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Recommended Citation

Aziz Huq, "Libertarian Separation of Powers," 8 New York University Journal of Law and Liberty 1006 (2014).

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LIBERTARIAN SEPARATION OF POWERS

Aziz Z. Huq^{*}

INTRODUCTION

This essay concerns an oft-assumed, if insufficiently examined, relationship in constitutional law: the causal link between constitutional structure and those social and political goods that the Constitution aims to secure. Structural aspects of the Constitution such as the separation of powers are not valued for their own sake. There is no distinctive aesthetic value in particular designs for governance, no golden mean of constitutional design. Second-order constitutional design instead succeeds only if it creates desirable first-order goods. In the American context, these goods might be said to include democratic governance, individual rights, social welfare, and — of central importance here — individual liberty.

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One need not search long or far to find evidence of a deeply entrenched belief that this causal nexus is more than hypothetical. Speaking for a unanimous Supreme Court in 2011, Justice Kennedy explained that “individuals, too, are protected by the operations of separation of powers and checks and balances.”¹ Kennedy reasoned for the Court that the individual benefits flowing from structural principles such as the separation of powers and federalism entailed their justiciability at the behest of individual as well as institutional litigants.² In closer cases, the same nexus between structural principle and substantive value plays an equally important role in justifying controversial outcomes. Again speaking for the Court in the 2008 *Boumediene v. Bush* litigation, Justice Kennedy justified the extension of the Suspension Clause to the detentions of alleged enemy combatants at Guantánamo by invoking “the separation-of-powers scheme.”³ Reasoning from a string of historical examples, Kennedy posited a strong connection between “the protection of individual liberties” and the American “separation-of-powers scheme” as a warrant for judicial superintendence of executive detentions at the Cuban base.⁴ So self-evident was this causal nexus that Justice Kennedy apparently found no need for supporting authority or evidence.⁵ Perhaps this is unsurprising. The asserted interaction be-

¹ *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). For criticism of Bond’s logic and holding, see Aziz Z. Huq, *Standing for the Structural Constitution*, 99 86 VA. L. REV. 1435 (2013) [hereinafter Huq, *Standing*]. This essay develops and expands upon themes initially elaborated in that paper and other work cited in the following notes. Because my earlier work has focused on the implications of retail Separation of Powers doctrines, I spend more time here on the question whether wholesale adoption of the Separation of Powers *ab initio*, at the moment of constitutional ratification, can be justified in terms of its predictable substantive effects.

² *Bond*, 131 S. Ct. at 2364–65.

³ *Boumediene v. Bush*, 533 U.S. 723, 743 (2008).

⁴ *Id.* at 2246.

⁵ Somewhat in tension with his claims in *Bond* and *Boumediene*, in cases concerning preemption, Justice Kennedy has taken the position that “[p]reemption concerns

tween liberty and separated powers is no novel proposition, but a truism of American constitutionalism. Writing as Publius, James Madison famously explained the need to give each branch the “necessary constitutional means ... to resist encroachments of the others” as part of a “constant aim ... to divide and arrange the several offices in such a manner as that each may be a check on the other”⁶ and therefore avoid tyranny. Rather than breaking new terrain, Justice Kennedy was merely evincing fidelity to that older Madisonian logic.⁷

Despite the antiquity of the argument’s provenance, the precise mechanisms whereby the separation of powers produces valuable first-order goods remains underspecified. The case reporters contain little beyond inchoate references to the checking and balancing effect of interaction between the branches. The concepts of balance and checking, however, have already been subject to thorough skeptical treatment in the legal scholarship and persuasively condemned on two grounds. First, the optimal equilibrium between the branches is difficult if not impossible to specify.⁸ Second, the Con-

the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals.” *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 117 (1989) (Kennedy, J., dissenting).

⁶ THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter, ed., 1961).

⁷ It is not clear, though, whether Madison believed that the separation of powers would be self-enforcing, or whether it would require judicial enforcement. Judicial enforcement might be undesirable, *inter alia*, because it allows private interest groups to seek rents by litigating structural values and conduces to asymmetrical enforcement of different branches’ interests. See generally, Huq, *Standing*, *supra* note 1, at 1491–1512.

⁸ The best work is by Dean Elizabeth Magill. See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1194–97 (2000) (“We do not know what ‘balance’ means, and we do not know how it is achieved or maintained.”); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) (arguing that “both commitments at the center of separation of powers doctrine [separation and balance] are misconceived”).

stitution fails to align official incentives with institutional (as opposed to narrowly political) goals, and as such its proposed dynamic of checking and balancing lacks any foundation in the incentives of institutional actors.⁹

To date, these piercing critiques have failed to command general recognition. Perhaps such critical accounts operate on an insufficiently granular level to obtain purchase on the observed effects of constitutional structure. Even if the Constitution creates no necessary nexus between institutional platforms and official incentives, that is, norms may nonetheless develop around some constitutional institutions in ways that conduce to appropriate incentives.¹⁰ The ensuing arrangement may be lopsided because some branches are better than others at guarding their fiefs. Nonetheless, there may be some domains—consider, for example, the interbranch struggle over budgeting and fiscal matters—where the relevant branches operate with some rough parity of institutional power while animated by similarly powerful incentives.

My aim in this essay is to develop a different critique of separation of powers logic using by way of launching point some themes in Professor Epstein's treatise-like treatment of the U.S. Constitution, *The Classical Liberal Constitution*.¹¹ My argument starts from a

⁹ 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).

¹⁰ Aziz Z. Huq, *Enforcing (But Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1031–34 (2012) (discussing various kinds of “administrative constitutionalism,” which evince an executive branch commitment to take seriously legal rules); Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 781–83 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)) (arguing that elected federal officials are motivated by a preference for legality and constitutionality).

¹¹ RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2013) [hereinafter EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*]. Epstein's work, Whitman-like, contains

simple intuition: Perhaps earlier generations of structural constitutional critics have failed to specify with sufficient granularity the specific social or political goods at stake in constitutional design. After all, the Constitution is not plausibly read to yield only one social or political good. Democratic accountability, the prevention of entrenched political capture, effective governmental response to threats to the national welfare, and the promotion of individual liberties within a non-captured, functioning democracy—all of these are plausible system-wide maximands for the structural constitutional designer. Without a theory that picks out priorities and guides optimization across plural goals, it may be that neither the positive case for (nor the negative case against) the separation of powers is complete. Any criticism of status quo arrangements might be parried with the response that if one constitutional good is being sacrificed by a particular design decision, this is because other valuable social and political goods are elsewhere being vindicated. Debate about the desirability of the separation of powers, in short, skirts indeterminacy due to the possibility of many differently comprised bundles of constitutional goals, each of which could be a legitimate target for the constitutional designer.

One way to obtain more traction on the relation of second-order constitutional structure to first-order goods is to narrow the scope of analysis. Pick just one good and ask whether, and how, structural design might be deployed to further that end. My modest aim in this essay is to begin that inquiry, taking as a touchstone for analysis a version of libertarianism described (if not wholly embraced) in Epstein's *The Classical Liberal Constitution*. To what extent, I ask, can the interbranch design of the federal government—and in particular the choice to separate powers—be employed as a proxy for a bun-

multitudes, and I do not presume to do more than use it as an opportunistic starting point for my own analysis.

dle of primary goods that the libertarian prizes? As explicated by Epstein, this bundle “embrace[s] the liberty of action, the ownership of private property, and the freedom from arbitrary arrest.”¹² All these may plausibly be derived from a libertarian account of human personality that prioritizes “personal autonomy or self-rule.”¹³ On this view, legal interventions are viewed “under a presumption of error.”¹⁴ Among the many potential forms of separated powers,¹⁵ and the many species of liberty across the spectrum of negative to positive,¹⁶ therefore, we can pick out a distinct, isolate, and tractable question: Does the specific instantiation of separation of powers that is textually invested by the Constitution reliably produce the species of negative liberty valued by the libertarian?¹⁷ And if not, then what is it good for?

¹² *Id.* at 2.

¹³ Richard A. Epstein, *The Reflections and Responses of a Legal Contrarian*, 44 TULSA L. REV. 647, 648–49 (2009).

¹⁴ EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 11, at 5; *see also id.* at 18 (describing and endorsing a “deep ambivalence about state power”). As Adrian Vermeule has argued, Epstein’s criticisms of the administrative state (including his juxtaposition of a naturalized property rights regime and a sinister, free-wheeling administrative discretion) were anticipated and rebutted by the legal realists and their successors. Adrian Vermeule, *Same old, same old*, NEW REP., Mar. 12, 2012, *available at* <http://www.newrepublic.com/article/books/magazine/100987/richard-epstein-design-liberty-private-property-law>.

¹⁵ Epstein notes at one point that “the doctrine of separation of powers is conceptually underpowered.” EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 11, at 274. Although this formulation is not entirely clear to me, it hints at the possibility that many possible separations of power exist for a constitutional designer to endorse while at the same time resisting a wholly unitary structure of government.

¹⁶ *See* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY, IN FOUR ESSAYS ON LIBERTY 118–72 (1969).

¹⁷ Even this version of the question, however, hides important complications. For example, the dedicatee of *The Classical Liberal Constitution*, David Currie, has observed that when “government acts to deprive the citizen of life, liberty, or property . . . it may have to furnish a judicial remedy to test the legality of its action as well as legal services and materials to enable the indigent object of its action to defend.” David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864,

The question may be pursued in two ways. First, we might take the perspective of the constitutional designer, who is concerned with molar decisions about the fundamental building blocks of government structure. *Ab initio*, our libertarian designer might ask, are her normative interests best advanced by installing a unitary parliamentary system, a presidential system characterized by a separation between the legislature and the executive, or even a dictatorial arrangement that vests power with a single individual or clique? A second level of analysis focuses on more sublunary details: Assuming a presidential system characterized by the separation of powers has been adopted (as in the United States), are libertarian ends best preserved by maximizing separation or by permitting novel, interbranch checks and balances? Is there a simple algorithm for resolving challenges to institutional innovation?

At both levels of analysis, I submit, the libertarian's choice is far less clear than might be believed. Even as focused upon a narrow understanding of what constitutions should maximize, the analysis of structural constitutional design proves only ambiguous and fragile guidance. The wise libertarian—and I will suggest that Epstein falls into this camp based on some evidence in *The Classical Liberal Constitution*—will not employ structure as a proxy for the goods she seeks.

Two threshold caveats are necessary before proceeding to the pith of the analysis. First, I should clarify that this essay is not intended as either an endorsement or a defense of libertarianism. My interest here is not in assessing the merits *vel non* of any particular philosophy. Rather, I pick out that approach simply as an instrument to enable more careful analysis of structural design's conse-

886–87 (1986). It is also well known that negative rights depend on positive state action in the form of enforcement and taxation. See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS UPON TAXES* (1999).

quences. Second, Epstein distinguishes libertarianism from the classical liberal position. The latter includes a commitment not only to limited government and strong negative rights, but also to “checks and balances.”¹⁸ This position aggregates first-order and second-order goods into a single intellectual fabric. My aim here is to raise a question that is prior to that aggregation in respect to whether, and how, governmental structure produces valuable human goods. The fear is that without such an account, what otherwise seems a cogent and internally coherent intellectual position might prove to be merely a historically contingent congeries of social and institutional qualities, ones that happened to be correlated in the past, but which in the future will easily peel apart.

I

A libertarian constitutional designer can opt between three basic institutional design options. In a parliamentary system, the government depends on the confidence of the legislature. In a presidential system, the head of government is elected for a fixed term, so the executive and legislative branches are independent—and hence separated—from each other.¹⁹ In contrast, dictatorships can

¹⁸ EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 11, at 4 (citation omitted).

¹⁹ Jose Antonio Cheibub, *Presidentialism, Parliamentarism, and Democracy* (2007). This taxonomy is overly simplistic. Sartori points out that this distinction obscures the observed existence of “impermissible bedfellows,” such as quasi-presidential systems. GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES* 83–86 (1997); *see also* José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, *Beyond Presidentialism and Parliamentarism: On the Hybridization of Constitutional Form* 20 (Feb. 28, 2010), available at <http://www.uio.no/english/research/interfaculty-research-areas/democracy/new-s-and-events/events/conferences/2010/papers/Cheibub-Elkins-Ginsburg-PresidentialismAndParliamentarism-2009.pdf> (measuring coherence of categories such as semi-presidentialism and presidentialism, and finding presidentialist regimes to be the most internally variegated).

be defined negatively by the absence of free and fair legislative or presidential elections, or alternatively any form of free but indirect election of the executive via a legislature.²⁰

The latter option seems obviously antithetical to libertarian assumptions. It is surely the case that a libertarian drafter would always eschew dictatorial regimes not only because the very existence of unfettered authority is inconsistent with individual liberty, but also because the temptation to centralize authority by replacing markets with extensive state planning would prove in practice impossible to resist. But is it possible that a rational designer, at least in a small category of cases, would opt for a dictatorial regime? That possibility, though hardly salient to the American experience, merits attention here, but not because it is a credible option in most cases. Rather, the mere fact that it is possible to identify conditions under which a libertarian preference for dictatorship may be credible, opens a first conceptual wedge between second-order design and first-order goods: It shows the hidden hazards and snares of inferring design from substantive first-order commitments.

The possibility of a libertarian preference for dictatorship arises because not all dictatorships concentrate authority in a single person, clique, or elite.²¹ Maintaining political control requires either allies with coercive power or the capacity to manufacture cooperation among the general public. Coercive tools for preserving power are risky. The Florentine humanist Niccolò Machiavelli famously cautioned that those who come to power by “the corruption of the soldiers” risk becoming hostages to “the will and fortune of whoever

²⁰ MILAN W. SVOLIK, *THE POLITICS OF AUTHORITARIAN RULE* 22 (2012).

²¹ *Id.* at 3–5 (demonstrating the importance of regime elites in explaining change in dictatorial regimes).

er conceded it to them.”²² Instead of coercion, dictatorships may be more secure if they employ instruments such as a single-party system to hierarchically assign state services and benefits, control appointments, and engage in selective repression or recruitment.²³ Think here of contemporary China. Indeed, single-party dictatorial regimes tend to be more resilient than their personalist or military peers.²⁴ Even if they do not create a single-party infrastructure, dictators can share rents or make policy concessions as a means to preserve control.²⁵ They can rely on legislatures to obtain information about events on the ground such as sources of incipient popular dissatisfaction.²⁶ Such regimes tend to endure longer than authoritarian regimes that want for constitutional arrangements.²⁷ Moreover, there is some reason to think they can harness market mechanisms in ways that advance the welfare of many of their citizens.

²² NICCOLÒ MACHIAVELLI, *THE PRINCE* 24 (Angelo M. Codevilla, trans. & ed. 1997) (1513).

²³ Svulik, *supra* note 20, at 163, 168–84; *id.* at 13 (noting that legislatures “enhance the stability of authoritarian power-sharing by alleviating commitment and monitoring problems among authoritarian elites”); *id.* at 35 (presenting data on frequency of single- vs. multi-party dictatorships).

²⁴ *Id.* at 162–65 (describing “party-based co-optation” in dictatorial regimes). There is also, however, evidence that elections in authoritarian regimes conduce to regime breakdowns. Jennifer Gandhi & Ellen Lust-Okar, *Elections Under Authoritarianism*, 12 ANN. REV. POL. SCI. 403, 414–17 (2012) (summarizing relevant empirical literature).

²⁵ Jennifer Gandhi & Adam Przeworski, *Cooperation, Cooptation, and Rebellion under Dictatorships*, 18 ECON. & POL. 1, 1–3 (2006).

²⁶ Edward Malesky, Paul Schiler, & Ahn Tran, *The Adverse Effects of Sunshine: A Field Experiment in Legislative Transparency in an Authoritarian Assembly*, 106 AM. J. POL. SCI. 762, 766–67 (2012); *id.* at 784 (generating experimental evidence that the Vietnamese legislature is a site of “elite bargaining between central and local leaders”).

²⁷ See Michael Albertus & Victor Menaldo, *Dictators as Founding Fathers? The Role of Constitutions under Autocracy*, 24 ECON. & POL. 279, 304 (2012) (finding, based on empirical analysis, that “autocratic coalitions who adopt and operate under constitutions extend their survival”).

A libertarian case for authoritarian rule might rest on a comparison between the partial diffusion of authority achieved through party-based dictatorships on the one hand, and the degree of political and market freedoms possible under an alternative, overtly democratic dispensation on the other. Democracy might conduce to violent fragmentation of the nation due to latent political conflict within fragile, fissiparous boundaries. Or alternatively it might be functionally indistinguishable from dictatorship due to an effective hegemony held by some already powerful socio-economic elite, one that would dominate any democratic arrangement.²⁸ As a keen student of Roman law and politics, Epstein would no doubt cite here by way of example the installation of the Roman republic by a social elite keen “to keep the reins of political power out of the hands of the majority” that preferred a monarchy.²⁹ In contrast to these expected outcomes, a sufficiently capacious party structure committed to the maintenance of free markets by dint of being enmeshed in such markets might be preferable to the capricious whim of the *hoi polloi*.

This sort of a justification for dictatorship is hardly impossible to conjure in practice. Consider the Chinese example, where authoritarian political control has coexisted with free markets, albeit deeply penetrated by state-controlled entities, since the late 1970s reforms associated with Deng Xiaoping.³⁰ The ensuing economic system (at least on its face) promises to increase net social welfare,

²⁸ The former argument was famously developed by Carl Schmitt, who used Lincoln as a case study. See CARL SCHMITT, *DICTATORSHIP* 118–19 (M. Hoelzl & G. Ward trans. 2014). The latter argument was famously proffered by V.I. Lenin to justify the Bolshevik seizure of political power in Russia. DAVID MCLELLAN, *MARXISM AFTER MARX* 86–878 (1976).

²⁹ THOMAS E. MARTIN, *ANCIENT ROME FROM ROMULUS TO JUSTINIAN* 21 (2012).

³⁰ See Ian Bremmer, *State Capitalism Comes of Age: The End of Free Markets?*, *FOREIGN AFF.*, May-June 2009, at 40 (using China as an example of a state that plays a large role in the market).

bringing large gains for many citizens (and arguably has sometimes succeeded beyond expectation in this regard).³¹ Indeed, rather than punishing or stigmatizing entrepreneurs, the Chinese Communist Party (CCP) has proved adept at assimilating them into its ranks.³² It has also allowed novel forms of capitalist enterprise to thrive, first at the political margins and then to spread nationally.³³ From the perspective of a post-Mao reformer within the CCP who is libertarian in bent, but fearful of catastrophic political change, it is far from obvious that the path taken to partial economic and social (if not political) liberalization is irrational (even if ethically horrifying).³⁴

This paradoxical line of argument surely has sharply defined boundaries. And there are obvious implementation-related objections.³⁵ I am not persuaded, though, that arguments for dictatorship and against democracy are in practice only made in bad faith.³⁶ To

³¹ Azar Gat, *The Return of Authoritarian Great Powers*, FOREIGN AFF., July-Aug. 2007, at 59, 66 (describing China's economic success in comparative terms).

³² See KELLE S. TSAI, CAPITALISM WITHOUT DEMOCRACY: THE PRIVATE SECTOR IN CONTEMPORARY CHINA 3-4 (2007).

³³ RONALD COASE & NINA WANG, HOW CHINA BECAME CAPITALIST (2012) (presenting a bottom-up account of economic liberalization in the immediate aftermath of Mao's death). The story is complicated by the fact that the CCP's fear of political liberalization appears to have inflected reform's trajectory. Until 1989, a general liberalization of financial policy allowed private businesses to flourish in the countryside; after 1989, economic development was increasingly channeled through state-owned enterprises. YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS (2008).

³⁴ This argument has a kinship with the "Asian values" critique of human rights offered by authoritarian leaders in the 1990s. See, e.g., Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, FOREIGN AFF., Mar.-Apr. 1994, at 111.

³⁵ An obvious objection to this argument is that a constitution designer is likely also to be a participant in the first generation of governance under a new constitution, and as such may suffer from a surfeit of perceptions of internal or external enemies. On the other hand, a constitutional designer might both misperceive the perils of democracy and also be correct in her underlying assessment.

³⁶ See, e.g., JONATHAN ALTER, THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE 5 (2006) (recounting Walter Lippmann's advice to Franklin

the contrary, early twentieth century theorists of the minimal state such as Friedrich Hayek consciously “struggled to explain how the free market could be implemented and protected in the midst of a hostile public without the adoption of such form of authoritarian control.”³⁷ Subsequent generations of such theorists, including Milton Friedman were, to say the least, less than equivocal in their rejection of brutal, antidemocratic regimes such the post-1973 Chilean Junta.³⁸ At a bare minimum, the argument limned here usefully raises the possibility that at least under certain circumstances, even a libertarian constitutional designer might opt for a form of dictatorship as the least bad option available.³⁹ The gap between first-order preferences and second-order institutional instruments, therefore, is wider than first appears.

What, though, about the more plausible comparison between parliamentary and presidential systems?⁴⁰ Can the libertarian designer of constitutions opt confidently for one or the other of these institutional technologies secure in the knowledge that she has obtained the blessings of political and economic liberty to her succes-

Delano Roosevelt that “You may have no alternative but to assume dictatorial powers”). One might also look to contemporary political conflict in Thailand for another example of sincere and wide-spread opposition to democracy.

³⁷ ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* 121 (2012).

³⁸ *Id.* at 204–05 (describing Friedman’s 1975 visit to Chile). For a fuller account, see JUAN GABRIEL VALDÉS, *PINOCHET’S ECONOMISTS: THE CHICAGO SCHOOL IN CHILE* (1995).

³⁹ This is arguably the account of Deng Xiaoping offered recently in EZRA VOGEL, *DENG XIAOPING AND THE TRANSFORMATION OF CHINA* (2011). For a vigorous critique of Vogel’s account as excessively tailored to the policy interests of American foreign policy makers, and hence misleading, see Perry Anderson, *Sino-Americana*, *LON. REV. BOOKS*, Feb. 9, 2012, at 20.

⁴⁰ Subject to the caveat that such categorical choices submerge a good deal of internal heterogeneity. See Cheibub, *supra* note 19.

sors to the maximal extent feasible?⁴¹ A minimal condition of such endowments is systemic political stability. A political system that proves fragile in the teeth of internal conflict or external buffeting provides refuge for neither individual liberty nor property rights. Since a seminal 1985 article by Juan Linz, however, there has been an extensive debate among political scientists about the relative stability of presidentialism and parliamentary systems. Drawing on the observation that most presidential systems around the globe tend to founder,⁴² Linz identified five of their institutional characteristics that not only conduced to internal conflict and fragmentation, and that also were absent from parliamentary systems.⁴³ Other scholars have subsequently countered that these features can also be found in parliamentary regimes,⁴⁴ or that the conditions under which the presidential breakdown occurs are not “prevalent” in the fashion Linz supposed.⁴⁵ On these accounts, predictions must account for the distribution of political preferences among the public as well as the underlying party landscape before offering firm prescriptions.

Yet other scholars have observed (often in response to Linz) that the original Latin American examples upon which Linz relied are distinctive and different from other forms of observed presiden-

⁴¹ For a general account of constitution makers’ incentives, see Tom Ginsburg & Aziz Huq, *What Can Constitutions Do? The Afghan Case*, 25 J. DEM. 116 (2014).

⁴² “A cursory look around the world will show that there is only one long-lived democracy that is also presidential: the United States.” Cheibub, *supra* note 19, at 1.

⁴³ Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEM. 51, 54–64 (1990) (cataloguing flaws of presidential systems, including competing claims to democratic legitimacy, the rigidity that comes from fixed presidential terms, zero-sum dynamics, and an intolerant style of presidential politics).

⁴⁴ Scott Mainwearing & Matthew S. Shugart, *Juan Linz, Presidentialism, and Democracy*, 29 COMP. POL. 449, 451–56 (1997). In the American context, for example, Linz’s concern about competing claims to legitimacy arises if and only if there is divided government, which in the United States has been rare. Sartori, *supra* note 19, at 86–91.

⁴⁵ Cheibub, *supra* note 19, at 18.

tialism, including the genus observed in the United States.⁴⁶ On the latter view, those countries that happened historically to adopted presidential institutions, largely in the twentieth century, were also countries in which “militarism remained strong at the middle of the twentieth century.”⁴⁷ Under those conditions, any institutional design would have been vulnerable to military capture and collapse. At a minimum, therefore, the post-Linz literature demonstrates that the likely stability of a presidential or parliamentary system depends on history and political context, and that an assessment of likely endurance must account for such retail factors as the background national political party system and the likelihood of elections producing divided government.

One lesson is clear from this literature: Confident prediction and prescription require a high degree of historical and circumstantial tailoring. There is no facile algorithm. To the extent such tailoring is essayed, its outputs are also subject to decay over time. An analysis of ambient conditions in, say, 1787, may not yield the same outputs as the lessons yielded by a parallel analysis in 2013.⁴⁸ The

⁴⁶ Mainwearing & Shugart, *supra* note 32, at 456–60; José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEX. L. REV. 1707, 1730 (2011) (identifying several institutional features that “distinguis[h] the Latin American presidency from those in other regions of the world”). To his great credit, Linz has recognized the force of several of these criticisms. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY 14–15 (Juan J. Linz & Arturo Valenzuela eds., 1994) (acknowledging various criticisms of his previous work).

⁴⁷ Cheibub, *supra* note 19, at 23 (calling this a “coincidence”).

⁴⁸ I have developed this point in Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165 (2014). Consider, for example, the seemingly durable long-term trend of increasing party polarization within Congress. See generally NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 224–32 (2006). Whether this is a consequent of polarization among the broader public is debated. Compare MORRIS P. FIORINA, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (3d ed. 2010) (arguing that the American public is not polarized on most issues), with ALAN I. ABRAMOWITZ, *THE DISAPPEARING*

optimality of structural arrangements instead fluctuates over time, provided a constitution is sufficiently long-lived.⁴⁹

The question of molar political stability, however, may not be dispositive or important to a libertarian constitutional designer.⁵⁰ A constitution may be adopted under conditions in which no grave internal or external threats obtain. Or confident predictions about the stability of institutional arrangements might be on hand given exogenous support for a constitution.⁵¹ Under those circumstances, the libertarian designer nonetheless confronts a difficult choice between presidential and parliamentary design principles, a choice that has potential consequences along two design margins. First, she must consider how each design option will interact with the electorate's preferences. Second, she must consider the evidence of how different structural arrangements conduce to different policy outcomes that count within the libertarian calculus, such as fiscal policy or the extent of uncontrolled bureaucratic discretion.

Take first the interaction between constitutional structure and the preferences of the electorate. A designer with preferences over diverse substantive outcomes must consider how structure interacts with expected electoral preferences to produce policy. Given libertarian ends, this counsels for either a parliamentary or a presidential form depending on ambient political circumstances. A libertarian designer who believes she shares her first-order preference with stable majorities of the population may be indifferent between par-

CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2d ed. 2012) (arguing that the American public is polarized).

⁴⁹ That does not mean that structural change is appropriate when conditions change; the transition costs of amending basic constitutional design margins may be sufficiently great that a status quo is preferable.

⁵⁰ Cf. Sartori, *supra* note 19, at 113 (distinguishing systemic stability from regime stability).

⁵¹ The case of occupation constructions in postwar Germany and Japan are examples here.

liamentary and presidential forms, with a slight preference for the former. Under either system, votes will be aggregated and transformed into representation that reinforces libertarian preferences. Under a presidential system, in which minorities are able to seize power in only one legislative chamber, there is therefore possibility of submajoritarian influence. To mitigate that risk, a parliamentary system characterized by robust parties with libertarian leanings may be preferred.

On the other hand, a libertarian designer may find herself at odds with substantial majorities within the polity who favor more aggressive government action. This designer might opt for a system that diffuses popular majorities, and that installs a buffering layer of representation to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country.”⁵² This may or may not explain the state design adopted in 1787. Reasonable disagreement still obtains as to whether a fear of majoritarian redistributive impulses well explains either the thought of any specific framer or the original understanding of constitutional federalism.⁵³ Whether it does or not, it is nonetheless the case that divergences between framers’ preferences and those of an expected median voter’s in respect to government activities may press the liber-

⁵² THE FEDERALIST NO. 10, at 126 (James Madison) (I. Kramnick ed., 1987).

⁵³ An excellent survey of the historiographic debate is Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9 (2010). It is often said that Madison viewed redistributive federal action with apprehension and offered constitutional designs to constrain popular majorities. GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* xix-xx (1981). *But see* EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 11, at 31. Dean Treanor, however, has demonstrated that Madison had a more nuanced view of redistribution, albeit within the contours defined by republican theory. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 844–47 (1995).

tarian drafter toward a form of government that vests minorities among a political elite with an effective veto.

This last concern may have particular bite when constitutional change occurs against the backdrop of a state infrastructure that, from a libertarian perspective, is already excessive. Drafters rarely “inherit a blank slate that they can remake at will,” but instead typically “find that the dead weight of previous institutional choices seriously limits their room to maneuver.”⁵⁴ Historical, pre-ratification “policies create politics” in the form of interest groups and electoral alliances.⁵⁵ This lock-in effect may be especially pronounced in the context of social welfare spending.⁵⁶ Under these conditions, a constitutional designer might wish to reallocate decisional authority in ways that dilute the force of such majoritarian preferences.⁵⁷

Even aside from judgments about the stability of different second-order constitutional design choices, therefore, a libertarian constitutional designer has cause to anticipate and alter course based

⁵⁴ Paul Pierson, *The Limits of Design: Explaining Institutional Origins and Change*, 13 GOVERNANCE 475, 493 (2000).

⁵⁵ Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334, 344 (1993); accord Theodore Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 WORLD POL. 677, 691–92 (1964) (positing a link between different “arenas” of policymaking and political relationships within those areas). In the context of the 1787 Constitution, the obvious example relates to the nexus of interest groups, well represented in the Philadelphia Convention, that benefited from and sought to protect slavery.

⁵⁶ See, e.g., JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* (2002).

⁵⁷ I bracket here the question of how a libertarian constitutional designer should account for widely held statist preferences, and, more generally, the possibility of conflict between a liberty of political choice and a liberty from what the libertarian believes to be excessive government. I also bracket the question whether there is a correlation between majoritarian preferences for redistribution and economic inequality, such that the libertarian constitutional designer would propose different solutions for countries with high and low Gini coefficients.

on the expected distribution of popular political preferences. Roughly speaking, the closer her libertarian preferences align to those of the median voter's, the more desirable a majoritarian system looks. By contrast, the larger the gap between the framer's and the median voter's preferences, the stronger becomes the case for a representational system that fragments and disperses political powers so as to empower and protect minorities' preferences and interests.

The second difficulty confronting the libertarian constitutional designer hinges on the expected policy effects of opting between a parliamentary and a presidential system. I focus here on fiscal outcomes, in particular, the magnitude of governmental spending and the attendant risk of sovereign default. These are not the only relevant policy effects, though. Among the additional considerations at stake, the libertarian designer would have to reckon on recent theoretical work that suggests how the fragmentation of legislative power through adoption of a separation of powers system may increase both the frequency and expected extremism of enactments.⁵⁸

To begin with here, I presume that libertarian preferences list against both larger governmental spending and sovereign defaults, which impose considerable deadweight costs.⁵⁹ Indeed, these preferences seem intertwined. Difficulty for a libertarian constitutional designer arises, however, because empirical studies suggest that concern about the budgetary magnitude and concern about sovereign default point in different directions—at least when it comes to opting between different forms of government. The absence of a strict correlation may reflect a causal process underlying sovereign

⁵⁸ Matthew C. Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 J. LEG. STUD. 331, 335–37 (2013) (summarizing results of a formal model to this effect).

⁵⁹ Barry Eichengreen, *Restructuring Sovereign Debt*, 17 J. ECON. PERSP. 75, 77 (2003).

defaults that implicates a wider range of factors than mere budgetary magnitude. Whatever its cause, the divergence in prescription implied by this body of empirical data generates a choice: which is the worse evil, inflated government spending or sovereign default?

In respect to fiscal policy, presidentialist systems dominate parliamentary systems. Using data from the 1990s concerning 85 democracies, Persson and Tabellini estimated the fiscal effect of switching between parliamentary and presidential forms, particularly in regard to “spending programs with many beneficiaries (such as general public goods and broad welfare programs).”⁶⁰ They conclude that “under assumptions of conditional independence and linearity, the negative constitutional effect of presidential regimes on governmental size is large (between -5% and -8% of GDP) and robust to specification.”⁶¹ In short, “presidential regimes create considerably smaller governments than parliamentary regimes.”⁶²

Acemoglu, however, has offered an important critique of the Persson-Tabellini results. He observes that their findings may not be estimates of the causal effects of constitutional features if political actors have induced preferences over political institutions, as well as policies, in light of their first-order policy preferences.⁶³ In-

⁶⁰ TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* 155 (2005). The theoretical foundation of the study’s hypothesis is set forth in Torsten Persson, Gérard Roland, & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q. J. ECON. 1163, 1167 (1997) (“Direct control by the voters keeps the executive more accountable, as it minimizes the danger of collusion between the legislature and the executive . . .”).

⁶¹ Persson & Tabellini, *supra* note 60, at 162; *id.* at 168–69 (noting confirmation of basic finding with other methodologies).

⁶² *Id.* at 185.

⁶³ Daron Acemoglu, *Constitutions, Politics, and Economics: A Review Essay on Persson and Tabellini’s The Economic Effects of Constitutions* 12–13 (Nat’l Bureau of Econ. Research, Working Paper No. 11235, 2005), available at <http://www.nber.org/papers/w11235>.

voking the potential for divergence between drafters' and median voters' preferences that is explored above,⁶⁴ Acemoglu "imagine[s] a world consisting of some politically powerful elites and citizens. The elite oppose redistribution, while the citizens favor it. . . . Imagine also that the elite prefer presidential systems,"⁶⁵ perhaps because they wish to retain greater political control on the logic developed above. Given these predicates, Acemoglu notes, a correlation would be observed between presidentialism and smaller government.⁶⁶ To the extent that a libertarian constitutional designer uses Persson and Tabellini as the current state of the art on the economic effects of constitutional choice, it must be done with an asterisk marking the caution identified by Acemoglu.

The available evidence on tendencies toward sovereign default, in contrast, suggests that there is a "stark" difference between presidential and parliamentary regimes: the former's risk of default (6.0% per annum) is roughly four times larger than the latter's (1.6% per annum).⁶⁷ Kohlscheen suggests the difference flows from the different "micro-political games" engendered by the presence of a "compensation instrument directly tied to the survival of the executive" in parliamentary systems (i.e., the confidence vote) but not in presidential systems.⁶⁸ In effect, presidents default more because they can get away with it.⁶⁹ Because these statistics are the product

⁶⁴ See *supra* text accompanying notes 52–57.

⁶⁵ Acemoglu, *supra* note 63, at 13.

⁶⁶ *Id.* at 13–14. Acemoglu also makes the important point that it is often difficult to "unbundl[e] institutions" in ways that clarify empirically the "role of specific components." *Id.* at 24.

⁶⁷ Emanuel Kohlscheen, *Sovereign Risk: Constitutions Rule*, 62 OXFORD ECON. PAPERS 62, 62 (2010). Excluding Latin American countries, however, the contrast is 2.2% to 0.7%. *Id.* at 76.

⁶⁸ *Id.* at 63, 68–69.

⁶⁹ This dynamic is linked to the hypothesis, first offered by North and Weingast, that endogenous constraints on a debtor government (e.g., those produced by the

of regression analysis that does not account for the possibility of endogenous preferences that explain both institutional form and default,⁷⁰ however, they are amenable to the critique developed by Acemoglu above.

Nevertheless, there are some reasons to think that Kohlscheen's results should be credited. Somewhat counterintuitively, his result may be consistent with Persson and Tabellini's result in respect to fiscal effects. This is because default is never the sole option for a sovereign: It can also raise taxes.⁷¹ Tax collection, however, requires the creation of institutional infrastructure within government and public tolerance for higher rates. The tendency to default will depend in part on whether these capacities have been developed. Hence, in the wave of defaults among American states in the early 1840s, it was those states that lacked political infrastructure enabling taxation, or populations to tax (in the case of the frontier states), that were most likely to default.⁷² Regimes equipped with

move from pure monarchy to a parliamentary monarchy) are necessary for that government to commit credibly to repay debts to international lenders. See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 806 (1989); accord Kenneth A. Schulz & Barry R. Weingast, *The Democratic Advantage: Institutional Foundations of Financial Power in International Competition*, 57 INT'L ORG. 3, 5 (2003).

⁷⁰ Kohlscheen, *supra* note 67, at 74 (listing control variables); see *supra* text accompanying notes 60–66.

⁷¹ This hypothesis is in some tension with Reinhart and Rogoff's conclusion that "willingness to pay rather than ability to pay is . . . the main determinant of country default." CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 54 (2009). By "willingness," though, Reinhart and Rogoff may be glossed to include past willingness to tax and attitudes toward revenue collection.

⁷² Richard Sylla & John Joseph Wallis, *The Anatomy of Sovereign Debt Crises: Lessons from the American State Defaults of the 1840s*, 10 JAPAN & WORLD ECON. 267, 273 (1997); *id.* at 288 (explaining the fact that Maryland and Pennsylvania defaulted, but New

the infrastructure for and popular acceptance of taxation—which, Persson and Tabellini teach, are likely to be parliamentary and not presidential—are less likely to default.⁷³ If this hypothesis holds, the challenge for the libertarian constitutional designer is particularly acute.

The indeterminacy of structural choice is not an artifact of fiscal policy: It spills over into other domains in which libertarian priorities might apply. There is very little work, for example, on the interaction between choice-of-governmental-form and civil and political liberties. What little exists tends weakly to support the adoption of a presidential system.⁷⁴ But one might also conceptualize the relevant sphere of individual liberty with wider calipers. In his other work, for example, Epstein has expressed grave concern about the creation of untrammelled bureaucratic power within the federal administrative state.⁷⁵ To the extent this concern is fairly assimilated

York and Massachusetts did not, by reference to the existence of active state infrastructure for tax collection in the latter but not the former).

⁷³ Another account for defaults focuses on the possibility of a “war of attrition” between different socio-economic interest groups over which will bear the brunt of adjustment. Alberto Alesina & Allan Drazen, *Why are stabilizations delayed?*, 71 AM. ECON. REV. 1170, 1170–72 (1991) (suggesting that political polarization predicts the likelihood of default).

⁷⁴ BRUCE BUENO DE MESQUITA ET AL., THE LOGIC OF POLITICAL SURVIVAL 181–82, 199 (2003) (“[W]ithin the realm of systems generally considered democratic, presidential systems (with their larger coalition requirements) do better at advancing civil liberties and somewhat better at protecting political rights than parliamentary systems.”). For an insightful binary comparison, see Adrian Vermeule, *Emergency Law-making After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155 (2008). The available empirical work on this question is so sparse that any inferences must be exceedingly cautious.

⁷⁵ See, e.g., RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW 7 (2011) [hereinafter, EPSTEIN, DESIGN FOR LIBERTY] (“[T]he levels of discretion that modern legislation confers on the organs of the administrative state make it impossible to comply with those neutral virtues captured in the rule of law.”); see also EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 11, at 275–79 (discussing the constitutionality of independent agencies).

into the DNA of libertarianism,⁷⁶ it is not clear that it is distinctive to the presidential context, or that parliamentary states are any more immune to a creeping fug of bureaucratization. Indeed, since the turn of the twentieth century European countries that have parliamentary or semi-presidential forms of government have also struggled to “develop[] . . . enforceable, yet flexible, delegation constraints,” which were viewed as “essential to the reconciliation of historical conceptions of parliamentary democracy with the reality of executive power in an age of modern administrative governance.”⁷⁷ The European Union also has been encumbered with what David Marquand famously labeled a “democratic deficit” due to the gap between its strong bureaucratic authorities and its weak democratic credentials.⁷⁸ The somewhat interminable quality of debate on the other side of the Atlantic on that issue suggests that the problem of excessive bureaucratic discretion in the absence of clear guidance from elected actors is hardly distinctive to the American context, to the presidential form of government, or even to the national (as opposed to supranational⁷⁹) context.⁸⁰ Nor is there any

⁷⁶ Objections to delegation might be based on libertarian concerns about intrusions on property rights or liberty. Alternatively, they might be grounded on concerns about democracy. See, e.g., Justin Fox and Stuart V. Jordan, *Delegation and Accountability*, 73 J. POL. 831, 843–44 (2011) (identifying conditions under which delegation can provide politicians with an element of plausible deniability). Epstein’s objection moves in part from a concern with the rule of law. EPSTEIN, *DESIGN FOR LIBERTY*, *supra* note 75, at 14, 34. But see Mark Tushnet, *Epstein’s Best of All Possible Worlds: The Rule of Law*, 80 U. CHI. L. REV. 487, 504–09 (2013) (critiquing Epstein’s rule-of-law arguments).

⁷⁷ Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 YALE L.J. 1341, 1353 (2004).

⁷⁸ DAVID MARQUAND, *PARLIAMENT FOR EUROPE* 64–66 (1979). For data on declining turnout in European elections, see Mattias Kumm, *To Be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty*, 11 COLUM. J. EUR. L. 481, 512 (2005).

⁷⁹ See generally Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006).

particular reason to posit that its solutions must be cabined to either the parliamentary or the presidential context. It may rather be that subconstitutional innovations in institutional design crafted to mitigate the potential for agency costs within bureaucracies can be transplanted between presidential and parliamentary context.

* * *

Taken together, the arguments marshaled in this Part are intended to cast doubt on the possibility of any strong, mechanical linkage of structural constitutional choice—i.e. parliamentarism versus presidentialism—and the primary good of negative liberty. Our hypothetical constitutional designer of a libertarian bent would instead do well at minimum to hesitate before opting either for one form or another of government. She must first ascertain whether the form will be stable. Having done so, she must weigh the interaction between her libertarian preferences and those of the median voter. Greater divergence between preferences may conduce to presidentialism, and lesser to parliamentarism. Finally, she must account for the complex and contested empirical literature on constitutions' fiscal effects and the risk of sovereign default. Accounting for all these considerations in the aggregate, the decision over second-order structure is far from straightforward. It is likely to differ considerably under different political and socioeconomic conditions. A commitment to the first-order libertarianism goals, in short, yields no simple preference over the molar second-order decisions concerning constitutional structure.

⁸⁰ It rather may be the product of new obligations and compulsions pressed upon both North American and European states in the first half of the twentieth century. The locus classicus argument is offered by ALAN S. MILWARD, *THE EUROPEAN RESCUE OF THE NATION-STATE* 4 (1992) (making this argument for European states).

II

For better or for worse, we cannot all be constitutional designers. Even if libertarian priorities provide only incomplete guidance in regard to the wholesale decision about which basic form of government structure to adopt, they may nonetheless channel an interpreter toward a particular methodology. Even if there is not a general preference for one form of government that emerges from a libertarian matrix, perhaps there is a distinctive, stable hermeneutic methodology that can be derived independent of any concrete dispute or problem, and then applied consistently across the board.

The inquiry into the nexus between libertarian priorities and an election of constitutional methodologies, at least in regard to constitutional structure, is complicated by the absence of any stable taxonomy of interpretive methodologies. Notwithstanding a semblance of a debate between different schools of constitutional interpretation, most interpreters of the Constitution agree that a variety of hermeneutic tools coexist to some degree.⁸¹ Epstein, for example, begins *The Classical Liberal Constitution* by enumerating text, "historical context,"⁸² "constitutional prescription," and the intellectual

⁸¹ On one account, these include: "arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy." Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987). Perhaps an exception to the acceptance of plural tools is originalism. But the latter "is not the title of one particular theory of constitutional interpretation but rather the name of a family of diverse ideas, some of which are actually at odds with each other," only some of which would demand exclusive attention to original public meaning. ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 155 (2d ed. 2005).

⁸² By which he means, somewhat unorthodoxly, the common-law heritage and usage of certain terms. EPSTEIN, *CLASSICAL LIBERAL CONSTITUTION*, *supra* note 11, at x.

heritage of the Framers as key hermeneutic tools.⁸³ If heterodox along some margins, the list places Epstein plainly within the mainstream of pluralist constitutional interpreters. Efforts to group jurists and scholars into interpretive camps are inevitably contentious and incomplete.⁸⁴ Differences between jurists are matters of degree and emphasis, not kind. To put it glibly, even Justice Scalia sometimes cares about consequences, and even Justice Breyer sometimes cares about text. There is thus no simple choice between two (or three, or five) interpretive theories onto which libertarian priorities can be mechanically mapped. Worse, there is an absence of metrics for evaluating how much weight any particular interpretative tool has been assigned in the context of a specific analysis. That is, there is no way of ascertaining how much work text, as opposed to precedent, custom, or consequences, does in the ordinary course of things beyond rough approximations that fit snugly in only outlier instances of methodological purism. The absence of any clear, universally used choice set over interpretive methodologies means that it is simply not helpful to ask which single method the libertarian should employ.⁸⁵

⁸³ *Id.* at ix-x.

⁸⁴ For example, Judge J. Harvie Wilkinson III identifies living constitutionalism, originalism, political process theory, and pragmatism as the availed competing theories. See J. Harvie Wilkinson III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNMENT* (2012). Judge Wilkinson might have added 'judicial minimalism' (to which he adheres), although this would have had the unhappy consequence of inculcating him in the act of theorizing he so bravely calumniates. Dean Chemerinsky, in a review of Wilkinson's book, most parsimoniously slices the universe into originalists and non-originalists. Ernest Chemerinsky, *The Inescapability of Constitutional Theory*, 80 U. CHI. L. REV. 935, 936 (2013). I see no straightforward way of ascertaining who is 'correct' in their taxonomy.

⁸⁵ A correlative to this analysis is that heated debates about interpretive method in the law reviews tend to overstate the stakes.

Nevertheless, a weaker kind of inquiry can be imagined. It is common ground that the Supreme Court's approach to separation of powers has oscillated between two roughly defined poles of formalism and functionalism.⁸⁶ A formalist asks whether "the challenged branch action falls within the definition of that branch's constitutionally derived powers--executive, legislative, or judicial"--and proceeds accordingly.⁸⁷ By contrast, a functionalist looks to ensure that no "branch is fatally undermined in performing its essential constitutional functions, and no branch fundamentally aggrandizes itself," before tolerating an institutional innovation.⁸⁸ Even if libertarian theory cannot single out a general theory of constitutional interpretation, it might pick out one of these two dominant approaches to the separation of powers as superior.

For three reasons, however, even this more modest aspiration is beyond reach. First, at least within the small sample of observed disputes over the separation of powers there is no consistent correlation between libertarian ends and either formalism or functionalism. The Court's jurisprudence yields examples of both formalism and functionalism promoting libertarian ends. On the one hand, the Court has employed formalism to impose limits on the regulatory state, limiting the reach of federal regulation and (perhaps incidentally) advancing libertarian ends when it has interpreted the

⁸⁶ 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).

⁸⁷ Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 454 (1991).

⁸⁸ Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 712 (1997).

removal power.⁸⁹ An example of recent vintage is the decision by the Court of Appeals for the D.C. Circuit to employ a textual formalism to impose historically novel limitations on the President's authority to make recess appointments to regulatory bodies headed by multimember commissions.⁹⁰

Yet on other occasions, functionalism might better serve libertarian ends. In *Bowsher v. Synar*, for example, the Court employed formalist tools to invalidate a provision of the Gramm-Rudman-Hollings Balanced Budget Act. This provision endowed the Comptroller General with power to execute deficit-cutting directives, even though he or she could be removed only through a joint resolution of Congress and only for certain statutorily defined reasons.⁹¹ Formalism in this case eliminated a potentially powerful instrument for curbing federal spending. Or consider the Court's decision in *Mistretta v. United States* upholding the federal Sentencing Guidelines against separation-of-powers challenge, a decision that rested squarely on functionalist grounds.⁹² The guidelines' goal was to

⁸⁹ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (invalidated limitations on presidential removal power in relation to an accounting oversight entity embedded within the Securities and Exchange Commission); *Myers v. United States*, 272 U.S. 52 (1926) (invalidating statutory constraints on the president's removal power respecting a first-class postmaster); see also Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013) (casting doubt on the *Free Enterprise Fund* Court's central claim that its decision would promote democratic accountability).

⁹⁰ *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (2013); see also EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 11, at 282 (endorsing the result in *Noel Canning*, although not explaining why).

⁹¹ 478 U.S. 714, 726 (1986) ("[W]e conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.").

⁹² 488 U.S. 361, 374, 381–82 (1989) (rejecting a delegation challenge, and then a separation of powers challenge based on a "flexible understanding of separation of powers"); *id.* at 416–22 (Scalia, J., dissenting) (finding the commission unconstitu-

eliminate the “[s]erious disparities in sentences.”⁹³ That is, they attempted to reduce a form of unpredictable discretion previously vested in an unelected body of actors (sentencing judges) that has direct effects on personal liberty, and that might be exercised on the basis of invidious reasons as well as good reasons. Functionalism here furthered the libertarian’s rule of law aspirations.

The same argument applies to the Court’s decision to uphold the independent counsel provisions of the 1978 Ethics in Government Act⁹⁴ against Article II challenge in *Morrison v. Olson* on functionalist grounds.⁹⁵ Independent counsel provisions “seek to accomplish the neutral administration of the criminal laws by a familiar method—requiring the executive branch to request, and the judiciary to appoint, a neutral investigator in a specified category of cases.”⁹⁶ Like the sentencing commission, they purport to be a solution to the problem of excessive, and here potentially politicized, discretion that is a byproduct of the administrative state.

These examples in net suggest that the libertarian jurist will find inconstant solace in either the functionalist or the formalist accounts of the separation of powers. At times, the former will ac-

tional in the absence of “any legitimating theory to explain why it is not a delegation of legislative power”).

⁹³ *Id.* at 365; see also James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Inter-Judge Sentencing Disparity Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 302–03 (1999) (identifying areas in which disparities were reduced by guidelines); accord Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 287 (1999).

⁹⁴ Title VI of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1867-75 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1988)).

⁹⁵ 487 U.S. 654, 669–70 (1988).

⁹⁶ Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels under the Ethics in Government Act*, 79 GEO. L.J. 1, 6 (1990). On the other hand, perhaps the Independent Council was problematic from a rule-of-law perspective.

commodate her priorities. At other times, the latter will be the better fit.

Second, in some circumstances, the choice between formalism and functionalism might not make much difference in respect to libertarian goals. Formalism, in particular, might be overinclusive as a proxy for libertarian ends. Consider, for example, the Court's invalidation of the line-item veto in *Clinton v. City of New York* on formalist grounds.⁹⁷ At first blush, the *Clinton* Court's deployment of a formalist reading of the Constitution's bicameralism and presentment provisions seems to support a libertarian preference for functionalism. But this impression is only superficial. A dynamic model of interbranch bargaining suggests that a veto "designed to reduce the bargaining incentives that lead to pork barrel legislation . . . is more likely simply to change the players in that process" by making the President a more influential participant in initial budget negotiations.⁹⁸ The line-item veto may thus be orthogonal to libertarian goals: The latter provide scant guidance in how to think about innovations that have no direct bearing on either fiscal policy or negative liberties. Libertarian priorities, in short, do not cover the waterfront of separation-of-powers problems.

Finally, the libertarian jurist might opt between formalism and functionalism on the ground that one constrains better the branch that poses the greater threat to some valued bundle of liberties. But which branch is the greater foe? This might be Congress (if one were motivated by a fear of free-wheeling spending underwritten by log-rolling among legislators) or it might be the executive branch, which might be thought to have greater power to impinge on negative liberties simply because of the lower transaction costs

⁹⁷ 524 U.S. 417, 438-39 (1998).

⁹⁸ Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 417 (1992).

of direct executive action as opposed to legislation. But this logic rests on a fallacy: it is often impossible to trace strong correlations between branch power and the preservation of individual liberties.⁹⁹ Expansions of presidential power, for example, can either enlarge or contract regard for individual liberties depending upon whether the executive is displacing a Congress with either more authoritarian or more libertarian preferences.¹⁰⁰ The effect of separation-of-powers principles on liberty, therefore, depends on the fickle intricacies of partisan political circumstances. For this reason, judicial predictions about the effect of separation of powers decisions will be unreliable. Contra Justice Kennedy's perorations, greater legislative control over the military detentions at Guantánamo was not in practice correlated with a higher volume of releases than periods of less substantial congressional control.¹⁰¹ Rather, the net effect on individual liberty of the advancement of one branch's interests is *ex ante* uncertain since it is contingent on dynamic, fluid considerations of political context.

* * *

The absence of any facile correspondence between interpretive methodologies and substantive outcomes in the separation of powers domain helps explain what, at least for this reader, was a puzzling aspect of *The Classical Liberal Constitution's* chapters on the separation of powers. On the one hand, Epstein warns the reader against the peril of "excessive literalism" in thinking about the dis-

⁹⁹ This argument is drawn from Huq, *Standing*, *supra* note 1, where it is developed at excessive length.

¹⁰⁰ Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CAL. L. REV. 887, 923 (2012) (developing this point in the context of national security policy-making).

¹⁰¹ See Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 402-05 (2010) (presenting data to this effect).

tribution of rule-making authority between Congress and agencies.¹⁰² Yet a few pages later, in examining the constitutionality of independent agencies, Epstein resorts to a fairly mechanical inference from the Vesting Clauses as his central argument.¹⁰³ And a scant few pages later, he seems to label himself the “restrained functionalist” in regard to Article I courts.¹⁰⁴ Then, some paragraphs thence, Epstein endorses the results of formalist analysis in cases concerning appointments and removals.¹⁰⁵ It would be too facile, however, to condemn this as inconstancy. Rather than heretical fickleness, Epstein’s seemingly mercurial path is consistent with the capacious plurality of interpretive tools to which he lays claim.¹⁰⁶ It is, after all, the Brocken specter of his close fidelity to the substantive first-order ends on constitutional interpretation that *The Classical Liberal Constitution* celebrates. In the heart of a text developed to showing how an avowed maven of negative liberties and a limited state would read the Constitution is a deeper warning about the perils of confusing one’s first-order aspirations with the tenets of second-order structural reasoning.

CONCLUSION

There is no magic bullet in constitutional methodology to target accurately libertarian ends. The first-order preference for negative liberty yields only ambiguous and contingent lessons for the constitutional designer of governmental structures. The effects of struc-

¹⁰² EPSTEIN, CLASSICAL LIBERAL CONSTITUTION, *supra* note 11, at 268.

¹⁰³ *Id.* at 276 (“The Constitution does not contain any mention of one, let alone two, quasi branches. Where, then, is the textual warrant for creating these distinct commissions that have no legislative, executive, or judicial pedigree?”).

¹⁰⁴ *Id.* at 278.

¹⁰⁵ *Id.* at 282–84 (discussing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)).

¹⁰⁶ *Id.* at ix–x.

tural choice on first-order goods are mediated through a sufficiently dense scrim of political, institutional, and legal effects that they cannot often provide secure guidance for the attainment of those first-order goods. The separation of powers – whether in its wholesale instantiation at the moment of drafting or in its retail applications in the quotidian course of interpretive labor – is not a sound proxy for libertarian judges and scholars given the want of a strong, consistent nexus between “the protection of individual liberties” and the American “separation-of-powers scheme.”¹⁰⁷ Those who seek to promote a just measure of liberty may, rather deflatingly, be better off talking just about liberty after all.

¹⁰⁷ *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).