One starting point in answering this question is the Court's separation of powers case-law, which can be explained in terms of externalities. Examination of those cases, however, suggests that courts have considerable difficulty accurately identifying plausible, externality-derived limits on bargaining, and at minimum should proceed with caution when acting on the belief that they have such a case at bar.

First, the limits on delegation in *Chadha*, *Bowsher*, and *Clinton* all echo a *numerus clausus* principle, i.e., a limit on the variety of forms property interests can take.<sup>321</sup> In real property law, the *numerus clausus* principle is justified on the ground that "[s]tandardization of property rights reduces [the] measurement costs" of third parties by eliminating the prospect of idiosyncratically defined entitlements.<sup>322</sup> By analogy, prohibitions on legislative vetoes, lockbox rules, and line-item vetoes might be justified in terms of negative epistemic spillover: Each institutional innovation tampers with the channels of democratic accountability. It thus raises the cost to voters of observing individual politicians. Just as the

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<sup>319</sup> Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 207, 209-10 (2005).

<sup>320</sup> TIMOTHY BESLEY, PRINCIPLED AGENTS? THE POLITICAL ECONOMY OF GOOD GOVERNMENT 105-06 (2006) (explaining that agency slack between voters and their representatives is typically addressed through either the mechanism of *ex ante* electoral selection effects or through retrospective voting).

<sup>321</sup> See text accompanying *supra* note 107.

<sup>322</sup> Merrill & Smith, *Coasean Property*, *supra* note 35, at 9.

Court's hostility to some campaign finance regulation is explained by a wish to clear channels of political competition, so these separation-of-powers rules serve to promote accountability by cabining the costs of deriving a national policy's etiology.<sup>323</sup>

Second, and alternatively, the results in these cases might be defended on the ground that each of these institutional innovations concentrates power, thwarting the Constitution's reliance on fragmented governmental power as a means to producing the rule of law by disregarding strict acoustic separations between distinct species of governmental power.<sup>324</sup> In this way, these decisions lower the barriers to tyranny developing within the constitutional framework as a consequence of one branch seizing an inordinate share of power. Hence, *Chadha*, *Bowsher*, and *Clinton* might be read to impose inalienability rules when negative liberty-related externalities outweigh the benefits of intermural deal-making.

It is worth reiterating that it is no doubt true that certain intermural deals should be prohibited due to negative externalities. But I am skeptical that the Court has successfully identified instances in which such a ban is warranted. Neither the democratic accountability nor the anti-tyranny accounts of *Chadha*, *Bowsher*, and *Clinton* are persuasive. First, a democratic accountability defense of those cases necessarily rests upon some estimate of voter confusion, the availability of proxies for voters, and the offsetting benefits of institutional displacement. Such a defense would also need to account for the possibility that the challenged institutional modifications might in some instances lower the costs of democratic accountability. The line-item veto, for example, might ease democratic accountability by "improv[ing] the transparency of budget decisions to voters."<sup>325</sup> Yet the Court's decisions are bereft of the necessary empirical investigations necessary to justify its conclusion that the institutional innovations in *Chadha*, *Bowsher*, and *Clinton* in fact undermined democratic accountability

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<sup>323</sup> Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998). A similar argument is offered in favor of the anticommandeering rule. See *Printz v. United States*, 521 U.S. 898, 929-30 (1997); *New York v. United States*, 505 U.S. 144, 168-69, 182-83 (1992).

<sup>324</sup> See Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 440 (2013) ("[T]he separation of powers might be thought of as a means to the division of power.").

<sup>325</sup> Garrett, *Accountability and Restraint*, *supra* note 118, at 873.

Furthermore, arguments against the legislative veto, sequester, and line-item veto from liberty externalities also founder on profound conceptual difficulties and empirical uncertainty. It is very plausible to think that the correlation between liberty and mandated separations of institutional power is, in fact, very weak.<sup>326</sup> I therefore doubt the threshold assumption that separated powers consistently produce positive externalities to begin with. Even setting aside that possibility, the outcomes in these cases are hard to justify. The Court simply lacked any warrant for concluding that the institutional innovations it has struck down diminish rather than augment liberty interests. Hence, even as interbranch consolidation of power enlarges government power, it might do so by reducing rent-seeking and increasing the rationality and predictability of federal action.<sup>327</sup> These liberty-promoting effects might dominate any loss in liberty from the concentration of government power. In the same way, election rules that “entrench one vision of democracy,”<sup>328</sup> and so protect incumbents, also create the stability and predictability necessary for democracy. In both contexts, agency costs might be smaller than stability and predictability gains.<sup>329</sup> Further, even brief reflection on the history of federal interventions on civil rights issues should reveal that centralizing power can sometimes *redistribute* liberty interests between different social groups so as to *expand* the net enjoyment of liberty under the Constitution—not to mention leaving that liberty allocated in more just arrangements.

Nevertheless, it may be possible to get more traction on the idea of externalities from institutional deals by considering the possibility that elected agents will be most likely to self-deal when there is unified rather

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<sup>326</sup> See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CAL. L. REV. 887, 923–24 (2012) (developing this point for national security policy); Huq, *Standing*, *supra* note 24, at – (developing the point more generally); see also ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 176–204 (2010) (offering empirical evidence that fears of institutional tyranny tend to be overstated).

<sup>327</sup> See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 100 (1985) (“[D]elegation to experts [is] a form of consensus building that, far from taking decisions out of politics, seeks to give political choice a form in which potential collective agreement can be discovered and its benefits realized.”).

<sup>328</sup> Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 135 (2003).

<sup>329</sup> Professor Waldron aligns the separation of powers with the rule of law. See Waldron, *supra* note 324, at 456–59. This analysis, by contrast, shows how violating a pure separation of powers can promote some rule of law values.

than divided government. Deals with potential institutional competitors might be a way for incumbents to reduce the risk that malfeasance, rent-seeking or neglect will come to voters' attention through institutional conflict and competition.<sup>330</sup> This would suggest that courts should look especially closely at deals struck by institutions controlled by the same political party, and allow bipartisan deals (such as the line-item veto and the original legislative veto) a greater margin of appreciation.

In sum, negative externalities sounding in liberty terms may well supply a justification for some inalienability rules. But specification of such a limit demands careful empirical evaluation of a law's effect upon democratic accountability and other important values. The Court is not clearly well-placed to engage in this sort of predictive and wide-ranging inquiry. The Court's interventions in *Chadha*, *Bowsher*, and *Clinton* cannot be defended as reasoned and informed evaluations of negative externalities. More generally, federal judges are poorly positioned to ascertain when an institutional bargain creates negative externalities. And they may be discomforted by the need to treat divided and unified government as constitutionally distinct. Instead, it should be up to officials, and their constituents, to ascertain in the first instance when institutional bargains illicitly compromise the positive liberty externalities of the constitutional framework. Judicial intervention, by contrast, should be cautious and deferential.

## **B. Paternalism and Intermural Bargaining**

It may seem that the second justification for limiting Coasean-bargaining—paternalism-warranting internalities—does not translate well to the institutional context. Institutions, unlike individuals, do not deploy what Daniel Kahneman calls “System 1” heuristics as a shortcut for making demanding decisions.<sup>331</sup> Institutions comprised of plural natural persons instead employ a variety of decision-making processes involving multiple stages and many individuals. In doing so, however, they must identify ways to overcome paradoxes of aggregation that lead to cycling problems<sup>332</sup> and

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<sup>330</sup> The Court has identified incumbent entrenchment as a concern of constitutional dimensions in the campaign finance context. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 236, 248-49 (2006) (plurality opinion).

<sup>331</sup> KAHNEMAN, *supra* note 49, at 20–21.

<sup>332</sup> CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 42–58 (2011) (exploring how institutions achieve coherent aggregated outputs).

overcome collective action hurdles. When they fail to do so, they may suffer from ‘internalities’ that can be invoked to justify paternalistic limits on institutional bargaining.

It is familiar fare that institutions can suffer from collective pathologies that impede rational pursuit of recognized self-interest.<sup>333</sup> Perhaps the most important cleft between institutional interest and institutional action here will emerge through failures of collective action. Institutions composed of plural members, and whose decisions depend on the aggregation of individual members’ preferences, can fail to reach outcomes that maximize collective welfare under certain conditions. The most important of these is the tragedy of the commons, “in which what is best for each person individually leads to mutual defection, whereas everyone would have been better off with mutual cooperation.”<sup>334</sup> A paternalism justification might apply if an institutional entitlement was held by a collective in common, for example a group of legislators or a group of states, and the collective was routinely unable to overcome its internal transaction costs to engage in desirable coordinated action. This might result in intermural trading in which the collective ‘sells’ the entitlement on the cheap due to its inability to cohere behind a single bargaining position. Worse, collective inaction might lead to anomie or wholesale atrophy of an entitlement.<sup>335</sup>

Concerns about collective action ‘internalities’ of this kind might hence be a platform for judicial intervention in favor of Congress and against the executive branch in the separation of powers context. Congress, that is, suffers from a collective-action internality. The legislature is a plural entity with higher decision costs than the relatively centralized and hierarchical executive. In contrast to the ceaseless churning of biennial and sextennial elections, the executive is able to maintain a cadre of long-term civil servants and bureaucrats who identify consistently with Article II

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<sup>333</sup> There are other institutional pathologies with no obvious relevance in this context, such as group polarization. IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES 10-13 (1972). Alternatively, “many minds might spin their wheels indefinitely, reaching no single answer or composite perspective at all.” Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 20 (2009). This raises the intriguing possibility that the *failure* to reach an intermural deal might warrant an external corrective on paternalist grounds.

<sup>334</sup> ROBERT AXELROD, THE EVOLUTION OF COOPERATION 9 (1980). Axelrod is describing the prisoners’ dilemma; the tragedy of the commons is a multiperson prisoners’ dilemma.

<sup>335</sup> See Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421, 423-25 (2012).

aspirations, gather stocks of knowledge necessary to their defense, and develop strategic, long-term plans to further that goal.<sup>336</sup> For example, the Office of Legal Counsel, which furnishes legal opinions on questions of constitutional and statutory law raised by executive action, tends to hold a “robust conception[n] of presidential power” regardless of party affiliation.<sup>337</sup> It has also developed a system of stare decisis for its written work product<sup>338</sup> The result of this institutional asymmetry in collective action costs is an imbalance in the branches’ willingness to vindicate their respective institutional interests. Moreover, it may well be that judicial attention should be more rigorous in periods of unified rather than divided government, since when the White House and Congress are in the same hands, the temptation to allow institutional interests to slide may be especially acute.

This argument is appealing in theory. But it is not clear that courts in practice are well situated to make the necessary judgments about institutional internalities. To the contrary, the available evidence suggests courts tend to compound internalities, not resolve them. Perhaps the most forceful argument for a paternalism-based limitation on intermural bargains to date has been offered by Professors Curtis Bradley and Trevor Morrison. They persuasively criticize the courts’ longstanding use of interbranch custom as a “gloss” on interbranch relations on the ground that “Congress as a body does not systematically seek to protect its prerogatives against presidential encroachment” due to “collective action problems and veto limitations.”<sup>339</sup>

But whereas Bradley and Morrison’s argument wisely counsels for skepticism of historical gloss as a means to narrow legislative and increase presidential authority,<sup>340</sup> federal courts continue to deploy custom as a way to transfer authority from Article I to Article II.<sup>341</sup> In so doing, courts

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<sup>336</sup> Cross-branch partisan links also weaken congressional attachment to institutional interests, *see* Levinson & Pildes, *supra* note 249, at 2324-25, but might do the same for the executive.

<sup>337</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY* 34 (2007); *accord* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 106 (2010).

<sup>338</sup> *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1457–58 (2010) (concluding that “OLC does not often overrule itself”).

<sup>339</sup> Bradley & Morrison, *supra* note 103, at 414–15.

<sup>340</sup> *Id.* at 448–49 (arguing that “where acquiescence is the touchstone of the analysis, the standard for legislative acquiescence should be high”).

<sup>341</sup> *See, e.g., Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, -- F.3d --, 2013 WL 3799663, at \*12 (D.C. Cir. Jul. 23, 2013).

amplify a distorting imbalance endogenous to the constitutional structure rather than ameliorating it. In lieu of resorting to custom when resolving interbranch disputes, federal judges may do better by forcing interbranch trades to go through bicameralism and presentment, especially if partisan linkages and presidential influence on the law-making process addresses the risk of legislative hold-outs.

Moreover, to the extent that there is an asymmetry between Congress and the executive, it is not clear that the judiciary supplies the best remedy. As previously noted, judges tend to hew to their appointing president's views.<sup>342</sup> Given how many Article III judges previously worked within U.S. Attorneys' office, this is perhaps no surprise. Rather than attempting to reorient the appointment process, Congress may be better advised to seek an endogenous solution to its asymmetrical relation to the executive. Congress, for example, might seek to create a repository of institutional legal opinions to serve as its standard-bearing in interbranch battles akin to OLC. Or it might seek to impose more restraints on legal interpretation within the executive branch through its appropriations power. The precise solution is less important here than the idea that restoring the interbranch equilibrium need not involve the federal courts.

In sum, paternalism-warranting internalities may well be a separate ground for resisting certain intermural deals, particularly when these are reached through incremental and inattentive drift rather than formal negotiation. But this does not mean that courts are well positioned to make paternalistic judgments about the limits of intermural Coasean bargaining. To the contrary, courts have in fact systematically failed to police internalities. Once more, this suggests that the existence of limits to negotiation between institutions should not be confused with a compelling need for judicial enforcement. The framework for assessing institutional deals, which comprises a default rule and two exceptions, is better deployed in the first instance by officials and their constituents in the course of departmentalist and popular judgments about new institutional arrangements, with judicial review as a secondary resort.

### **Conclusion**

Institutional bargains are a persistent aspect of the constitutional order. They are inevitable because of both the text's incomplete

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<sup>342</sup> See *supra* text accompanying notes 298 to 299.

specification of initial entitlements and the tectonic pressures of exogenous economic, social, and geopolitical change. Not that this inevitability should be bemoaned. Intermural deals are often a desirable means of resolving constitutional ambiguities, adapting to changed conditions, and realizing new policy goods.

Rather than resisting the inevitable, I have proffered a general framework for evaluating the ensuing deals. To that end, I have adapted the simple rule deployed in private law analyses of bargaining. As a default matter, I suggest, intermural deals reallocating institutional interests should be viewed as acceptable in the absence of concerns about either negative externalities or paternalism-warranting internalities. Without endeavoring any comprehensive accounting of those categories, I have started to sketch how they might be operationalized. Rather than relying on courts, which are not well-positioned to make judgments about the limits of intermural bargains, and which have rendered poor decisions in the separation-of-powers context previously, I have suggested that the general framework developed here should be employed in departmentalist and popular judgments of the constitution. Adoption of the framework, when coupled with judicial humility, should bring into crisper focus the many and varied forms of institutional bargaining that contour, delimit, and enable the routine operation of our constitutional dispensation.



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