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Toward A "Due Foundation" for the Separation of Powers: *The Federalist Papers* as Political Narrative

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Articles

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> *If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other.*[1]

During the past quarter century, lawyers have become strangely comfortable with descriptions of our government's structure that would, to an untutored ear, speak contradiction. We are quite satisfied to say that governmental powers are separate and shared, departments distinct and overlapping, functions autonomous and interdependent.[2] We have settled

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1. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 34 (Max Farrand ed., rev. ed. 1966) [hereinafter FEDERAL CONVENTION] (statement of James Madison of Virginia, July 17, 1787).

2. The most famous formulation of this kind appears in *Youngstown Sheet & Tube Co. v. Sawyer*: The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." 343 U.S. 579, 635 (1952) (Jackson, J., concurring). It is oft-repeated. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 381 (1989); Morrison v. Olson, 487 U.S. 654, 694 (1988) (both quoting Justice Jackson's statement in *Youngstown*).

into these contradictions as we would a roomy chair: talking this way is no longer controversial but taken for granted, uttered with a knowing wink, perceived as the starting point of sophisticated analysis. A not "entirely separate,"[3] but "entirely free,"[4] set of departments is the only way we can think about the separation of powers anymore. Indeed, the Supreme Court has even managed to convince itself that these "cancelling quotations"[5] best describe historical understandings.[6]

Exhausted by this discourse of cancellation, we cling to reminders of the importance of the separation of power. On a regular basis, we invoke Madison's words from *The Federalist* that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny."[7] Repeated so often, however, the words have almost lost their meaning.[8] If we step back and repeat them, we find Madison's statement oddly exaggerated. We live in a world in which the very "tyranny" Madison decries has become banal: daily, the departments each perform legislative, executive, and judicial functions without inspiring the slightest public outcry against "tyranny."[9]

This Article argues that these fragmentary and contradictory understandings depend upon a partial, but serious, misunderstanding of the very idea of separated *powers*. Every time we use the term "separation of powers," we invoke a common, yet tacit, narrative of power—a narrative constructed upon the idea of legal authority: we imagine the executive,

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3. *Mistretta*, 488 U.S. at 380 (citing Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977)).

4. *Id.* (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935)).

5. This reference is to Justice Jackson's statement in *Youngstown* that "[a] century and a half of partisan debate and scholarly speculation" about the separation of powers has yielded no net result other than "apt quotations" that "largely cancel each other." *Youngstown*, 343 U.S. at 634-35 (Jackson, J., concurring).

6. *Mistretta*, 488 U.S. at 380 (attributing to the Framers and specifically to James Madison the idea that each of the three branches need not be "entirely separate and distinct" but must remain "entirely free from the control or coercive influence" of the others (quoting *Humphrey's Ex'r*, 295 U.S. at 629)).

7. THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). Unless otherwise noted, all references to *The Federalist* are to the essays written by James Madison as they appear in the Rossiter edition.

8. As Rebecca Brown has put it, "The brief bow to Madison so often performed . . . is more a ritualistic gesture than an effort to supply a meaningful framework for the inquiry at hand. The quoted passage rarely, if ever, appears to influence the writer's analysis in any substantive way." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1515 (1991).

9. *See, e.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987) ("[O]ur formal, three-branch theory of government—at least as traditionally expressed—cannot describe the government we long have had . . . ."). Indeed, we have known this for some time. *See* Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting) (stating that the Constitution "left to each [branch] power to exercise, in some respects, functions in their nature executive, legislative and judicial").

judicial, and legislative powers divided and neatly arranged among the departments. In this Article, I explore the implications of a different narrative of power, one based on the idea that power is as much constituted by the political relationships the Constitution creates as by the legal authority it bestows. I argue that the separation of political power is as, if not more, vital to the continued separation of our governmental institutions as the separation of any particular function or the allocation of any particular legal authority.[10]

I arrive at this rather untraditional position by revisiting a very traditional text, a text that has often seemed the source of all our cancelling quotations: Madison's *Federalist* essays Nos. 47 through 51. Whether we are originalists or not,[11] the stories we tell of the separation of powers today are stories we associate with *The Federalist*. In the past decade, no major Supreme Court opinion[12] or law review article[13] on the separation

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10. The term "political power," in the sense I use it here, assumes power grounded upon human relationships rather than legal commands. *See* HANNAH ARENDT, ON VIOLENCE 44 (1970) ("When we say of somebody that he is 'in power' we actually refer to his being empowered by a certain number of people to act in their name.").

11. To engage with the Founders is not to make the normative claim of an originalist. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Framers did not expect courts to rely only on "intentionalism" as an interpretative strategy); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) (suggesting that the Founders "intended something independent of their own intent to serve as a source of constitutional law"). It does, however, take the Founders "seriously at the level of thought and aspiration that they understood themselves." DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM, at ix (1989). Taking this thought seriously does not bind one by historical practice. As Professor Michelman has argued, to take the founding ideals of republicanism seriously may involve "recognition[s]" that help counter received wisdom, political and otherwise. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988).

12. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1454 (1995); Mistretta v. United States, 488 U.S. 361, 380, 381, 382, 394, 409, 426 (1989); Morrison v. Olson, 487 U.S. 654, 697-99, 704-05, 726 (1988) (Scalia, J., dissenting); Bowsher v. Synar, 478 U.S. 714, 721-22 (1986); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting) (all citing Madison or Madison's *Federalist Papers* essays to support separation of powers arguments).

13. *See, e.g.*, Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 493 (1987); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155-56, 1215, 1216 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 608 (1994); Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357, 365, 372 & n.48 (1990) [hereinafter Carter, *Improprieties*]; Stephen L. Carter, *From* Sick Chicken *to* Synar*: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 740, 773-74, 776-78 [hereinafter Carter, *Separation of Powers*]; E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 517-18 (1989); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123 (1994); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1259-66, 1308 (1988); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 593, 597-98, 600 (1986); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105 (1994); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 229, 258-59; Martin H. Redish &

of powers has failed to enlist Madison or Madison's *Federalist* in the contemporary battle for the separation of powers. Scholars and judges with widely varying, indeed contradictory, views on the separation of powers have claimed Madison's *Federalist* as their own, each finding an essential, yet different, separation of powers.[14]

Most understandings of Madison's work have been premised on the idea that Madison shares our modern narrative of power—that he, too, sought to divide the governmental universe into three separate functions or descriptions of legal authority. My analysis suggests that this assumption deserves serious reconsideration. Politics, rather than law, inspired Madison's embrace of the separation ideal;[15] in the end, political restraints, rather than legal definitions, maintain the separation of powers.[16] To understand this, however, one must first understand that Madison's vision of the separation of powers differs radically from modern lawyers' vision. For us, the separation of powers raises questions about how to define and arrange legal authority; for Madison, the question was how to prevent the political collapse of a fledgling government.

Today, it seems odd that Madison's essays spend so little time discussing items that seem so important—the definition of functions or checks, the vesting clauses, or the terms "executive," "legislative," or "judicial." What I propose to do in this Article is to make sense of Madison's essays without recourse to the conventional terms—to move beyond the cancelling rhetoric of separated and shared powers, of checks and functional descriptions. To do that, I must recount a political history

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Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 449 (1991); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 435-37, 450, 452-53, 494 (1987); Strauss, *supra* note 9, at 494; Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 430-35, 436, 450, 504, 505 (1987); Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 598 (1992); Paul R. Verkuil, *A Proposal to Resolve Interbranch Disputes on the Practice Field*, 40 CATH. U. L. REV. 839, 841 (1991) [hereinafter Verkuil, *Practice Field*]; Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 301, 303 (1989) [hereinafter Verkuil, *Rule of Law*] (all citing Madison or Madison's *Federalist Papers* essays in discussion of separation of powers theory).

14. *See, e.g.*, Elliott, *supra* note 13, at 516-18 & n.33 (contending that Madison's view of the separation of powers principle is consistent with pragmatic functionalism and shared powers); Merrill, *supra* note 13, at 258-59 (arguing that Madison's *Federalist* essays are consistent with a minimalist separation of powers theory); Redish & Cisar, *supra* note 13, at 462-65 (drawing on Madison's *Federalist* essays in support of a formalist approach to separation of powers theory).

15. *See, e.g.*, Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 480, 490-92 (1988) (positing that Madison's view of the separation of powers was based on his understanding, and distrust, of state politics).

16. By this, I do not mean to suggest that the courts should play no role in policing structural disputes. As I argue in subpart V(C), the Supreme Court's role should be to ensure that no department is permitted to corrupt the "rules of the political game."

we have forgotten, a political history that uses different concepts and terms—of "dependence," and "interest," and "political connection." In that world, the greatest danger to the separation of powers was not, as we assume today, the misallocation of legal authority; the greatest danger was that one department might corrupt the members of a rival department. This was not a theoretical danger; it had happened in Britain and it had happened in America, too. By the time of the Constitutional Convention, Madison and others had long known that maintaining separate powers was a matter of protecting persons and incentives as well as powers and authority.[17]

Once we remember this history, we can begin to understand what we have long skipped over as we plodded through *The Federalist*. We can understand—I believe for the first time—the importance of a set of passages in *Federalist* Nos. 47, 48, and 51 that have gone largely unnoticed. These passages comprise what Madison terms the "due foundation" for the separation of powers. Without these passages, Madison's ultimate solution—his "practical security" for the separation of powers—makes little sense, and reduces us to trading "cancelling" adjectives about sharing and separating, about checking and balancing.[18] With these passages, we understand that the most important requirement for a system of separated institutions is a set of independent persons exercising incomplete power.[19]

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17. It is easy to forget, but true, that Madison's generation was well acquainted with failed attempts to separate power; they called it by a name we have now forgotten—they called it corruption and dependence. The principal example of failure was, of course, the British Parliament: independent in law, the Parliament was dependent in fact upon the King, who bought and paid for members' support with places in his government. America fought a war inspired, at least in part, by this corruption, only to reinvent a new kind of legislative "despotism." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., 1954) (1787). State constitutionmakers expressly enjoined separate powers but these parchment barriers did nothing to prevent legislatures from forcing their political will on other departments—by the very same means that the King had used to control Parliament—by controlling the salary, appointment, and tenure of their institutional rivals. For this history, see *infra* text accompanying notes 42-80.

18. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 493-97 (1989) (emphasizing shared powers); Greene, *supra* note 13, at 124-25, 130-31, 148-53 (emphasizing checks and balances); Redish & Cisar, *supra* note 13, at 474-87 (emphasizing separate functionally defined departments). My reading also diverges significantly from major extended analyses of the *Federalist Papers*, none of which focus on the idea of dependence or the importance of separating institutional allegiances. *See, e.g.*, GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 50-95 (1989) (recognizing the role of personal motive without reference to the political context that makes this view intelligible); DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* 136-41 (1984) (arguing that Madison's essays separate power defined as "ambition"); GARRY WILLS, EXPLAINING AMERICA: *THE FEDERALIST* 123, 122-25 (1981) (emphasizing Madison's reliance on bicameralism to check encroachment by the legislature).

19. THE FEDERALIST No. 51, at 322-23. As I describe later, the "independence" of persons is not synonymous with the "separation" of persons. *See infra* text accompanying notes 146-49, 158-62. The Constitution does not demand, nor did Madison advocate, a complete separation of personnel. *Cf.* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation*

With these passages, we understand that, to maintain separation, the most important structural provisions in the Constitution are not the vesting clauses or the terms "executive," "legislative," or "judicial," but the seemingly pedestrian terms that govern office.[20] With these passages, we understand that Madison's separation of powers was far less a separation of functions or checks or constitutional authority, but, something far more important, a separation of political power.

In Part I of this Article, I lay the historical groundwork for my reading of *The Federalist* in Part II. Part II argues that conventional understandings of the separation of powers have forced us into misreadings of *The Federalist* and have hidden what Madison describes as the "due foundation" for the separation of powers, a foundation built upon the independence of persons. Part III returns to the conventional understandings of Madison's essays—checks, shared powers, and functional description—and argues that none of these understandings can fully explain Madison's theory of separate political power, since none comprehends Madison's emphasis on political incentive and institutional design. Part IV moves beyond the history toward theory, arguing that our conventional understandings have misled us because they all—checks, shared powers, and functional description—depend upon a particular, and impoverished, idea of power as formal legal authority. In this Part, I suggest that this assumption is what has led us, ultimately, to miss Madison's point and elide portions of the essays that depend upon a different idea of political power, one built upon human relationship and connection. Finally, in Part V, I consider the implications of this rereading for modern separation of powers theory; in particular, for functionalism, formalism, and originalism. I also consider here how this theory helps us move beyond the current impasse among commentators and in the Supreme Court about removal cases such as *Morrison v. Olson*.[21]

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of Personnel?, 79 CORNELL L. REV. 1045, 1050-52 (1994) (highlighting the Constitution's failure to bar all dual departmental service, but arguing that a "separation of personnel" is vital to maintain the separation of powers (emphasis omitted)).

20. A variety of important structural provisions ensure the independence of those who hold government power. *See* U.S. CONST. art. I, § 2 (mandating the election of the House of Representatives "by the People"); art. I, § 3, cl. 1 (declaring election of senators by the "State legislatures"), *amended by* U.S. CONST. amend. XVII, § 1 (providing that election of senators shall be "by the people [of the State] thereof"); art. I, § 5, cl. 2 (ensuring that removal of members of Congress is determined by Congress itself); art. I, § 6, cl. 1 (providing that congressional salaries are to be determined by Congress "by law"); art. I, § 6, cl. 2 (separating members of the executive and legislative departments by declaring that no member of Congress shall be an executive officer and no executive officer shall be a member of Congress); art. II, § 1, cls. 2-3 (commanding that the president be elected by a system of "electors"); art. II, § 1, cl. 6 (prohibiting Congress from reducing or increasing the president's salary during his term of office); art. II, § 2, cl. 2 (authorizing the president to appoint his own executive officers); art. III, § 1 (providing life tenure and salary protections for judges).

21. 487 U.S. 654 (1988) (upholding the independent counsel provisions of the Ethics in Government Act of 1978).

I. Prologue: Politics and *The Federalist*

A painter may defend his work as pleasing or challenging; a novelist, as gripping or thought provoking; a social scientist, as carefully crafted or statistically significant. A politician, however, must defend his work as legitimate and secure. When the idea to be defended is a government, it must not only be right; it must also work. It is in this sense that *The Federalist*[22] must be read: as a political document, crafted in the context of political argument and intended to persuade a skeptical public audience that the proposed scheme would succeed in practice.[23]

To read *The Federalist* as a political document is not to ignore its various intellectual influences.[24] We venture into *The Federalist* at our peril if we fail to understand the philosophical "climate of opinion"[25] in which it was forged. But, too often, intellectual histories of *The Federalist* have disappointed lawyers and legal scholars. We discover that what we propose to investigate is not the unified concept we thought.[26] Or, we

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22. The 85 *Federalist* essays were written during the fall of 1787 and the spring of 1788 by Alexander Hamilton, James Madison, and John Jay, writing under the pseudonym "Publius." Madison wrote the five essays specifically devoted to the separation of powers. Douglass Adair, *The Authorship of the Disputed Federalist Papers* (1944), *reprinted in* FAME AND THE FOUNDING FATHERS 27, 28-29, 63-71 (Trevor Calbourn ed., 1974) (arguing that Madison, not Hamilton, wrote the five essays on the separation of powers). These essays were then, and still are today, considered a seminal work on the nature of the Constitution and its structure. *See* Thomas Jefferson, Report to the President and Directors of the Literary Fund (from the minutes of the Board of Visitors, University of Virginia) (Mar. 4, 1825), *reprinted in* WRITINGS OF THOMAS JEFFERSON 479 (Merrill D. Peterson ed., 1984) (asserting that *The Federalist* is "an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution . . . on questions as to its genuine meaning"). *See generally* James W. Ducayet, *Publius and Federalism: On the Use and Abuse of* The Federalist *in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821 (1993).

23. *The Federalist*'s influence during the ratification debates was substantial. *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1498 n.285 (1987) ("[T]he Papers were consciously quoted and used more than any other source during the ratification period."). On the debate between the antifederalists and the supporters of the Constitution, see generally FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 1989) [hereinafter FEDERALISTS AND ANTIFEDERALISTS].

24. For discussions of the various intellectual influences on the Founding Generation, see BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS (1968); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); WILLS, *supra* note 18; and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

25. CARL L. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS 5 (1932) ("Whether arguments command assent or not depends less upon the logic that conveys them than upon the climate of opinion in which they were sustained.").

26. *See* W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 37-65 (1965) (detailing various strains in the "meaning" of the separation of powers in seventeenth- and eighteenth-century political thought); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 263-64 (1989) (arguing that a variety of institutional arrangements were extolled as consistent with the "separation of powers" in eighteenth-century America).

find that the founding moment actually changed the very idea we are studying.[27] In the end, while we must understand the intellectual currents flowing through *The Federalist*, we must judge *The Federalist*'s arguments within the political context in which they were forged—a context in which failures of intellectual coherence may have been quite necessary to the political project at hand.[28]

Madison was no stranger to the task of political persuasion. He understood, like most successful politicians, a fundamental and timeless truth about politics: "In their obsession with the state, men are of course obsessed with themselves."[29] In reconstituting the nation, Madison and his colleagues were reconstituting their generation as much as their government. If, then, we are to understand Madison, we must try to re-imagine the political context in which he acted. And, to do that, we must first reinvent the immediacy and the danger of the project, the fears and the hopes of Madison's audience, and the symbolic power of events that shaped his generation's understanding of the meaning of the separation of powers.[30]

A. Insecurity and Structure

It is widely accepted today that we have lost a coherent theoretical vision of the separation of powers and that in the distance between Madison's time and our own, any real understanding of the need or importance of this doctrine has been squandered.[31] Madison's essays may be

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27. *See* J.G.A. Pocock, *States, Republics, and Empires: The American Founding in Early Modern Perspective*, *in* CONCEPTUAL CHANGE AND THE CONSTITUTION 55, 55-70 (Terence Ball & J.G.A. Pocock eds., 1988) [hereinafter CONCEPTUAL CHANGE] (discussing the Framers' transformative use of the concept of separation of powers imported from England); *accord* Kurland, *supra* note 13, at 594 (remarking that the "separation of powers as adopted by the American Constitution had no true precedents either in fact or in theory").

28. Later, Madison was to acknowledge: "It cannot be denied without forgetting what belongs to human nature, that in consulting the cotemporary [*sic*] writings, which vindicated and recommended the Constitution, it is fair to keep in mind that the authors might be sometimes influenced by the zeal of advocates . . . ." Letter from James Madison to Edward Livingston (Apr. 17, 1824), *in* 3 FEDERAL CONVENTION, *supra* note 1, at 463.

29. MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 2 (1964). Professor Edelman's statement is a modern version of an insight well known to the Founding Generation. As Madison himself said: "But what is government itself but the greatest of all reflections on human nature?" THE FEDERALIST No. 51, at 322.

30. On the importance of political psychology to the understanding of *The Federalist*, see Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 460 (1989).

31. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634, 634-35 (1952) (Jackson, J., concurring) ("Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."); Kurland, *supra* note 13, at 607, 611-12 (complaining that the Framers' separation of powers survives in modern government "largely in name, if at all").

almost universally cited,[32] but the conventional readings, littered with the modern spirit of cancellation, offer more solace than solution.[33] History presents fragments of several conflicting theories that support the doctrine—theories of mixed government,[34] Whig opposition,[35] and Leveller influence.[36] Treatises and law review articles list policy concerns animating the separation of powers, such as the rule of law, integrity, and individual liberty.[37] Neither the intellectual histories nor the modern policies, however, have led to a coherent vision of the separation ideal or its implications in the modern world. Certainly, none explains what moved the eighteenth-century mind to embrace the "separation of powers" with such emotion[38] as a "sacred" bulwark against tyranny.[39]

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32. *See supra* note 13.

33. On the dangers of reading historical language in light of modern ideas, see Lessig & Sunstein, *supra* note 13, at 12-13.

34. Mixed-government theory rested upon the idea that the greatest stability in a governmental regime is achieved by mixing the three classically elemental "forms" of government: "monarchy, the rule of one; aristocracy, the rule of a few; and democracy, the rule of many or of all." BAILYN, *supra* note 24, at 20, 20-22. In seventeenth- and eighteenth-century Britain, this took the form of "maintaining the balance in government of the basic socio-constitutional elements of society: king, lords, and commons." *Id.* at 21; *see* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *153-60; DAVID HUME, *Of the Independency of Parliament*, *in* ESSAYS: MORAL, POLITICAL, AND LITERARY 42, 43-46 (Eugene F. Miller ed., 1985) (both arguing that the British experience established that a workable system of mixed government could be created and maintained).

35. For a description of eighteenth-century Whig opposition, see BAILYN, *supra* note 24, at 45-46. Opposition to official corruption was one of its prominent calls-to-arms. *See generally id.* at 31-58; POCOCK, *supra* note 24, at 506-52.

36. *See* GWYN, *supra* note 26, at 41 ("For Lilburne and the Levellers, the doctrine of the separation of powers became one of their most powerful ideological weapons for attacking what they considered to be parliamentary tyranny."). The Levellers, most often associated with their leader, John Lilburne, attacked Parliament's abuse of power during the mid-seventeenth century and disputed Parliament's right to sit as both judge and legislator, which "rob'd [the people] of their intended and extraordinary benefit of appeales." *Id.* at 42 (quoting JOHN LILBURNE, THE PICTURE OF THE COUNCEL OF STATE (1649), *reprinted in* THE LEVELLER TRACTS: 1647-1653 (W. Haller & G. Davies eds., 1944)). The Levellers also decried members of Parliament who profited from their office by holding "places" in government, arguing that this destroyed Parliament's ability to rule in the common interest. GWYN, *supra* note 26, at 39.

37. Cass Sunstein's *Constitutionalism After the New Deal* best details these policies. *See* Sunstein, *supra* note 13, at 434-36; *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 362-65 (2d ed. 1991) (both noting that the purposes of separation of powers include sustaining the rule of law, fragmenting power, limiting government, and suppressing factions).

38. "The *political liberty of the subject is a tranquillity of mind*, arising from the opinion each person has of his safety. In order to have this liberty, it is requisite that the government be so constituted *as one man need not be afraid of another.*" MONTESQUIEU, THE SPIRIT OF LAWS, Book XI, ch. 6[3]-[4], at 202 (David W. Carrithers ed., 1977) (Thomas Nugent trans., London, Nourse 1750) (1748) (emphasis added); *see also id.* at Book XII, ch. 2[1], at 217 ("Political *liberty* consists in security, or at least in the opinion we have of security." (emphasis in original)).

39. *See* THE FEDERALIST No. 47, at 308 (referring to the separation of power as a "sacred maxim of free government"); *see also* Verkuil, *Rule of Law*, *supra* note 13, at 301-02 (arguing that the abstractness of contemporary discussions about the separation of powers frustrates analysis).

Today, few venture to hope that the separation of powers will rid our government of corruption, arbitrariness, or inefficiency. Indeed, we no longer embrace the separation of powers as a bulwark against the most obvious danger to which it was interposed—autocracy.[40] With so little sense of the efficacy or modern importance of this principle, it is no wonder that the emotional rhetoric of the eighteenth century is so attractive and yet so strange to modern readers.

Imagine, however, that rather than a coherent intellectual history, we found a *political practice* that illuminated the meaning of the separation of powers. Imagine further that fears of this political practice were repeatedly voiced in various intellectual and political tracts, in England and in the colonies, in the records of the Constitutional Convention and in the ratification debates.[41] Would not this political fear give us a very strong clue about the emotion once associated with "the separation of powers"? Would not this fear help us reclaim at least part of the tradition that we have lost? This is the story I hope to tell in what follows, a story I believe that legal scholars have largely ignored.

B. Politics and Corruption

During the seventeenth and eighteenth centuries, many political theorists, from Montesquieu to Blackstone to Hume, defenders and antagonists of the monarchy both, embraced principles we now associate with the separation of powers.[42] As an actual description of the British government, however, the rhetoric of the separation of powers was "not merely inaccurate but profoundly misleading."[43] Although the House of Commons was in theory independent of the monarchy, in practice it was far from a separate sphere of political power. The monarchy amassed its

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40. Political scientists such as Robert Dahl have questioned the importance of the separation of powers in preventing tyranny. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 21, 20-22 (1956) ("[W]hether or not powerful minorities or mass-based dictatorial leaders have refrained from establishing tyranny is clearly not related to the presence or absence of constitutional separation of powers.").

41. *See infra* note 155 (listing the many references made during the Constitutional Convention to the corruption of the British "placemen").

42. *See, e.g.*, MONTESQUIEU, *supra* note 38, at Book XI, ch. 6, at 201; 1 BLACKSTONE, *supra* note 34, at *153-60; HUME, *supra* note 34, at 42-46. Both Montesquieu and Blackstone claimed that the British monarchy had attained the ideal of separated powers. *See* MONTESQUIEU, *supra* note 38, at Book XI, ch. 6, at 213; THE FEDERALIST No. 47, at 301-02; 1 BLACKSTONE, *supra* note 34, at *154-55.

43. BAILYN, *supra* note 24, at 23; *see* Pocock, *supra* note 27, at 64 ("[R]hetoric of the 'separation of powers' . . . was held in check by the evident fact that the legislative power resided, not in either house of Parliament, but in the Crown, which was united with both."); *see also* 4 MARK A. THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 355, 354-55 (1938) (noting that Blackstone's vision of the British government as consisting of parts that served as checks upon each other "never was . . . carried out in practice for any length of time").

power not by law or prerogative, but by patronage: the King "directed affairs in Parliament by bribing members or their followers with appointments to positions of preferment and profit."[44] These so-called placemen sat in all three "estates"—Crown, Lords, and Commons—binding their interests into a common whole.[45] Failure to vote in favor of the King's program often spelled the revocation of a post or pension.[46] Not surprisingly, many members of the House of Commons had a strong personal incentive to support the King's political initiatives. In a world in which patronage cemented the interest of King and Commons, separate institutions did not mean separate powers.

To the British Whig opposition, the offering of places was the "most insidious and powerful weapon of eighteenth-century despotism."[47] Critics flooded the opposition press with diatribes against the placemen.[48] Patronage "rendered representatives of the people, who ought to be as independent as those they represented, dependent upon the Court and the ministers from whom they received it."[49] As J.G.A. Pocock has explained, this "dependence" was "worse, because more lasting, than mere venality": "[I]f it was bad that a member should receive a purse of guineas for voting with the Court, it was ten times worse that he should receive a pension, or hold an office, in the Court's gift, since this rendered subservience to the Court his permanent interest."[50]

Trenchard, co-author of *Cato's Letters*, was typical of opposition writers of his day: he did not object to the monarchy as such or even to the individual corruption that pervaded British government.[51] He objected to its structural implications—to the power the King obtained over the Commons as an institution. An independent Commons, wrote Trenchard, "must act for the common Interest of England."[52] But the Commons could not act in the common interest when its vote had been purchased by the King. A House of Commons corrupted by places, pensions, and

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44. MCDONALD, *supra* note 24, at 83.

45. *Id.*

46. COLIN R. LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 433 (1962); *cf.* JOHN TRENCHARD, SHORT HISTORIE OF STANDING ARMIES IN ENGLAND (1698), *reprinted in* GWYN, *supra* note 26, app. at 138, 139 ("[Parliament] knew [the King] would give them ready Mony no longer than he had absolute Necessity for them . . . ."). For example, "in the early years of George III an outcry was raised when General Conway was deprived of the command of a regiment because of a vote he had given on the question of general warrants." THOMSON, *supra* note 43, at 360.

47. *See* WOOD, *supra* note 24, at 143 (describing the similar views of American Whig opposition).

48. *See* BAILYN, *supra* note 24, at 45-49 (reviewing criticism of ministerial corruption in England under Walpole); GWYN, *supra* note 26, at 84-85 (noting Trenchard's belief that it would be "fatal" to the separation of powers "to have many placemen in Parliament").

49. POCOCK, *supra* note 24, at 407.

50. *Id.*

51. TRENCHARD, *supra* note 46, at 138.

52. *Id.*

bribes, was a political body without a "will." "What shall be done," Trenchard asked, "when the Criminal becomes the Judg, and the Malefactors are left to try themselves?"[53] How may the Commons redress the grievances "occasion'd by the Executive Part of the Government . . . if they should happen to be the same Persons, unless they would be publick-spirited enough to hang or drown themselves?"[54]

By the 1770s, similar complaints had become a staple in the American opposition press. Thomas Paine's *Common Sense* railed against a monarchy that "derives its whole consequence merely from being the giver of places and pensions."[55] The crown-appointed colonial "governors, in imitation of the king in England, . . . offer[ed] well paying positions in the executive branch to key members of the legislature."[56] Colonial profit-seeking was both rampant and widely criticized. Of "the governors' shameless exploitation of the royal prerogative of conferring offices and dignities,"[57] one pamphleteer wrote, "[It is] a secret poison [that] has been spread thro'out all our Towns[,] and great Multitudes have been secured for the corrupt Designs of an abandoned Administration."[58] Indeed, the Declaration of Independence specifically identified the dependency of judicial officers (then considered executors of the law) as a reason for Revolution: the King had "made Judges dependent on his Will alone, for the tenure of their offices and the amount and payment of their salaries" and thereby "obstructed the Administration of Justice."[59]

By the end of the Revolution, Americans had "resolved to destroy the capacity of their rulers ever again to put together such structures of domination . . . ."[60] Borrowing the language of the Whig opposition, American politicians decried "offices of profit" as "creating dependence and servility" to the appointing authority.[61] Indeed, the Pennsylvania Constitution went so far as to assert that such offices were the cause of "faction, contention, corruption, and disorder among the people."[62] Not surprisingly, these voices helped to create state constitutions in which the

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53. *Id.* at 140.

54. *Id.* at 141. Trenchard's work was well known and influential in colonial America. *See* BAILYN, *supra* note 24, at 54-55; POCOCK, *supra* note 24, at 467-68 (both noting the influence of Trenchard and Gordon on colonial political debate).

55. THOMAS PAINE, COMMON SENSE (1776), *reprinted in* THOMAS PAINE: COLLECTED WRITINGS 5, 11 (Eric Foner ed., 1995).

56. Donald S. Lutz, *The United States Constitution, 1787, in* ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 266, 271 (Stephen L. Schechter ed., 1990).

57. WOOD, *supra* note 24, at 146.

58. *Id.* (quoting an uncited colonial source).

59. THE DECLARATION OF INDEPENDENCE para. 10-11 (U.S. 1776).

60. WOOD, *supra* note 24, at 148.

61. *Id.*

62. *Id.* (quoting the Pennsylvania Constitution).

legislature, not the executive department, would appoint officers and in which officers were barred from dual officeholding.[63]

Perhaps most importantly for our purposes, the framers of these new state constitutions made explicit the idea that governmental power should be exercised by separate and distinct departments.[64] This idea reflected a variety of influences and intellectual commitments—commitments to an idea of mixed government, to the efficient exercise of power, and to the separation of conflicting interests.[65] But the political and psychological certainty with which the separation ideal was embraced owed at least as much to the experience of "dependent" officers as it did to these goals and ideas. The very idea of dependency carried with it fears of structural collapse and perversion, transforming public into private interest.[66] What better way to prevent corruption of officers than by declaring that the departments be administered separately and distinctly? As J.G.A. Pocock has put it, the colonists "found themselves committed to the model of a republic of separated powers, in the belief that this would check the executive's tendency to corrupt the legislature. . . ."[67]

It only took a decade to dash the colonists' hope for a separation of powers achieved by constitutional prohibition. The framers of the state constitutions had placed great faith in the new constitutional provisions

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63. *See* MCDONALD, *supra* note 24, at 86 (noting that many state constitutions forbade or restricted holding of multiple offices or required rotation in office). Some historians appear to assume that dual-officeholding provisions in the state constitutions eradicated fears of corruption. *See, e.g.*, WOOD, *supra* note 24, at 156 (suggesting that dual-officeholding prohibitions could prevent the "dependencies" decried by drafters of the state constitutions). A review of Madison's notes from the Constitutional Convention and various records of the ratification debates makes clear that fears associated with dependency remained long after dual officeholding was barred. *See infra* text accompanying notes 73-80.

64. WOOD, *supra* note 24, at 157, 449.

65. *See, e.g.*, TRENCHARD, *supra* note 46, at 138. *See generally* Sunstein, *supra* note 13, at 4306 (asserting that the Founding Generstion believed that separating power was necessary to avoid concentration of authority, to limit the ability of government to act, to minimize the influence of private interest groups, and to promote stability in the political system).

66. J.G.A. POCOCK, *Civic Humanism and Its Role in Anglo-American Thought*, *in* POLITICS, LANGUAGE & TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 80, 92-93 (1971).

67. Pocock, *supra* note 27, at 65; *see also* Lutz, *supra* note 56, at 271 (stating that out of the "colonial attempt to prevent the crown-appointed governments from buying off members of the legislature" came widespread calls for a government of separated powers). This is not an idiosyncratic position, although it is one largely ignored by legal scholars. Recently, Professor Steven Calabresi has revived at lesst some of this early American history but has suggested *(wrongly, I believe)* that the Founders drew no explicit connection between the independence of officers and the separation of powers. Calabresi & Larsen, *supra* note 19, at 1062, 1062-65 (arguing that constitutionsl provisions separating personnel—*i.e.*, the incompatibility clauses barring dual officeholding—had the "*unanticipated* consequence[]" of "reinforc[ing] . . . the separation of powers" (emphasis added)). As notes from both the Constitutionsl Convention and the ratification debates suggest, the connection between the separation of powers and fears of "dependent" officers were far from inadvertent. *See infra* text accompanying notes 73-80, 109-10, and 153-57.

demanding separate powers.[68] But, in constructing their governments, they had inadvertently transplanted the sins of the monarchy to the state legislatures. Armed with the power to appoint and remove judges and administrators, as well as the power to increase or decrease their salaries,[69] state legislatures could, and did, manipulate the governor and the judiciary to serve their own ends.[70] Soon, writers such as Thomas Jefferson attacked the state constitutions in almost the same terms as patriots had decried the British colonial efforts of years earlier—as tyrannies built upon patronage, dependency, and corruption.[71] As St. George Tucker described the political situation in Virginia, the executive possessed "not a single feature of Independence" because "in Virginia, [it] is chosen, paid, directed, and removed by the legislature."[72]

Given this history, it is not surprising to see the language of dependence and separation surfacing hand in hand during many of the most important debates at the Constitutional Convention. Take, for example, the battle over the structure of the executive department. For most of the convention, the president was to be elected by the "national legislature" (the House of Representatives).[73] Some delegates sought to make the

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68. THE FEDERALIST No. 48, at 312-13.

69. WOOD, *supra* note 24, at 148, 161.

70. Thomas Jefferson wrote of Virginia,

> The judiciary and executive members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. . . . They have accordingly, in many instances, decided rights which should have been left to judiciary controversy: and the direction of the executive, during the whole time of their session, is becoming habitual and familiar.

JEFFERSON, *supra* note 17, at 120; *see* THE FEDERALIST No. 48, at 311 (quoting this passage from Jefferson).

71. *See* JEFFERSON, *supra* note 17, at 121 (warning that the powers of the departments of government "must be so divided and guarded as to prevent those given to one from being *engrossed* by the other; and if properly separated, the persons who officiate in the several departments become centinels in behalf of the people to guard against every possible usurpation"). The term "engrossment" was typically used to refer to the practice of buying the influence of government officers. *See, e.g.*, 1 FEDERAL CONVENTION, *supra* note 1, at 101 (statement of George Mason of Virginia, June 4, 1787) (complaining that "[t]he Executive may refuse its assent to necessary measures till new appointments shall be referred to him; and having by degrees *engrossed* all these into his own hands, the American Executive, like the British, will by bribery & influence, save himself the trouble" of using the veto (emphasis added)).

72. CHARLES S. SYDNOR, AMERICAN REVOLUTIONARIES IN THE MAKING: POLITICAL PRACTICES IN WASHINGTON'S VIRGINIA 87 (1965) (quoting ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 119 (1803)).

73. The Virginia Plan provided "that a National Executive be instituted; to be chosen by the National Legislature for the term of [blank] years . . . ." 1 FEDERAL CONVENTION, *supra* note 1, at 21 (May 29, 1787) (recording the resolutions proposed by Edmund Randolph of Virginia). This issue remained unresolved far into the convention. *See* 2 *id.* at 401-04 (Aug. 24, 1787) (recounting the continuing debate on how to structure the executive).

president "absolutely *dependent*" on the legislature.[74] Others argued that such a dependency would breed corruption: "If the Executive be chosen by the Natl. Legislature, he will *not be independent* on [*sic*] it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence."[75] Madison insisted upon an "independent" executive, agreeing with Elbridge Gerry that presidential appointment by the legislature "would give birth to intrigue and corruption between the Executive & Legislature previous to the election and to partiality in the Executive afterwards to the friends who promoted him."[76]

Similar terms governed the debate over the selection of senators,[77] the payment of members of Congress,[78] and the president's tenure in office.[79] Madison summed up the connections between the idea of political "independence" of officers and the separation of powers in his

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74. 1 *id.* at 68 (statement of Roger Sherman of Connecticut, June 1, 1787).

75. 2 *id.* at 31 (statement of Gouverneur Morris of Pennsylvania, July 17, 1787) (emphasis added); *see also* 1 *id.* at 69 (statement of James Wilson of Pennsylvania, June 1, 1787) (arguing for "appointment by the people" because this would make the executive branch "as independent as possible").

76. 1 *id.* at 175 (statement of Elbridge Gerry of Massachusetts, June 9, 1787). This was Madison's preferred position. In the end, of course, he supported the "electoral college" compromise that mediated direct election with a system of electors and allowed a role for Congress in the election of the president in case no candidate obtained a majority of electoral votes. THE FEDERALIST No. 39, at 244 (describing the electoral college system as characteristic of a republican form of government). History, however, has tended to prove the validity of Madison's concerns about a congressional role in presidential elections. The election of 1824, which was thrown into the House of Representatives, led to charges that John Quincy Adams struck a deal for the presidency by buying "places" in his administration for his supporters in the House. *See generally* Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 209-10 (1994).

77. The Virginia plan provided that "members of the second branch of the National Legislature ought to be elected by those of the first . . . ." 1 FEDERAL CONVENTION, *supra* note 1, at 20 (May 27, 1787) (recording the resolutions proposed by Edmund Randolph of Virginia). To such suggestions, it was argued that if the Senate were to be appointed by the first branch, "it would make them too *dependent*, and thereby destroy the end for which the Senate ought to be appointed." 1 *id.* at 59 (statement of Roger Sherman of Connecticut, May 31, 1787); *see also* 1 *id.* at 52 (statement of James Wilson of Pennsylvania, May 31, 1787) (asserting that the Senate ought to be "*independent*" of the national legislature); 1 *id.* at 59 (statement of George Mason of Virginia, May 31, 1787) (expressing the opinion that it "would be highly improper to draw the Senate out of the first branch . . . [because] it would make the Members too *dependent* on the first branch") (emphases added throughout).

78. 1 *id.* at 215-16 (statement of James Madison of Virginia, June 12, 1787) (arguing that payment of the members of the national legislature by the states would "create an improper dependence"); 2 *id.* at 292 (statement of Daniel Carroll of Maryland, August 14, 1787) ("[Members of Congress] ought . . . not . . . be dependent on nor be paid by the States.").

79. *See* 2 *id.* at 102 (statement of Elbridge Gerry of Massachusetts, July 24, 1787) (arguing that the president should serve for as many as 20 years to diminish his "dependence" on the legislature if elected by that body); 2 *id.* at 102 (statement of James Wilson of Pennsylvania, July 24, 1787) (agreeing to "almost any length of time" for presidential tenure to eliminate the "dependence" that will result from appointment by the legislature).

argument that the president, if chosen by the House, should not be eligible for re-election:

> If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be *independent* of each other. The Executive could not be *independent* of the Legislure [*sic*], if *dependent* on the pleasure of that branch for a re-appointment. Why was it determined that the Judges should not hold their places by such a tenure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of the laws. In like manner a *dependence* of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.[80]

We have come full circle, to "tyrannical laws" via dependence, and now have a better idea of the concrete political images that moved a generation to embrace the separation of powers as "sacred."[81] Imagine that you are faced with the prospect of a government in which the persons who hold power on your behalf—*your* representatives—are "dependent" for their livelihood upon their political rivals. The representatives no longer represent only you in the competition for political power; they also represent their own personal interests. Imagine further that you have no political recourse: there is no rival center of political power to challenge the status quo. Is not this scheme—one in which the private interest of the governors may easily prevail over the public interest—the very definition of tyranny? Is not this scheme—one in which political power has become a private commodity—the antithesis of a republic? Is not this scheme a government of men, not laws?

Focusing on these political experiences not only resurrects the fears of a generation that embraced the separation of powers; it also helps to explain some of the difficulties posed by the modern separation ideal. If I am correct that the emotional power of the separation of powers doctrine lies in the political experience of "dependent" officers but that its rhetoric embraces far more abstract conflicts of function, it is not surprising that we might have lost the power of the original. The intellectual move from officials to entities, from persons to repositories of power, from will to function, subtracts the human dimension of governance. Rather than

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80. 2 *id.* at 34 (statement of James Madison of Virginia, July 17, 1787) (emphasis added). Similar terms were used during the ratification debates to couch claims that the new constitution violated the separation of powers. *See infra* notes 156-57.

81. *See supra* note 39.

imagining individuals who wield power corruptly, we imagine institutions with conflicting functions. And once we focus on institutions, any necessary connection between the idea of separate powers and personal corruption disappears. What was once "sacred" is still embraced as sacred, but, in the process, we have forgotten why it is more than mundane.

I make no claim that this story fully explains the separation of powers—a concept that embraces a set of ideas, not a single event or theory.[82] I see the political history I have emphasized as a moment uniting "[t]he psychological and the political" as "different perspectives on the same problem."[83] Long after the intellectual histories and the policy reasons have left us wondering what *The Federalist*'s fear of "tyranny" is all about, we can see much in this political history that helps us to appreciate, at least in part, the fear and the expectations of those who embraced the separation of powers as a "sacred maxim" both intrinsically valuable and "essential to the preservation of liberty."[84]

II. Rereading *The Federalist* on the Separation of Powers

The Federalist No. 51, Madison's major essay on the separation of powers, begins with an important question: "To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution?"[85] Scholars have answered this question in as many different ways as they have described the separation of powers.[86] But, in the process, most have missed something important in the question itself. Madison says: "To what expedient then shall we finally resort . . . ?"[87] This phrasing tells us that the essay marks an *end*: No. 51 is the culmination of a series of essays in which Madison rejects various proposals for maintaining the separation of powers. At the same time, the quotation also tells us that we are at a *beginning*: the beginning of a true search for an expedient that will maintain "in practice the necessary partition."[88]

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82. *See generally* GWYN, *supra* note 26, at 37-65 (discussing the many concerns underlying the seventeenth-century British commitment to separation of powers); Sunstein, *supra* note 13, at 430-36 (discussing the policies served by the separation of powers).

83. PAUL W. KAHN, LEGITIMACY AND HISTORY 15 (1992).

84. THE FEDERALIST No. 47, at 301 ("No political truth is certainly of greater intrinsic value . . . ."); THE FEDERALIST No. 51, at 321 (arguing that the "separate and distinct exercise of the different powers of government" is "admitted on all hands to be essential to the preservation of liberty").

85. THE FEDERALIST No. 51, at 320.

86. *Compare* WILLS, *supra* note 18, at 122 (arguing that bicameralism acts as the expedient in Madison's separation theory) *with* Redish & Cisar, *supra* note 13, at 462-65 (suggesting that the expedient is found in the formal division of exclusive power among the branches).

87. THE FEDERALIST No. 51, at 320.

88. *Id.*

In this ending and beginning, we find a crucial distinction. In No. 51, we are told that Madison is looking for something that will "maintain[] in *practice* the necessary partition of power among the several departments as laid down in the Constitution."[89] We find in this single question two very important, but little understood, points about *The Federalist*'s view of the separation of powers. First, Madison assumes, rather than articulates, a division of power; second, he assumes that the division is not itself sufficient to maintain the separation of powers. Whatever maintains separation must be some other thing, some kind of "practical security."[90]

The implications of this deceptively simple distinction should not be underestimated. At present, much of the debate about the separation of powers rests on the assumption that the proper questions to ask are questions about the allocation of legal authority: "Is this power properly located in the judiciary department?" or "Is that power permissible for an administrative agency?"[91] In these questions resides a serious, yet unarticulated, inconsistency with Madison's project. Madison's goal was not to offer an intellectual history of the separation of powers or even to explain how the Constitutional Convention had arrived at its division of power. His goal was to assure his readers that the allocation of power chosen would remain secure in practice—that the Constitution's institutional design was not only *right*, but that it would also *work*.

A. No. 47: In Search of "Practical Security"

As *Federalist* No. 47 opens, Madison sings loudly the praises of the separation of powers. Although no doubt sincere, this veneration was also purposeful. Madison understood the political stakes, and they were high: the antifederalists had charged that the proposed Constitution violated the separation of powers.[92] Such charges were calculated to inflame, difficult to rebut, and wrapped in a maxim as widely accepted as it was ill-defined. Aware of the risk, Madison sought to calm his readership and to assure them that the Framers took seriously the question of separated powers. And so he embraces the principle warmly and repeatedly, praising this "celebrated maxim"[93] of government and even conceding that "[w]ere the

89. *Id.* (emphasis added).

90. THE FEDERALIST No. 48, at 308. This position is heavily underscored by Madison's rejection of "parchment barriers" as an impediment to tyranny. *See infra* notes 113-25 and accompanying text.

91. *See* Mistretta v. United States, 488 U.S. 361 (1989) (addressing the question whether the Sentencing Commission is properly located in the judiciary department); Morrison v. Olson, 487 U.S. 654 (1988) (addressing the question whether the independent counsel may exercise "executive" powers).

92. *See* MCDONALD, *supra* note 24, at 285; WOOD, *supra* note 24, at 548 (both discussing the antifederalists' separation of powers claims).

93. THE FEDERALIST No. 47, at 303.

federal Constitution . . . really chargeable with this accumulation of power, . . . no further arguments would be necessary to inspire a universal reprobation of the system."[94]

Having proclaimed allegiance to the principle of separation, Madison is left to argue that the "maxim on which [his opponents were relying] ha[d] been totally misconceived and misapplied."[95] Madison labors to give the impression that his dispute with the antifederalists is not very serious: he argues that his opponents simply misunderstand the "celebrated Montesquieu."[96] Montesquieu "did not mean that the departments ought to have no partial agency in, or no control over, the acts of each other."[97] The "real meaning" of Montesquieu, Madison asserted, was that "the *whole* power" of one branch should not rest in "the same hands which possess the *whole* power of another department."[98] Although this passage is among the most famous in this essay, it is arguably the least convincing and certainly the most obscure. Read with an emphasis on the phrase "whole power," Madison's interpretation of Montesquieu suggests that one department may wield everything but the last ounce of another department's authority. But this interpretation[99] cannot go very far before it runs headlong into arguments made later in the essays. We know, for example, that neither Madison nor Montesquieu would have sanctioned a scheme in which the legislative branch wielded anything close to the "whole" of the executive or judicial power.[100]

The contemporary focus on Madison's bow toward Montesquieu has, unfortunately, obscured a far more important part of the essay. After Madison explains that the Constitution's critics have misunderstood

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94. *Id.* at 301.

95. *Id.*

96. *Id.* Madison's principal argument here is that Montesquieu approved of the British Constitution, which did not maintain departments "totally separate and distinct" from each other. *Id.* at 302, 302-03.

97. *Id.* at 302 (emphasis omitted).

98. *Id.* at 302-03 (emphasis in original).

99. Some, but not all, of the difficulty of this interpretation is eliminated if we shift our focus from the adjective "whole" to the phrase "the same hands," emphasizing those who hold power rather than the quantum of power held. Throughout the *Federalist* essays, Madison describes the separation of powers in terms that focus on those who wield power. *See infra* notes 330-32 and accompanying text. Under this view, the statement does not mean that one department may not hold the whole power of another, but that no person (*e.g.*, a president) within a department may hold the whole power of another department.

100. *See, e.g.*, THE FEDERALIST No. 48, at 309 ("[I]t is against the enterprising ambition of [the legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions."); THE FEDERALIST No. 49, at 315-16 ("[T]he tendency of republican governments is to an aggrandizement of the legislative at the expence of the other departments."); MONTESQUIEU, *supra* note 38, at Book XI, ch. 6, at 208 ("But whatever may be the issue of that examination, the legislative body ought not to have a power of judging the person, nor of course the conduct of him who is intrusted with the executive power.").

Montesquieu, he spends the bulk of the essay[101] "turning the tables"[102]—pointing out that the critics had conveniently ignored the fact that their own state constitutions violated the very Montesquieuian principle they espoused. "If we look into the constitutions of the several States," Madison writes, "there is *not a single instance in which the several departments of power have been kept absolutely separate and distinct.*"[103] Some provide "too great a mixture" of power; others, an "actual consolidation."[104] But, most importantly, "in *no* instance,"—in no state constitution, Madison writes—"has a competent provision been made for maintaining *in practice the separation delineated on paper.*"[105]

Here sits one of the most overlooked clues to *The Federalist*'s separation of powers and to the practical security Madison ultimately seeks. At this point in the text, we have no idea what Madison means by a "competent provision,"[106] but we do know that whatever it is, each state constitution lacks it—each lacks something essential to "maintain[ ] in practice the separation delineated on paper."[107] If we return to the discussion of the state constitutions and examine each critique, we find that each shares a peculiar emphasis. Substantive powers are rarely mentioned,[108] but every state constitution is criticized extensively for its arrangement of officeholders. Indeed, references to particular powers are overwhelmed by references to appointment, removal, and dual officeholding.[109] Typical of this discussion is Madison's critique of the

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101. George Carey estimates that Madison spends more than half of No. 47 surveying the constitutions of 11 states. CAREY, *supra* note 18, at 56.

102. This kind of argument appears frequently throughout *The Federalist*. *See id.* at 56 & n.5 (noting that Madison frequently used the "'glass house' argument: a type of argument . . . designed to show that the charges against the proposed Constitution could be leveled with far greater justification against the state constitutions").

103. THE FEDERALIST No. 47, at 303-04 (emphasis added).

104. *Id.*

105. *Id.* at 308 (emphasis added).

106. *Id.*

107. *Id.*

108. The veto power and the pardon power are the principal exceptions to Madison's focus on officeholders. *See, e.g., id.* at 304-07.

109. In New Hampshire,

> [t]he executive head is himself eventually *elective* [*sic*] *every year by the legislative department*, and his council is every year *chosen by and from the members of the same department*. Several of the officers of state are also *appointed by the legislature*. And the members of the judiciary department are *appointed by the executive department*.

THE FEDERALIST No. 47, at 304. In Massachusetts, "[t]he members of the judiciary department, again, are *appointable by the executive department*, and *removable by the same authority* on the address of the two legislative branches." *Id.* at 305. In New Jersey, "[t]he governor, who is the executive magistrate, is *appointed by the legislature* . . . [,] *is a member of the Supreme Court of Appeals*, and president, with a casting vote, of one of the legislative branches." *Id.* In New York, "[i]n its council of *appointment* members of the legislative are associated with the executive authority, in the *appointment* of officers, both executive and judiciary." *Id.* In Pennsylvania, "the president, who is

Virginia Constitution. In Virginia, he tells us, "the chief magistrate, with his executive council, are appointable by the legislature; . . . two members of the latter are triennially displaced at the pleasure of the legislature; and . . . all the principal offices, both executive and judiciary, are filled by the same department."[110]

At one level, this kind of critique should seem unexpected. If we are looking for the modern separation of powers, most of Madison's analysis seems unremarkable. When we return to the text, we do not find a discussion of powers mixed or functions garbled. Instead, Madison offers us something else: the attributes of office. And, yet, as we will see, this reference is only the first to what becomes an exceedingly important idea—an idea that Madison will describe as the "due foundation"[111] for the separation of powers.

B. No. 48: Virginia and Parchment Barriers

If No. 47's reference to maintaining "in practice"[112] the separation of powers seems to the casual reader an isolated, offhand remark, No. 48 leaves no doubt about the phrase's significance. At the opening of No. 48, Madison warns:

> [P]ower is of an encroaching nature and . . . it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, *the next and most difficult task is to provide some practical security for each, against the invasion of the others*.[113]

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head of the executive department, is annually *elected by a vote in which the legislative department predominates*." *Id.* at 306. In Delaware, "the chief executive magistrate is annually *elected by the legislative department*. The speakers of the two legislative branches are vice-presidents in the executive department." *Id.* In Maryland, "the executive magistrate [is] *appointable by the legislative department*." *Id.* In North Carolina, "the *legislative department [appoints] . . . not only . . . the executive chief, but all the principal officers* within both that and the judiciary department." *Id.* at 307. In South Carolina, "the constitution makes the *executive magistracy eligible by the legislative department*. It gives to the latter, also, the *appointment of the members of the judiciary department*, including even justices of the peace and sheriffs; and the *appointment of officers* in the executive department . . . ." *Id.* In Georgia, "we find that the executive department is to be filled by *appointments of the legislature*." *Id.* (emphasis added throughout).

For a similar argument made during the ratification debate, see 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 560-61 (Merrill Jenson ed., 1976) [hereinafter RATIFICATION DEBATES] (statements of James Wilson, Dec. 11, 1787) (criticizing the separation of powers in the state constitutions of Pennsylvania, New Jersey, Georgia, South Carolina, and North Carolina).

110. THE FEDERALIST No. 47, at 307.

111. THE FEDERALIST No. 51, at 321.

112. THE FEDERALIST No. 47, at 308.

113. THE FEDERALIST No. 48, at 308 (emphasis added).

We are left in suspense about what this practical security might be. Madison tells us only that it is "the great problem to be solved."[114] Yet, we are clearly on notice now of its importance—an importance that becomes clearer as each essay proceeds, as each considers and rejects solutions precisely because they fail to provide such security.

The first candidate, considered and rejected in No. 48, seeks to hold the departments in their place by constitutional boundary. "Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government," asked Madison, "and to trust to these parchment barriers against the encroaching spirit of power?"[115] The rhetoric betrays the answer: parchment barriers are not enough. Readers typically stop here, either puzzled by Madison's refusal to recognize the importance of textual prohibitions or admiring of Madison's skepticism about their efficacy. Both positions miss the point: Madison's rejection of boundaried solutions is not a statement of legal theory but a statement of political experience—constitutional boundaries had *already failed* to secure the separation of powers.

Early in No. 48, Madison reminds his readers that, after the Revolution, a number of states had included in their constitutions express provisions enjoining separate powers.[116] These provisions were "the security which appears to have been principally relied on by the compilers of most of the American Constitutions."[117] Madison warns that such provisions have been highly "overrated."[118] Over time, the states had come to violate the very injunction to separate power they had once drafted. At this point, Madison refers his readers to the experience of his own state, Virginia. Quoting at length from Thomas Jefferson's *Notes on the State of Virginia*, Madison explains that Virginia had relied upon an explicit constitutional provision requiring separate departments, but that this injunction had been violated time and time again:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body [in the State of Virginia]. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. . . . An *elective despotism* was not the government we fought for . . . .[119]

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114. *Id.*
115. *Id.*
116. *Id.*; *see supra* text accompanying note 105.
117. THE FEDERALIST NO. 48, at 308.
118. *Id.* at 309.
119. *Id.* at 310-11 (emphasis in original) (quoting JEFFERSON, *supra* note 17, at 120).

How had Virginia arrived so quickly at despotism by the legislature if its constitution expressly required separate and distinct departments? Madison's quotation from *Notes on the State of Virginia* tells us that "*no barrier was provided between these several powers.*"[120] But this answer seems unsatisfying. Virginia had provided a "barrier" in all conventional legal senses of the term. The Virginia Constitution expressly provided that "the legislative, executive, and judiciary departments should be separate and distinct."[121] Indeed, it had gone even further, barring "any person" from exercising the "powers of more than one of [the departments] at the same time."[122]

What, then, does Jefferson mean by his statement that "no barrier was provided"? The passage that follows this statement strongly suggests that the barrier mentioned was not a legal barrier, but a barrier against personal influence and bribery: "The judiciary and the executive members were left *dependent* on the legislative for their *subsistence* in office, and some of them for their *continuance* in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made . . . ."[123] Here, we see quite literally the echoes of the English opposition and their distrust of dependence and placemen, of political power corrupted by personal interest. In Virginia, the corruption had simply operated in reverse: the legislature had manipulated the executive through the executive's attributes of office—salary, removal, and appointment. As one commentator put it, the executive possessed "not a single feature of Independence" because "in Virginia, [it] is *chosen, paid, directed,* and *removed* by the legislature."[124]

By gaining the dependence of members of the executive and judicial branches, the Virginia Assembly obtained indirectly what it could not achieve directly. The legislature never proclaimed its "right" to judge cases or execute laws. It achieved that result, however, by manipulating the appointment, removal, and salary powers of the members of other departments. In the end, this was a far more effective means of obtaining power than an open declaration or usurpation. Once a department gains

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120. *Id.* at 311 (emphasis in original) (quoting JEFFERSON, *supra* note 17, at 120).

121. *Id.*

122. VA. CONST. OF 1776, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3812, 3815 (Francis N. Thorpe ed., 1909).

123. THE FEDERALIST No. 48, at 311 (emphasis added) (quoting Thomas Jefferson).

124. SYDNOR, *supra* note 72, at 87 (quoting ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 119 (1803)) (emphasis in SYDNOR); *see* 1 FEDERAL CONVENTION, *supra* note 1, at 203 (statement of Edmund Randolph of Virginia, June 11, 1787) (arguing that "[t]he Executive & Judiciary of the States, notwithstanding their nominal independence on the State Legislatures are in fact, so dependent on them" that they would never align themselves with the federal government).

the adherence of the members of another, it need not fear an adverse reaction: "[N]o opposition is likely to be made . . . ."[125] The result is not only structural but also self-perpetuating corruption. By the time of the Constitutional Convention, political experience had long shown that parchment barriers would prove no match for those who would seek to corrupt men, first.

C. Nos. 49 & 50: Judging One's Own Cause

In Nos. 49 and 50, Madison continues to lead the reader on a search for practical security by considering two proposals authored by Thomas Jefferson. In the first, breaches of separation would be resolved by a constitutional convention whenever two departments would agree to call for such a convention;[126] in the second, such breaches would be addressed by periodic constitutional conventions.[127] Ultimately, neither solution proves satisfactory to Madison, and, once again, Madison premises his rejection of these proposals upon political "experience."

Both of Jefferson's proposals fail because each poses the same risk presented in No. 48—the risk that constitutional structure will be determined by private, not public, interest. In No. 49, the risk comes from a legislature bent on doing what the Virginia Assembly had done, "gaining" to itself "the interest" of other departments' members.[128] If the legislature could bend to its will "even one third of [the] members" of another department and the two should combine to oppress a third department, Madison explains that the weaker department would "derive no advantage from Jefferson's remedy."[129] After all, what use is a constitutional convention subject to call by two departments if one department has corrupted the members of another? In No. 50, Jefferson's proposal for periodic conventions fares no better, again because the proposal offers incentives to use personal interest to subvert structure.[130] In both cases, Madison is less concerned about a corrupt bargain between the departments than he is about the incentives of those likely to be chosen as members of any body deciding structural questions. Popularly-elected conventions, Madison argues, will be "composed chiefly of the men" already sitting in the legislature, men who are "distributed and dwell among the people at large."[131] The same "influence which had gained them an election into

125. THE FEDERALIST No. 48, at 311.
126. THE FEDERALIST No. 49, at 313.
127. THE FEDERALIST No. 50, at 317.
128. THE FEDERALIST No. 49, at 314.
129. *Id.*
130. THE FEDERALIST No. 50, at 317-18.
131. THE FEDERALIST No. 49, at 316.

the legislature would gain them a seat in the convention."[132] Placing these men in the position of constitutional arbiters effectively puts them in the position of deciding their own cases: *legislators* will determine whether acts of structural aggrandizement *by the legislature* are consistent with the constitution.[133] In a republic, where structural encroachments are most likely to come "from the legislative at the expense of the other departments,"[134] such a proposal invites self-interested solutions that provide little "practical security" against departmental collapse.

D. No. 51: The "Due Foundation" and Practical Security

As Madison opens his final essay on the separation of powers, he restates the question he first asked in No. 47: "To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the constitution?"[135] At this point, we have seen one proposal after another rejected as insufficient: parchment barriers (No. 48); review by a constitutional referee (No. 49); and periodic reviews by the people (No. 50). And, still, Madison keeps the reader in suspense. He tells us that "[t]he only answer that can be given is that as all these exterior provisions are found to be inadequate," the defect must be supplied by an "interior" solution.[136] We must so "contriv[e] the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[137]

This bit of information should disappoint the reader looking for a discussion of executive, legislative, and judicial power. Nothing in this opening paragraph even mentions these ideas. We know only that, whatever solution Madison will propose, it will be one that involves the "interior structure" of the government and that it will be enforced by the departments themselves.[138] In the discussion below, I follow Madison's text as he first describes the "due foundation" for this structure (a part of the essay that has been largely ignored). I then consider Madison's ultimate prescription for the "practical security" his essays seek.

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132. *Id.*

133. *Id.* Madison does allow for the possibility of aggrandizements by other departments but is still doubtful about whether such disputes could be decided "on the true merits" because the judgment "would be pronounced by the very men who had been agents in, or opponents of, the measures to which the decision would relate." *Id.* at 316-17.

134. *Id.* at 315-16.

135. THE FEDERALIST No. 51, at 320.

136. *Id.*

137. *Id.*

138. *Id.* at 320-21.

1. The "Due Foundation."—Before Madison is willing to explain his "interior" solution, he begs for another delay, asking the reader to indulge a brief paragraph or two to set a "due foundation" for a forthcoming revelation:

> In order to lay a *due foundation* for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a *will* of its own . . . .[139]

Again, this answer seems calculated more to frustrate than to inform. Madison has not told modern readers what they expect to hear—that the "due foundation" for the separation of powers is a question of powers or functions or checks. Rather, he tells us that it depends upon something called "the *will*" of a department.

Although Madison never stops to define this *will* of the department, his text speaks almost immediately of the *persons* who run the departments: "[I]t is evident that each department should have a will of its own; and consequently should be so constituted that the *members* of each should have as little agency as possible in the appointment of the members of the others."[140] This reference to appointment—which seems at initial glance to be a digression—is the first of a series of crescendoed references to the attributes of office. From appointment, Madison moves on to removal and salary, arguing that tenure and salary protection are more than enough to protect the judiciary from dependence upon those who appoint them.[141] Madison adds that "[i]t is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices."[142]

The reader looking for powers and forms and functions is liable to skip over this passage, believing that the author has digressed. Modernity tends to resist the kind of anthropomorphism suggested by a departmental "will." In the eighteenth century, however, many believed that "the institutions of government were analogous to the individual's faculties of mind."[143] The "will" of a department was thus analogous to the will of

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139. *Id.* at 321 (emphasis added).

140. *Id.* (emphasis added).

141. *Id.*

142. *Id.* Madison acknowledges in an earlier essay that this is one of the facts from which the legislative department "derives a superiority." *See* THE FEDERALIST No. 48, at 310 ("[A]s the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.").

143. Daniel W. Howe, *The Language of Faculty Psychology in* The Federalist Papers, *in* CONCEPTUAL CHANGE, *supra* note 27, at 107, 120.

an individual. A department with a "will" was one that possessed the potential for independent choice, the ability to take action without corrupt or coercive influence. As the English Whig Trenchard put it, a House of Commons corrupted by places, pensions, and bribes was a political body without a "will."[144] Given this context, Madison's emphasis on the attributes of office becomes more apparent. Madison writes that the "will" of the department depends upon the independence of departmental members.[145] The independence of persons, in turn, depends upon protecting the attributes of office—salary, tenure, and appointment—from corrupt interference by other departments. In short, just as an individual's will is not his own if he is bound, by interest or threat, to another, a department's will is not its own if its members are subject to claims or interests of other departments.

To put this in more modern terms, Madison relied upon what is, in the end, most immediate and important to persons—their livelihood—to provide a "due foundation" for the separation of powers. Even today, it is an article of faith that the power to remove officers is one of the most important political powers residing in any government: the power to cut short an employee's tenure creates the power to force an employee to cleave to the policies of the institution holding the removal power. The same goes for salary and appointment powers. To render individual members of one department "dependent" upon another for their daily pay is to create the opportunity that "subsistence" may be withheld to obtain special favors or changes of position.[146] Similarly, the power to appoint carries with it the hope of future concessions from the appointee.

Here, for the first time, we have an important clue to the "interior structure" that Madison has promised: to protect the institution, one must protect the persons *within* the institution. Private interest must not dictate public interest. Thus, individual officers should be as independent[147] as possible from influence by other branches when it comes to matters in which their personal interest may obscure their public duties. And that means security for persons—the security from fear that one's livelihood

144. TRENCHARD, *supra* note 46, at 140-41.

145. THE FEDERALIST No. 51, at 321.

146. Although Congress retains the power of the purse, it may not use that power to diminish the salary of the president or members of the judiciary while those individuals remain in office. U.S. CONST. art. II, § 1, cl. 7; art. III, § 1. And, although Congress sets the "terms" for offices, it may not punish a particular officer by reducing her salary. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto law shall be passed.").

147. By the term "independent," I borrow the Madisonian usage, *not* the contemporary usage associated with the term "independent" agencies. "Independence," in the sense I am using it here, means independence from the corrupt influence of other departments (*inter*-departmental independence), *not* independence from political influences *within* a department (*intra*-departmental independence). For more on this subject, see *infra* notes 355-87 and accompanying text.

will be at risk if one pursues the obligations of office. "Dependence" might be achieved by any one of a number of factors (for example, the power of appointment, the power to remove, or the power to determine individuals' salaries).[148] At the same time, "independence" might be achieved through a combination of features.[149] The key in each case is whether the attributes of office, viewed as a whole, give officeholders a personal incentive to maintain or subvert the public mission of their departments.

Madison's argument that the departments should have a "will" of their own was neither an isolated reference, nor an odd turn of phrase: we see it foreshadowed in each of the preceding essays. In No. 47, we see Madison's claim that the state constitutions had failed to "maintain[ ] in practice the separation delineated on paper" because they "mixe[d]" appointment, removal, and salary provisions, permitting one to control the appointment and removal of the members of other departments.[150] In No. 48, Madison elaborates on this critique and focuses on Virginia, where the legislature had held the executive in check by manipulating its "subsistence" and "continuance" in office.[151] And in Nos. 49 and 50, we see Madison's wariness of solutions that pose a risk that private interest will determine constitutional structure.[152]

These essays, with their focus on "officers and offices,"[153] reflect basic understandings of the time about the nature of politics and political incentives. Both proponents and opponents of the Constitution were heirs to a political discourse in which "dependent" officers figured prominently.[154] The Whig opposition taught the Framers the destructive power of the English placemen, who sat in Parliament but were allegiant to the King.[155] The objection to "dependent" officers was not only an intellec-

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148. *See, e.g.*, THE FEDERALIST No. 48, at 310-11 (describing the "dependence" of executive officers under the Virginia Constitution created by a control over tenure and subsistence).

149. *See, e.g.*, THE FEDERALIST No. 51, at 321 (describing how the judiciary's appointment by other departments does not render it "dependent" on those departments because of its tenure and salary protections).

150. THE FEDERALIST No. 47, at 308, 304, 303-08.

151. THE FEDERALIST No. 48, at 310-11 (quoting JEFFERSON, *supra* note 17, at 120).

152. THE FEDERALIST No. 49, at 316-17; THE FEDERALIST No. 50, at 319; *see supra* text accompanying notes 126-34.

153. *Cf.* James Madison, Removal Power of the President (June 22, 1789), *in* 12 THE PAPERS OF JAMES MADISON 254, 255 (Charles F. Hobson & Robert A. Rutland eds., 1979) [hereinafter PAPERS OF MADISON] ("[I]f there is any point in which the separation of the legislative and executive powers ought to be maintained with greater caution, it is that which relates to officers and offices.").

154. *See supra* text accompanying notes 42-72.

155. References to the corruption of the British placemen appear throughout Madison's notes of the Constitutional Convention. *See, e.g.*, 1 FEDERAL CONVENTION, *supra* note 1, at 86 (statement of John Dickenson of Delaware, June 2, 1787) ("In the British Govt. itself the weight of the Executive arises from the attachments which the Crown draws to itself, & not merely from the force of its prerogatives. In place of these attachments we must look out for something else."); 1 *id.* at 99

tual position, but also a political fear, repeatedly expressed during the Constitutional Convention and the ratification debates.[156] Federalists and antifederalists alike entreated their colleagues to preserve the "independence" of those who would wield the power of government.[157]

Of course, the "independence" that Madison admired was only partially fulfilled in the Constitution.[158] The Senate's advice and consent power and Congress's impeachment power are two obvious reminders that the Constitution authorizes departments to exercise control over individual members of other departments.[159] Madison knew that the Constitution

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(statement of Benjamin Franklin of Pennsylvania, June 4, 1787) ("It was true the King of G.B. had not, As was said, exerted his negative since the Revolution: but that matter was easily explained. The bribes and emoluments now given to the members of parliament rendered it unnecessary . . . ."); 1 *id.* at 380-81 (statement of George Mason of Virginia, June 22, 1787) ("I admire many parts of the British constitution and government, but I detest their corruption. — Why has the power of the crown so remarkably increased the last century? A stranger, by reading their laws, would suppose it considerably diminished; and yet, by the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom."); *see also* 1 *id.* at 101 (statement of George Mason of Virginia, June 4, 1787) (referring to the role of "bribery & influence" in the workings of the British executive); 1 *id.* at 387 (statement of George Mason of Virginia, June 23, 1787) (mentioning "the abuses & corruption in the British Parliament, connected with the appointment of its members"); 1 *id.* at 376 (statement of Pierce Butler of South Carolina, June 22, 1787) (arguing that in Great Britain, "the source of the corruption that ruined the[] Govt." was that "men got into Parl[iament] that they might get offices for themselves or their friends"); 1 *id.* at 391 (statement of Pierce Butler of South Carolina, June 23, 1787) (discussing George II's practice of giving his opponents other offices or pensions in order to silence the opposition).

156. *See, e.g.*, FEDERALISTS AND ANTIFEDERALISTS, *supra* note 23, at 76 ("If he [a senator] places his future prospects in the favours and emoluments of the general government, he will become the dependant and creature of the President, as the system enables a senator to be appointed to offices [*sic*] . . . ; as such, he will favour the wishes of the President, and concur in his measures . . . ." (quoting *Luther Martin's Genuine Information*, MARYLAND GAZETTE, Jan. 8, 1788) (emphasis omitted)); 2 RATIFICATION DEBATES, *supra* note 109, at 567 (statement of James Wilson, Dec. 11, 1787 ("To have the executive officers dependent upon the legislative would certainly be a violation of that principle so necessary to preserve the freedom of republics, that the legislative and executive powers should be separate and independent.").

157. *See, e.g.*, 2 RATIFICATION DEBATES, *supra* note 109, at 508 (statement of John Smilie, Dec. 6, 1787) (presenting the antifederalists' argument that the Senate's power of appointment was a "share in the executive department" and, as such, would "corrupt the legislature" and "make the President merely a tool to the Senate"); DISSENT OF THE MINORITY OF THE CONVENTION (Dec. 18, 1787), *reprinted in* 2 *id.* at 634 (arguing that "the judges of the courts of Congress would not be *independent*, as they are not debarred from holding other offices during the pleasure of the president and senate, and as they may derive their support in part from fees alterable by the legislature" (emphasis added)). For references to the importance of the "independence" of officers at the Constitutional Convention, see *supra* notes 73-80 and accompanying text.

158. For example, Madison saw the Senate's role in appointing executive branch officers as an "exception" to be narrowly construed. *See infra* text accompanying notes 242-44; 12 PAPERS OF MADISON, *supra* note 153, at 233 (noting this "exception").

159. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 6 (providing that the Senate shall try impeachments); art. II, § 2, cl. 2 (allowing the president to appoint officers "by and with the Advice and Consent of the Senate"); art. II, § 1, cl. 3 (giving the House of Representatives the power to choose the president in case no candidate has a majority of votes of the electors); art. II, § 2, cl. 2 (providing that the Justices of the Supreme Court are to be named by the president "by and with the Advice and Consent

did not adhere to the principle of independence with "theoretical precision"[160] and that these failures were the product of political compromise.[161] And, yet, he and others firmly believed that the independence principle was "more strictly adhered to" in the federal constitution than it had ever been before—in the British Constitution, in any of the state constitutions and, indeed, as James Wilson was to put it at the Pennsylvania ratifying convention, "in any other system of government in the world."[162]

Today, this is difficult to see because the powers that allow a department to influence individual officeholders across departmental lines—the power to confirm appointments or to impeach executive officers—are often scenes of enormous political and constitutional conflict. Placed in historical perspective, however, these powers offer opportunities for influence across departmental lines that pale compared to a multitude of provisions that the Constitutional Convention considered and rejected.[163] We might have inherited a Constitution in which the president was elected

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of the Senate"). Constitutional omissions such as the lack of an incompatibility clause barring service by judges in the executive branch also create opportunities for cross-departmental influence. *See* Calabresi & Larsen, *supra* note 19, at 1122-29, 1131-33 (emphasizing the Constitution's failure to provide an incompatibility clause barring federal judges from serving in the executive branch).

160. 2 RATIFICATION DEBATES, *supra* note 109, at 561 (statement of James Wilson, Dec. 11, 1787).

161. At first glance, Madison appears to have violated this principle himself in his proposal for a council of revision. *See* 1 FEDERAL CONVENTION, *supra* note 1, at 74 (statement of James Madison of Virginia, June 1, 1787) (expressing his opinion that "an Executive formed of one Man would answer the purpose when aided by a Council, who should have the right—to advise and record their proceedings, but not to control his authority"). It is important to remember, however, that the council was proposed as a counterbalance to the legislature when the president was to be appointed by, and hence "dependent upon," the legislature. 1 *id.* at 70-71 (June 1, 1787).

162. 2 RATIFICATION DEBATES, *supra* note 109, at 561 (statement of James Wilson, Dec. 11, 1787); *see* THE FEDERALIST No. 47 (asserting that the Constitution embodies the independence principle more fully than either the British Constitution or the state constitutions). In this sense, Madison understood that the institutional design of the Constitution was, to use Neil Komesar's term, a question of "imperfect alternatives." *See generally* NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

163. A variety of important structural provisions ensures the independence of those who hold government power: U.S. CONST. art. I, § 2, cl. 1 (providing for the election of the House of Representatives by means independent of the other departments—"by the People"); art. I, § 3, cl. 1 (providing for the election of senators by means independent of the other departments—by the state legislatures); art. I, § 5, cl. 2 (specifying that the removal of members of Congress is to be determined by Congress itself); art. I, § 6, cl. 1 (allowing congressional salaries to be determined by Congress "by Law"); art. I, § 6, cl. 2 (separating the members of the executive and legislative departments by declaring that no member of Congress shall be an executive officer and no executive officer shall be a member of Congress); art. II, § 1, cls. 2-3 (establishing that the president is to be elected by means independent of the other departments—by a system of "Electors"); art. II, § 1, cl. 7 (limiting Congress's power to reduce or increase the president's salary); art. II, § 2, cl. 2 (authorizing the president to appoint his own executive officers); art. III, § 1 (granting life tenure and salary protections to judges).

by Congress[164] or in which members of the Senate were elected by the House.[165] These proposals, and others, were considered and rejected at the Constitutional Convention because they created an improper structural "dependency" of one department upon another[166]—a dependency that offers far more opportunity for abuse than any of the cross-departmental connections that remain today.

Experience under the state constitutions had taught Madison and his generation that even the clearest of constitutional injunctions to separate power could not survive internal corruption. No particular division of powers or functions would work *in practice* if those who wielded the power had an interest in subverting that division. No boundaries defining the powers or the forms of the departments would achieve separation *in practice* if those who wielded the power had an interest in leaping those boundaries. No check or balance would prevent the violation of separation *in practice* if the persons who controlled the branches had no incentive to assert such checks. Disintegration and collapse would be as inevitable as they were in England and the American colonies. It was this political fate that Madison hoped might be avoided by a "due foundation" resting squarely, if not perfectly, on the "independence" of persons.

2. "Practical Security" Explained.—Now that we have seen that Madison's "foundation" rests upon independent offices, we are capable of completing the picture Madison has promised since *Federalist* No. 47—a picture of the "practical security" that will maintain the separation of powers. Only with this foundation in place is it possible to see that Madison's ultimate solution cannot be described in the conventional terms of checks, or shared powers, or functional divisions. In what follows, I turn to the remainder of the essay's argument and its ultimate reliance on the "foundation" built at the beginning of the essay.

Having laid the groundwork for his final argument, Madison proceeds to explain that independence is necessary but not sufficient to secure the

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164. The Virginia Plan provided "that a National Executive be instituted; to he chosen by the National Legislature for the term of [blank] years . . . ." 1 FEDERAL CONVENTION, *supra* note 1, at 21 (May 29, 1787) (recording the resolutions proposed by Edmund Randolph of Virginia). "The Convention [attendees] . . . were perplexed with no part of this plan so much as with the mode of choosing the President of the United States." 2 RATIFICATION DEBATES, *supra* note 109, at 566-67 (statement of James Wilson, Dec. 11, 1787).

165. The Virginia Plan provided that "the members of the second branch [the Senate] . . . be elected by those of the first [the House]." 1 FEDERAL CONVENTION, *supra* note 1, at 20 (May 29, 1787) (recording the resolutions proposed by Edmund Randolph of Virginia).

166. 1 *id.* at 80-81 (June 2, 1787); 1 *id.* at 174-76 (June 9, 1787) (both documenting concerns about the dependence of the executive upon Congress if the executive were to be chosen by Congress); 1 *id.* at 152 (June 7, 1787) (documenting concerns about the dependence of the Senate on the House if senators were to be elected by the House).

separation of powers: "But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[167] This union of "means" and "motives" is explained in one of the most famous, and most difficult, passages in *The Federalist*:

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?[168]

The crucial line here is Madison's statement that "[t]he interest of the man must be connected with the constitutional rights of the place." The trouble comes with the term "interest." What is the "interest of the man" that Madison has sought to bind to his place? No other single word in *The Federalist* has led to as much confusion and inspired such wildly differing understandings of the document. From Charles Beard's interpretation of "interest" as "economic self-interest"[169] to modern pluralists' adoption of "interest" as the rough equivalent of modern "interest groups,"[170] much has hung upon the meaning of this phrase.[171] Unfortunately, this otherwise lively debate has left us without a common understanding of "interest,"[172] a crucial element in our analysis of the union of "means" and "motives" that Madison believed necessary to guard against the concentration of power.

Historians and political scientists tell us that in the eighteenth century, "interest" was a far more active psychological principle than we imagine

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167. THE FEDERALIST No. 51, at 321-22.

168. *Id.* at 322.

169. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 17, 14-18 (rev. ed. 1943) (arguing that the Constitution was the product of "a group of economic interests which must have expected beneficial results from its adoption"). Although Professor Beard's specific thesis may have been overdrawn, his more general point that the Constitution was the "product of human behavior and human decisionmaking" remains a crucial twentieth-century insight from which much modern scholarship has proceeded. *See* Neil K. Komesar, *Paths of Influence—Beard Revisited*, 56 GEO. WASH. L. REV. 124, 124 (1987).

170. *See* DAHL, *supra* note 40, at 22, 20-22.

171. For an explanation of the importance of both majoritarian and minoritarian "interests" to the Framers, see KOMESAR, *supra* note 162, at 217-20 (explaining the federalists' concern about potential majoritarian excesses and the antifederalists' concern about minoritarian bias).

172. *See, e.g.*, MORTON WHITE, PHILOSOPHY, *THE FEDERALIST*, AND THE CONSTITUTION 105-12 (1987) (distinguishing between "interest," "economic interest," and Madison's use of the word "interest" to mean "the general desire for ultimate happiness"); WILLS, *supra* note 18, at 201-07 (asserting that "interest" is used in *The Federalist* as a pejorative term akin to "ambition").

today.[173] One with an "interest" in something was believed likely to act in accordance with that interest. A typical "interest" was a bond or attachment. One was presumed to act in accordance with persons who shared or enforced one's "interest"; for example, the placemen were "governed by interest" because they were bound to the King.[174] At the same time, an "interest" might be used to refer to the bond or attachment itself; thus, mixed government theory taught that it was the balance of "interests" that maintained stability, referring to economic and social bonds of the monarchy, the aristocracy, and the commons.[175]

What, then, does Madison mean when he urges that the interest of the man must be connected to the constitutional rights of the place? Put in modern terms, Madison is describing a phenomenon we might today describe as "allegiance." The members of any institution—whether political, commercial, or educational—typically come to identify with the institutions they serve. Today, we see this frequently: the presidential candidate who decries the excesses of executive power but who, once in office, refuses to cede even the slightest constitutional authority; the congressional candidate who decries congressional investigatory power but later initiates a broad-reaching investigation. Each of these actors, upon becoming a member of the institution he once criticized, eventually allies himself with the "interests" of his institution.

Although I have described the concept in modern terms, Madison's idea is firmly grounded in eighteenth-century political psychology. When Madison speaks of governing man by his own "ambition," he speaks as a man of his philosophical generation. The echoes of the philosopher David Hume are as unmistakable in No. 51 as they are in No. 10.[176] When Madison takes man's less-than-angelic character as an axiom of government, he mimics Hume's assumption that "in contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a knave."[177] When

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173. On the eighteenth-century idea of "interest," see generally ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 38, 31-48 (1977) (concluding that eighteenth-century philosophers narrowed the meaning of "interest" to the pursuit of material, economic advantage) and Stephen Holmes, *The Secret History of Self-Interest*, *in* BEYOND SELF-INTEREST 267 (Jane J. Mansbridge ed., 1990) (analyzing seventeenth- and eighteenth-century philosophers' understanding of "interest" both as one motive among others and as the fundamental motor propelling all human efforts).

174. HUME, *supra* note 34, at 51.

175. As Hume and others taught, "interest" was essential to fidelity to government. WILLS, *supra* note 18, at 31 (explaining Hume's belief that shared interest lead humans to form governments).

176. Historian Douglass Adair discovered Madison's debt to Hume in his famous analysis of *Federalist* No. 10, *"That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist* (1957), *reprinted in* FAME AND THE FOUNDING FATHERS, *supra* note 22, at 93, 97-106.

177. HUME, *supra* note 34, at 42 (emphasis omitted). This was, of course, a common feature of much thought during the late seventeenth and eighteenth centuries. *See, e.g.*, GWYN, *supra* note 26,

Madison extends that assumption such that "[a]mbition must be made to counteract ambition,"[178] Hume finishes the thought: "By this [private] interest we must govern him, and, by means of it, make him, notwithstanding his insatiable avarice and ambition, co-operate to the public good."[179] Making Humean "bad men . . . act for the public good"[180] is precisely the goal of Madison's "policy of supplying by opposite and rival *interests*, the defect of better motives."[181] To connect the interest of the man to the rights of the place is to put a bond between person and institution[182] in the service of a public goal, namely separated departments, so that, as Madison puts it, "the private *interest* of every individual may be a sentinel over the public rights."[183]

The allegiance of person to place provides not only "hydraulic pressure," which pushes each department to maintain its powers, but also the internal force restraining the departments from openly destroying each other. Individuals, allied to the branches, seek to further the "rights" of the institution to which they are allied, expanding their power as they assert those rights. At the same time, however, each department must take into account the idea that its rivals have precisely the same incentives and interests. If you know that your rival for power may wield power in return, power that may destroy you, you think twice before picking a fight.[184] This "anticipation of antagonism" provides a powerful motive that restrains overt usurpation.[185] "Ambition . . . counteract[ing]

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at 23 ("Men are so subject to vices, and passions, that they stand in need of some restraint in every condition; but especially when they are in power." (quoting ALGERNON SYDNEY, *Discourses Concerning Government*, *in* THE WORKS OF ALGERNON SYDNEY (1772))); TRENCHARD, *supra* note 46, at 138 ("It is certain that every Man will act for his own Interest; and all wise Governments are founded upon that Principle: So that this whole Mystery is only to make the Interest of the Governors and Governed the same.").

178. THE FEDERALIST No. 51, at 322.

179. HUME, *supra* note 34, at 42.

180. *Id.* at 16.

181. THE FEDERALIST No. 51, at 322 (emphasis added).

182. Hume believed that one of the most politically important affections was an "'imaginary interest,' whereby individuals attach themselves psychologically to a leader whom they will never meet and from whom they can expect no material benefits." Holmes, *supra* note 173, at 273.

183. THE FEDERALIST No. 51, at 322 (emphasis added). The idea that one should recruit the passions of ambition and avarice in the service of a greater good was not, of course, limited to Hume. It was a staple of much political theory of the day. *See* HIRSCHMAN, *supra* note 173, at 14-20 (surveying various views on repressing and harnessing the passions).

184. As Professor Charles Black puts it: the president knows that "Congress, given the will, could put the White House up at auction." Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 18 (1974). Not surprisingly, the president has traditionally picked his fights. On power relationships and institutional design, see generally KOMESAR, *supra* note 162, at 196-231.

185. Judith N. Shklar, *Publius and the Science of the Past*, 86 YALE L.J. 1286, 1293 (1977).

ambition" and "opposite and rival interests"[186] tell a tale not only of vigor but also of self-restraint.

This reading fits well with Madison's plea for an "interior" solution to the problem of separated powers. The impulse to separate comes from *within* the departments: powered by the allegiance of individuals, each department pushes outward and expands to the limits of its power. Imagine that the departments were parts of a machine—as the Framers were wont to do[187]—and that each part represented an expandable chamber sharing a wall with another part. In such a scheme, each chamber's *internal* expansion serves to limit the reach of the power of its coordinate branch. Interest fuels both this hydraulic pressure and its restraint by expanding the chamber to limits set by the expansion of neighbor chambers. In such a scheme, the interior structure of the departments has been "so contrived" that its "several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[188]

A crucial feature of this plan is the role of interest—a feature few notice today. It is easy to misread *The Federalist* as expressing the idea that the departments will check each other's power. But the policy Madison advocates is not one supplying opposite and rival departmental *powers*; it is a policy of supplying "opposite and rival *interests*."[189] Context shows that Madison used these words differently: the "policy" is one of supplying "the defect of better motives," not powers; it is justified as a common way of dividing and arranging "offices," not powers; and it is intended, in the end, to ensure that private interest may be a "sentinel over the public rights" of the place.[190] When modern readers collapse the ambition of the department and the individual officeholder, they skip a crucial step. They miss the importance of the interests of the individual officeholder and, as a result, fail to see the importance of the protections for that interest contained in Madison's "due foundation."

This reading not only provides the missing "interior" solution, but it also explains why Madison expends so much effort in the early part of the essay discussing the "due foundation." Divided allegiance makes it impossible for the "constituent parts" of the government to "keep each

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186. THE FEDERALIST No. 51, at 322.

187. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 17 (1986) (quoting Thomas Jefferson and John Adams, who both referred to government as "the great machine"); *see also* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54, 54-55 (1947) (arguing that the Framers based their theory of "political dynamics" on an "unconscious copy of the Newtonian theory of the universe").

188. THE FEDERALIST No. 51, at 320.

189. *Id.* at 322 (emphasis added).

190. *Id.*

other in their proper places."[191] Consider the State of Virginia, where the legislature maintained control of the executive department by controlling individual members' subsistence and tenure. Because of that divided allegiance, the executive in Virginia could not "expand" to assert its constitutional rights despite an express constitutional provision demanding separate powers. The lesson of Virginia was clear: a government can have a perfectly drawn system on paper, but it will not prevent the departments from converging if individuals' allegiances to those departments are not secure.

Madison's "practical security" stands on the shoulders of many eighteenth-century beliefs and fears. The genius of No. 51 does not lie in its consistency with any known theory or philosophy of the separation of powers, but in the ease with which Madison strikes a new American version of the separation of powers. In No. 51, Madison took Hume's premises about human nature, but adopted Bolingbroke's political solutions.[192] He accepted the idea that men were knaves and concluded that the independence, rather than dependence, of persons was a crucial foundation for the separation of powers. He took Blackstone's mixed government theory and married it to Trenchard's republicanism, replacing mixed government's idea of warring social and economic interests—interests incompatible with the new republic—with warring offices and departments. All of this, ultimately, was placed in the service of a single goal—that the "distribution and organization of [the Constitution's] powers" would limit the "dependence" of one department upon the other and better "secure the dependence of the Govt. on the will of the nation" as a whole.[193]

3. The Separation of Powers "Working.".—This reading of *The Federalist*, with its emphasis on personal incentives and institutional allegiance, will frustrate modern ears straining for the sound of definition. In part, this frustration reflects an unstated commitment to a particular idea of political power, a point that I argue in detail in Part IV. This frustration also reflects, however, the difference in our self-assigned tasks: for Madison, the key was to create a system that would "work," that would

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191. *Id.* at 320.

192. Bolinghroke, and his followers, argued strongly against a system in which the King could enforce dependence on the Parliament by the selling of "places." *See supra* note 35. By contrast, Hume argued that "dependence" was essential to maintain liberty. *See* HUME, *supra* note 34, at 45 ("We may, therefore, give to this influence what name we please; we may call it by the invidious appellations of *corruption* and *dependence*; but some degree and some kind of it are inseparable from the very nature of the constitution, and necessary to the preservation of our mixed government." (emphasis in original)).

193. James Madison, Note to his Speech on the Right of Suffrage (1821), *in* 3 FEDERAL CONVENTION, *supra* note 28, at 451.

avoid the failures of the state constitutions and the Articles of Confederation. Today, the question is no longer whether our government works, but whether our system remains legitimate—whether governmental innovations remain consistent with constitutional principle.[194] This search, aimed as it is at courts and driven by the perceived need for legitimacy, seeks certainty in consistency, definition, and classification.

Madison found no security in definition or classification;[195] the dangers he perceived to governmental structure were political, not categorical. Personal and political corruption had destroyed the departmental separation mandated by state constitutions. Madison intended to ensure, to the extent possible, that the institutional structure of the federal government would prevent similar dependencies. Once this structure was in place, and the danger of gradual or secret encroachments had been minimized,[196] controversy over the distribution of power would be driven into the open. Freed of personal interest, political power would become less a commodity—a thing to be bartered based on one's "interest" in power—than a matter of popular will.[197] By taking away private incentives for departmental usurpation, Madison hoped to bring structural controversies out into the open where all could judge.[198]

Madison was willing to tolerate a political battleground for the separation of powers as long as no branch could rig the rules, cast the play themselves, corrupt the decision before the argument. Naively or not, Madison believed that the system would be largely self-regulating, that any department that sought openly to steal another's power would be met with swift reprisals, both popular and institutional.[199] However unrealistic this might seem in theory, experience has tended to bear out Madison's faith that a system based on independence and political allegiance would sustain separation, even though it might still leave us guessing about questions of classification, functional overlap, and legitimacy. Surely, we have seen

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194. *See, e.g.*, Carter, *Improprieties*, *supra* note 13, at 357 ("[T]he courts in structural cases should act as referees, and their proper role in determining the legitimacy of an institutional innovation is rigid enforcement of the rules.").

195. THE FEDERALIST No. 37, at 228-29 (expressing skepticism about ever being able to define departmental boundaries).

196. *See* THE FEDERALIST No. 48, at 311 (noting the ability of legislatures to "mask" encroachments "on the co-ordinate departments"); THE FEDERALIST No. 51, at 322 (arguing that the legislative power's necessary "predominat[ion]" will be remedied by bicameralism and a partial alliance between the Senate and the executive).

197. Pocock, *supra* note 27, at 63-65.

198. *See* ROBERT J. MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS 34 (1988) (arguing that Madison wanted to prevent interbranch "encroachment" which "is a subtle and largely invisible process").

199. *Id.*; *see* THE FEDERALIST No. 51, at 322-23 (asserting that the rival departments will defend against power aggrandizement and that the multitude of interests in society will act as a separate safeguard).

presidents, Congresses, and courts grab power. But two hundred years after *The Federalist* was written, the departments do retain identifiably different institutional identities. This is nowhere more clear than *within* those institutions: just ask the people who run the departments in the White House, Congress, and the courts. Ask them who they work for; ask them who their constituencies are; and ask them what they think of their rival departments.[200] If you listen, you will hear the separation of powers "working."

III. *The Federalist* Through Modern Lenses: Checks, Shared Powers, and Functional Division

The story I have told differs rather markedly from the stories traditionally told about *The Federalist*. In the course of this retelling, I have deliberately avoided terms typically used to describe the separation of powers, such as "checks and balances," "shared powers," or "functional division." In this Part, I explain that choice, arguing that each of these canonical understandings leaves us with a partial and often misleading view of the separation of powers. As I explain more fully in Part IV, checks, shared powers, and functional division all disappoint for the same reason: each has neutralized the idea of power, bleaching it of persons and politics, leaving a separation of powers built upon a sterile, contradictory description of law and function.

A. Checks and Balances

The term "checks and balances" sums up our most common ideal of the separation of powers. Not surprisingly, it has come to be associated with Madison's *Federalist* essays on the separation of powers.[201] Although the phraseology is slightly anachronistic, Madison did believe that the departments should be granted powers of self-defense.[202] The idea

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200. I do not mean to suggest by this that the departments are either organized or unified. It is no doubt true that members of independent executive, judicial, or congressional agencies may, on particular matters, find it hard to identify their constituency or their boss. Granting that, however, it still seems plausible to me that the vast majority of departmental officials, including those who work for independent agencies, are very rarely confused about the identity of their institutional rivals. (The capitol police, for example, are not likely to think that they work for the White House, and members of the Federal Trade Commission are not likely to think that they work for Congress.)

201. Literally hundreds of references to Madison and checks and balances appear in cases, treatises, and law review articles. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 470 (1972) (Rehnquist, J., dissenting) (quoting *Federalist* No. 51 to clarify the purpose behind the system of checks and balances); GWYN, *supra* note 26, at 3 (attributing to Madison the practice of writing "of political checks and balances rather than the separation of powers"); Calabresi & Praksh, *supra* note 13, at 568 n.69 (stating that Madison defends "the wisdom of checks and balances" in *The Federalist* (quoting THE FEDERALIST NO. 37, at 228)).

202. Madison was far more partial to the term "defense" or "defensive power." *See, e.g.*, THE FEDERALIST No. 51, at 321-22 (stating that "[t]he provision for *defense*" against "a gradual

is simple enough: when one department exceeds its powers, a rival department will use its specified constitutional authority to bring the first department back into line. In this sense, the paradigmatic checking power is the presidential veto, which allows the executive to reject, and thus restrain, excess legislative zeal.

Although common, this vision of Madison's theory has also proved troubling: if pushed, it seems either to swallow or to erase the idea of separation. If checks do the work of separation, then what independent purpose does the ideal of separation serve?[203] Perhaps we simply have a government of "checks."[204] But this position raises further questions. "Checks and balances have to do with the corrective *invasion* of the separated powers . . . ."[205] At this point, the checks advocate finds herself struggling: separation has been replaced by checks that have, in turn, been defined as departmental trespass. Where, she asks, has all the *separation* gone?

Despite the prevalence of the "checks" interpretation, my rereading suggests that Madison's essays cannot stand alone on a "checks" theory. Indeed, I believe that the essays themselves show why a system based on "checks" alone would fail. From Nos. 47 through 50, Madison's message is insistent: defensive power, power delineated on paper, is only as good as the structural incentives created to protect the independence of those who wield that power. So-called "checking powers" offer us no protection—indeed they may even *encourage* departmental collapse—if those who wield them have a personal incentive to undermine separate institutional identities.[206] At best, checks represent a necessary, rather than a sufficient, description of the Madisonian separation of powers.

This argument first appears in No. 47, although it is hidden in Madison's commentary on the state constitutions. Madison concludes his analysis by telling us that "in no instance" had any state produced a "competent provision" for "maintaining in practice the separation delineated on paper."[207] This indictment—indeed Madison's entire

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concentration of the several powers" shall "be commensurate to the danger of attack"); *id.* at 322 ("[I]t is not possible to give to each department an equal power of *self-defense*.") (emphasis added throughout). The term "check" alone appears only once in *Federalist* Nos. 47-51, and then in conjunction with the idea of separate "offices," not powers. *Id.* at 322.

203. *See* Merrill, *supra* note 13, at 232 (noting that modern views on the separation of powers become "indistinguishable from a free-floating checks and balances" theory).

204. *See, e.g.*, Greene, *supra* note 13, at 177-79 (arguing that the checking function is the essential "principle" of the separation of powers).

205. WILLS, *supra* note 18, at 119 (emphasis in original). Madison acknowledges this dilemma in his famous statement that the Constitution requires sufficient blending that each department may have a "constitutional control" over the others. THE FEDERALIST No. 48, at 308. For a complete discussion of this statement, *see infra* notes 234-44 and accompanying text.

206. *See infra* text accompanying notes 213-15.

207. THE FEDERALIST No. 47, at 308; *see supra* subpart II(A) (explicating No. 47).

analysis of the state constitutions—makes very little sense if we believe that Madison's "solution" lay in checking powers alone. If "checks" were the measure of practical security, why would every state have failed to provide a "competent provision" for maintaining separation? Several of the state constitutions Madison analyzed in No. 47 included powers we now associate with "checks," including the executive "veto power."[208] Madison did not single out for applause those state constitutions with checking powers, nor did he single out for criticism those without such powers. Instead, he described each, at least implicitly, as improperly melding powers and persons in ways that permitted the state legislatures to corrupt and control the members of other departments.[209] If "checking powers" really were Madison's candidate for practical security, his analysis of the state constitutions never reveals it.

No. 48 makes the point even more clearly. There, Madison reminds us that, despite all precautions, including express constitutional barriers, the state legislatures had made substantial encroachments on executive power. In Virginia, the "judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it."[210] The danger had not been created by the delineation of power on paper; the danger was created because those in power had no incentive to maintain separation. If the legislature were to assume "executive and judiciary powers, no opposition is likely to be made . . . ."[211] Checks in the hands of a "dependent" executive or judiciary were of no use *because they would not be used.*[212]

Indeed, checks may become tools to *undermine* the separation of powers. During the Constitutional Convention, Madison and others voiced considerable fear that the presidential veto, for example, would not be used and that disuse might lead to usurpations by the legislature.[213] Others feared that it could be abused: Dr. Franklin explained that "[h]e had some experience of this check in the Executive on the Legislature, under the proprietary Government of [Pennsylvania where t]he negative of the

208. Massachusetts had given its governor a conditional veto, and New York had granted this power to its council. THE FEDERALIST No. 47, at 304-05. Madison also refers to other so-called checks provided for by state constitutions, such as the impeachment power. *See id.* at 304-07.

209. *Id.* at 304-08.

210. THE FEDERALIST No. 48, at 311.

211. *Id.*

212. A similar argument appears in Nos. 49 and 50, in which Madison warns that any proposal to decide constitutional breaches will be distorted if left to those who have an "interest" in the outcome. THE FEDERALIST No. 49, at 317; THE FEDERALIST No. 50, at 318-20; *see supra* subpart II(C).

213. 1 FEDERAL CONVENTION, *supra* note 1, at 107 (statement of James Madison of Virginia, June 4, 1787) (questioning whether the veto power would be used "because no man will dare exercise it [when] the law was passed almost unanimously").

Governor was constantly made use of to extort money."[214] According to Franklin:

> No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition [of the veto]; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed . . . .[215]

The lesson is the same here as we have seen before, only in reverse: checking powers may be used as much to usurp as to defend if the persons who wield them have the means and the incentive to use them for personal advantage.

Finally, the checking theory fits uncomfortably with *Federalist* No. 51, Madison's culminating essay on the separation of powers. As noted above, Madison opens this essay with a call for an "interior" solution to maintain the separation of powers because all "exterior" solutions have failed.[216] Although Madison does not define the term "exterior," we know from earlier essays that parchment barriers and constitutional conventions fail his standards as "exterior" solutions.[217] This immediately calls into question the idea that "checking powers" qualify as an interior solution. Checking powers only work "externally"—they are imposed from without, by one department against another.

Garry Wills has suggested that some of these textual difficulties might be resolved if we focused less on checks as a whole and more on a particular check—the bicameral legislature.[218] At least superficially, this suggestion seems to offer a way to reconcile the checks idea and Madison's parameters for practical security: bicameralism looks more like an "interior" solution because it occurs "inside" the legislature, and it looks less like a parchment barrier because it depends upon the division of branches based on differing connections and ties.[219] There, however, the promise of bicameralism as practical security ends. If bicameralism were sufficient, alone, why would Madison have claimed in No. 47 that in "no instance"—including the nine states with bicameral legislatures[220]—had

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214. 1 *id.* at 99 (statement of Benjamin Franklin of Pennsylvania, June 4, 1787).

215. *Id.*

216. THE FEDERALIST No. 51, at 320.

217. *Id.* at 320; *see* THE FEDERALIST No. 49, at 317 ("[M]ere declarations in the written Constitution are not sufficient to restrain the several departments within their legal rights."); THE FEDERALIST No. 48, at 308-09 ("[E]xperience assures us that the efficacy of [parchment barriers] has been greatly overrated . . . .").

218. WILLS, *supra* note 18, at 117.

219. *See id.* at 122 ("For [Madison] there is only one powerful check in the three powers, and that is *within* the legislature. If it restrains itself, the other two will be safe." (emphasis in original)).

220. *See* MCDONALD, *supra* note 24, at 86-87 (listing the nine state constitutions that provided for bicameral legislatures).

"a competent provision been made for maintaining in practice the separation delineated on paper"?[221] Why had Virginia's government dissolved into legislative despotism if its bicameral legislature were a "competent provision" to maintain the separation of powers?[222]

I am not claiming that checking powers, including bicameralism, are irrelevant to Madison's scheme. Indeed, they are a crucial element of a system that seeks to prevent the undue dependency of one department upon another. That checks are *necessary*, however, does not mean that they are *sufficient* to explain or maintain the separation of powers. As we have seen, checking powers may be made the engine of corruption and collapse just as easily as the engine of separation. In the end, what distinguishes the two is not the nature of the checking power itself, but the structure of incentives that protect those who wield that power.

Modern experience tends to bear out the implications of Madison's essays—checking powers are important, but inherently limited, tools. A department does not resist encroachments because it is armed with checking powers but because the encroachment threatens the department's identity and prerogatives. When department members perceive a threat to their institution's power and, by analogy, to their own official identity, they resist—whether a specific checking power exists or not.[223] This is precisely the message Madison offers in his *Federalist* essays: *protecting the personal incentives of those who govern is as important to separation as is any specific power or legal authority granted.* Those incentives exist (or do not exist) without regard to the specific checking powers the

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221. THE FEDERALIST No. 47, at 308. One might argue that Madison's condemnation of the state constitutions in No. 47 was simply meant to emphasize his concerns about the inherent aggressiveness of legislative power. *See infra* note 231 (documenting Madison's fear of legislative power). But this interpretation would not necessarily support the conclusion that bicameralism (or, for that matter, any particular check) would qualify as Madison's "answer" because this argument would justify *any* restraint on the legislative power.

222. Even if we were to assume that bicameralism were to sit atop the "due foundation" protecting the departments from internal corruption, it still leaves much to be desired as a candidate for Madison's practical security because it does not explain how separation between other departments is achieved and sustained or explain evidence both inside and outside *The Federalist* that Madison believed the separation between the executive and the legislature (and not between the legislative branches) was most important to maintain. *See, e.g.*, Madison, *supra* note 153, at 255, 255-56 ("[I]f there is a principle in our constitution . . . more sacred than another, it is that which separates the legislative, executive, and judicial powers . . . .").

223. Imagine, for example, that the paradigmatic "check" did not exist—the veto power. Certainly, the president would be weaker, but not powerless. Even without a specified "check," the executive department is likely to oppose the legislature's actions and may still "defend" its prerogatives. For example, the president may direct his officers to delay or narrowly interpret a directive; he may ignore the directive and seek a political rapprochement with the legislature; or he may appeal to the people. *See* Kurland, *supra* note 13, at 606 (noting that the president's "usual weapons" against challenges to its power by other branches include "appeals to the electorate" and "control of disbursements and appointments").

Constitution enumerates, and they will find expression with or without constitutionally specified means.

B. Shared Powers: Madison's False Promise

The difficulties of the checks and balances theory have prompted many to argue that it should be replaced by the idea of "shared powers."[224] Advocates of this approach tell us that the checks idea trades on a false metaphor—that the "branches of government [are] not designed to be at war with one another."[225] Under this view, the departments do not battle themselves into submission; they cooperate or negotiate themselves into equilibrium. Shared powers moderate each department's demands, and, in this way, control and channel the impulse to encroach. As one observer has put it, "the sharers of power have to figure out a way to cooperate in exercising the shared powers or the result is deadlock."[226]

By recognizing that formal definitions do not describe how separation disputes are regulated on a day-to-day basis, the shared power theory makes significant gains on the checks theory. These descriptive gains are not matched, however, by the theory's prescriptive power. Even if shared powers "theory" more accurately describes the day-to-day business of government, the theory does not tell us how the most important power disputes should be resolved or what the structure of government should look like. If we push the shared power theory, how far are we to go? Is all sharing permissible? Or only some? It is one thing to argue that sharing exists, or that negotiation resolves most separation disputes; it is quite another to say that sharing is wise or something to be encouraged. To put it more concretely, it is one thing to say that existing arrangements allow the president to "share" legislative power with Congress through the veto, but it is quite another to suggest that judges should "share" the legislative power by voting as members of Congress. Like the checks theory, the shared powers idea—if pushed—tends to swallow the very separation ideal that it was intended to implement.

On more than one occasion, Madison's *Federalist* essays have been enlisted in the battle for a "shared powers" approach.[227] Although the

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224. *See* Lloyd N. Cutler, *Now Is the Time for All Good Men . . .* , 30 WM. & MARY L. REV. 387, 387 (1989) (stating that the Framers compromised between a total separation of powers and the need for checks and balances by creating separate branches with some shared powers); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 391 (1976) (lamenting the adversarial relationships among the branches and urging "[i]nstitutional self-restraint"). It is common usage to state that we have a government of "shared powers." *See, e.g.*, Verkuil, *Rule of Law*, *supra* note 13, at 301 ("The 'celebrated maxim' of separation of powers . . . is not really accurate as a description of how our government works—the phrase 'shared powers' says it better . . . .").

225. Levi, *supra* note 224, at 391.

226. Lloyd N. Cutler, *Some Reflections About Divided Government*, 18 PRESIDENTIAL STUD. Q. 485, 486 (1988).

227. *E.g.*, Bruff, *supra* note 13, at 493 ("*The Federalist Papers* provide ample support for the

text seems to encourage this reliance,[228] the essays as a whole do not support such a reading. Indeed, to believe that Madison unhesitatingly embraced any and all "shared powers" produces some rather unlikely readings of the essays. It would require us to forget that *Federalist* No. 47 condemns powers improperly blended or mixed.[229] It would require us to believe that periodic or occasional conventions would be an appropriate solution as long as we could induce them to recommend shared powers.[230] And, most importantly, it would require us to believe that Madison—whose greatest fear was the aggrandizement of legislative power—was willing to tolerate any initiative on the part of Congress that would permit it to "share" other departments' powers.[231]

Perhaps most importantly, the shared powers approach leaves no room for an essential part of Madison's vision: the idea that separation is as much the product of personal incentives, structurally protected, as of authority granted. That the president must negotiate legislation and in this sense "shares" the legislative power with Congress does not tell us whether the president will act as rival or as sycophant when Congress decides to use its power to encroach on the executive's prerogatives.[232] From the

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proposition that the framers contemplated considerable blending of power."); Farina, *supra* note 18, at 494 (arguing that Madison viewed the sharing of power as "not a perversion of the principle of separation of powers, . . . but rather the means most likely to ensure its fullest expression").

228. THE FEDERALIST No. 48, at 308; *see infra* text accompanying notes 235-41 (explaining this text).

229. THE FEDERALIST No. 47, at 301. This implies, of course, that Madison did approve of a "proper" level of blending. As I argue later, however, this claim amounts to little more than the "flip-side" of the checks argument. *See infra* text accompanying notes 235-41.

230. *See* THE FEDERALIST No. 50, at 317-20 (rejecting suggestions that conventions could serve as an effective remedy for infractions of the separation of powers).

231. Madison's fear of legislative power is repeated throughout the essays. *See, e.g.*, THE FEDERALIST NO. 48, at 310-12 (giving examples of states whose legislatures have encroached on the other branches); THE FEDERALIST No. 50, at 318 (envisioning a legislature "eagerly bent on some favorite object, and breaking through the restraints of the Constitution in pursuit of it"); THE FEDERALIST No. 51, at 322-23 (explaining that the bicameral system and the veto are necessary to check the legislature); *see also* 2 FEDERAL CONVENTION, *supra* note 1, at 35 (statement of James Madison of Virginia, July 17, 1787) ("Experience had proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent.").

232. The president has often concurred in legislative proposals that are later found to violate the separation of powers. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721-34 (1986) (striking down the Gramm-Rudman-Hollings Budget Act as a violation of the separation of powers); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion) (striking down Congress's creation of non-Article III bankruptcy judges as violating the separation of powers); Buckley v. Valeo, 424 U.S. 1, 109-43 (1976) (per curiam) (striking down the Federal Election Commission membership provisions of the Federal Election Campaign Act of 1971 as violating the separation of powers). Similarly, presidents often sign legislation while voicing misgivings about its constitutionality. *See, e.g.*, LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 125-26, 130 (1992) (describing a history of presidential "misgivings" about the constitutionality of bills containing legislative vote provisions).

perspective of one concerned with potential "dependencies" of those who actually run the departments, it matters not a whit which adjective we choose: *describing our system as one of separated or shared powers will not sustain departmental independence if the departmental competition we know as the separation of powers has no competitors.*[233]

Madison's text has provided substantial, albeit false, encouragement for those seeking to mold him as an advocate of "shared powers." At the very start of No. 48, Madison summarizes his earlier essay, No. 47, as demonstrating that the maxim of separation "does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other."[234] In No. 48, Madison sheds the tentativeness of this statement: "I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires . . . can never in practice be duly maintained."[235]

At first glance, these seem strong and clear words in support of a "shared powers" theory. The initial puzzle here—a substantial one—is how these statements can survive in essays otherwise rife with applause for separation and independence. The puzzle becomes even more difficult to unravel when we find that Madison never follows up on his promise. The terms "blending" and "connection" announced so loudly in the introduction to No. 48 disappear altogether from that essay and those that immediately follow.[236] We proceed through three entire essays without as much as an offhand reference to "blending" or "connection." Has Madison's fondness for turning the tables led him to mislead us?[237] Or does he sense that a broad claim for sharing power might be politically dangerous?[238]

If one believes that sharing describes *The Federalist*'s separation of powers, then No. 48's statement about "connection" and "blending" seems

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233. *See* THE FEDERALIST No. 51, at 321-22 (arguing that the competing personal ambitions of those in different branches will prevent power from becoming concentrated).

234. THE FEDERALIST No. 48, at 308.

235. *Id.*

236. For example, although Madison typically summarizes his "last number" in each subsequent essay, his summary of No. 48 includes no mention of "blending" or "connection": "We found in the last paper that mere declarations in the written Constitution are not sufficient to restrain the several departments within their legal rights." THE FEDERALIST No. 49, at 317.

237. Madison was fond of reversing the received wisdom. CAREY, *supra* note 18, at 56 & n.5. Madison's most famous argument of this type was, of course, his claim that the vast geography of America was essential to a republican government, an argument that reversed the traditional view that large republics could not survive. *See* THE FEDERALIST No. 10, at 82-84 (contending that elections in large republics will produce better representstives).

238. When Madison made a similar claim at the Constitutional Convention, it was roundly rejected by his colleagues. *See* 1 FEDERAL CONVENTION, *supra* note 1, at 140, 138-40 (June 6, 1787) (documenting the rejection of Madison's idea that the executive and judicial branches should share "in the revisionary business" of interpreting the laws).

nothing better than a cruel tease. If we reduce our expectations, however, and return to the text, Madison's statements in No. 48 can be seen as proposing something a good deal more limited. Madison's sharing turns out to be nothing more than the flip side of the checks theory: he claims that the departments should be "*so far* connected and blended"—so far "as to give to each a constitutional control over the others."[239] This is sharing incident to control; powers may be shared *only* to the extent that they give a department the ability to defend itself.

Madison's point here is a logical one: checking powers may, from a distance, appear as shared powers.[240] Much like a figure-ground drawing, in which a black silhouette appears and then recedes depending upon how closely one focuses, powers may appear at once as checks and as connections. Making the intellectual move from one to the other simply requires a greater focal distance. For example, we may describe Iraq and the United States as struggling world powers by focusing on each separately or seriatim. But if we bring them both within our intellectual viewfinder, we see their battle as a joint engagement in the shared enterprise of world politics.[241] Similarly, we see the veto power as a check (if we focus on either the executive department or the legislative), but if we retreat further afield, we may see the veto as a connection between departments.

The only remaining reference to "connection" in these essays reinforces the view that Madison's idea of "sharing" departs from the contemporary idea of "shared powers" as an exercise in self-moderating negotiation. In No. 51, Madison briefly addresses antifederalist claims that the Constitution improperly blends legislative and executive authority.[242]

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239. THE FEDERALIST No. 48, at 308.

240. This reading is further supported by Madison's usage in No. 47. Attempting to rebut the antifederalists' complaint that the Constitution failed to achieve sufficient separation, Madison argues that the state constitutions "blend" at least some powers. One example of blending Madison uses is the veto power, which he says "connects" the executive and the legislature. THE FEDERALIST No. 47, at 304.

Montesquieu also made clear that the veto power meant a kind of power sharing between the executive and the legislative departments: "The executive power, pursuant to what has been already said, ought to have a share in the legislature by the power of refusing, otherwise it would soon be stripp'd of its prerogatives." MONTESQUIEU, *supra* note 38, at Book XI, ch. 6[52], at 210. At the same time, Montesquieu explicitly condemned other kinds of shared power: "If the prince were to have a share in the legislature by the power of enacting, liberty would be lost." *Id.* at Book XI, ch. 6[53], at 210.

241. *See* Calabresi & Larsen, *supra* note 19, at 1119-20 (making a similar analogy to describe the "sharing" anticipated by the Framers).

242. *See, e.g.*, FEDERALISTS AND ANTIFEDERALISTS, *supra* note 23, at 68 ("The combination of the Senate and President in appointments and treaty-making was denounced [by the antifederalists] as a violation of the principle of separation of powers."); JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 138-39 (1961) (noting the antifederalist objections to the combined power of the Senate and president); 3 FEDERAL CONVENTION, *supra* note 1, at 358 (statement of

He defends this "*qualified connection*" as necessary so that the "weaker branch of the stronger department [the Senate] . . . may be led to support the constitutional rights of the [executive], without being too much detached from the rights of its own department."[243] This is a claim of alliance by the weaker departments against the stronger: the Senate comes to the executive's defense, not to moderate its own power, but to preserve its power from attack by its rival in the legislature, the House. In the end, the sharing Madison defends in No. 51 is not one in which joint power moderates, but one in which power is joined to create shared incentives to thwart a more dangerous aggressor.[244]

C. *Functional Division*

Finally, we should consider the claim that "functional" division forms the core of Madison's separation of powers. It is a widely held view, common to a variety of theoretical positions, that the three departments serve different functions and that these functional distinctions are essential to preserve the separation of powers. Assumed, here, is the idea that "[t]he executive Power," the "legislative Powers," and "[t]he judicial Power"[245] represent different kinds of power readily distinguishable in theory, if not in practice.[246] Although typically associated with those who favor a weak separation of powers rule, this idea of "functional" separation is implicit in positions ranging from the left to the right, from originalists to realists,[247] and from formalists to critical pragmatists.[248]

Abraham Baldwin, June 19, 1789, First Congress) ("[T]he mingling of the powers of the President and Senate was strongly opposed in the convention . . . . One gentleman called it a monstrous and unnatural connexion, and did not hestitate to affirm it would bring on convulsions in the Government."); *see also* Letter from James Madison to Wilson C. Nicholas (July 18, 1789), *in* 12 PAPERS OF MADISON, *supra* note 153, at 294 ("[T]he degree of mixture established by the Const[itution] . . . has been a ground of one of the strongest objections agst. it.").

243. THE FEDERALIST No. 51, at 323 (emphasis added).

244. *See* James Madison, Removal Power of the President (June 17, 1789), *in* 12 PAPERS OF MADISON, *supra* note 153, at 232, 234 ("[I]f in any case they [the departments] are blended, it is in order to admit a partial qualification . . . to guard against an entire consolidation.").

245. U.S. CONST. art. I, § 1; art. II, § 1, cl. 1; art. III, § 2, cl. 1.

246. The idea that functional description sits at the core of the "original" separation of powers comes from the work of Professor Vile, who argues that the "pure" view of separation required pure functional designations. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13-18, 153-71 (1967). As J.G.A. Pocock notes, Vile's thesis here is "slightly ahistorical." Pocock, *supra* note 24, at 479-80, 480 n.52 (arguing that the language of function and corruption were intertwined and that, ultimately, the idea of corruption won out).

247. *Compare* Carter, *Improprieties*, *supra* note 13, at 364-76 (adopting a quasi-originalist position but tacitly adopting a "functional" description of the separation of powers) *with* Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 348-51 (adopting a "realist" position that also appears to assume "functional" division).

248. *Compare* Redish & Cisar, *supra* note 13, at 474-90 (adopting a formalist position that tacitly assumes a "functional" division) *with* Tushnet, *supra* note 13, at 597-603 (adopting a critical stance that tacitly assumes a "functional" division).

When I use the term "functional," I am describing a phenomenon far more general than the term "functionalism" denotes. So-called functionalism is shorthand for a decision rule in separation of powers cases that generally defers to Congress's judgments about political structure.[249] The argument I address here has less to do with how courts should *decide* separation of powers cases (something to which I turn in Part V) than how we should *conceive or think* of the separation of powers. The premise that the separation of powers amounts to a separation of functions is not limited to those who favor a functionalist decision rule; it is widely shared by those who take precisely the opposite position on the proper approach toward deciding separation of powers cases.[250]

Despite its widespread appeal in the modern era, little in *The Federalist* text signals a theory centered on functional definition. No. 51, the culminating essay, offers almost no support for the popular assumption that a separation of functions is crucial to Madison's vision.[251] References to lawmaking and law implementation, to adjudication and to execution, are conspicuously absent from this essay. Madison discusses the "exercise of the different powers of government," "the appointments for the supreme executive, legislative, and judiciary magistracies," and "distinct and separate departments."[252] He speaks of the "interests" of men, the "will" of departments, and the "necessary constitutional means, and personal motives, to resist encroachments . . . ."[253] He speaks of structure and foundation and of institutional rivalry,[254] but he *never* promises that functional divisions shall secure the separation of powers.[255]

Elsewhere in the essays, however, Madison does make significant references to functional categories. He tells us, for example, in No. 48 that powers "may in their nature be legislative, executive, or judiciary."[256] And, in No. 47, Madison refers to powers that are

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249. On functionalism generally, see Strauss, *supra* note 9, at 510-26 (advocating a functionalist decision rule in separation-of-powers cases) and Brown, *supra* note 8, at 1522-31 (contrasting a formalist decision rule with a functionalist decision rule).

250. *See* Redish & Cisar, *supra* note 13, at 474-90 (adopting a position of "pragmatic formalism" that assumes functional distinctions).

251. This has been noted, but left unexplored, by other readers of the text. *See, e.g.*, EPSTEIN, *supra* note 18, at 127.

252. THE FEDERALIST No. 51, at 321, 323.

253. *Id.* at 322, 321, 321-22.

254. *Id.* at 320-23.

255. At one point, when discussing the Senate's role in the new government, Madison describes the "branches" of government as having "common functions," presumably referring to the legislative function of the House and Senate. *Id.* at 322. The term "function" appears nowhere else in No. 51.

256. THE FEDERALIST No. 48, at 308. Such references appear elsewhere in Madison's writings. *See, e.g.*, Madison, *supra* note 244, at 237 ("I conceive that the president is sufficiently accountable to the community; and if this power is vested in him, it will be vested where its nature requires it should be vested . . . .").

inherently "executive," such as the appointment and pardon powers.[257] But, in each case, Madison tells us that these assumptions do nothing to secure the Constitution from political collapse: "Discriminating [the powers] in theory" is not the most difficult task—that task "is to provide some practical security for each [department] against the invasion of the others."[258] Clearly, Madison believed that powers could be classified along functional lines, that certain powers were "in their nature" executive, judicial, or legislative.[259] It would be wrong then to claim that functional description was irrelevant to his argument. At the same time, however, Madison was profoundly skeptical about our capacity to divine or delineate functional boundaries with precision. In No. 37, he explains that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary."[260] Even the "greatest adepts in political science" were unable to unravel this puzzle.[261]

This skepticism about the efficacy of formal categories ultimately leads Madison to reject classification as a proper means to protect the separation of powers. Indeed, No. 48 may be read as a long rebuttal to those who argue that precise definitional boundaries are the key to maintaining separate departments. Boundaried solutions, Madison tells us, have been tried and have failed.[262] Despite its strict constitutional classification of functions, the Virginia legislature had, in fact, asserted improper powers, powers that belonged to other departments.[263] Thus, although Madison assumed quite readily the possibility of categorization and even argued for the importance of particular designations as "executive," "legislative," or "judicial,"[264] he held out little hope that the categories might fend off power-holders bent upon subverting them. Indeed, this position is inherent in the very project Madison sets for himself in *Federalist* No. 51: one only asks "to what expedient . . . shall we finally resort, for maintaining in practice the necessary partition of power" if the partition itself is inadequate to secure the separation of powers.[265]

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257. *See* THE FEDERALIST No. 47, at 306-07 (describing powers granted in the state constitutions).

258. THE FEDERALIST No. 48, at 308.

259. *See, e.g.*, THE FEDERALIST No. 48, at 308. Indeed, he seems to have recognized that the Constitution itself mingles functions. *See* Madison, *supra* note 153, at 255-56 (recognizing that the Senate is granted an "executive" function in its ability to advise and consent to the appointment of executive officers).

260. THE FEDERALIST No. 37, at 228.

261. *Id.*

262. THE FEDERALIST No. 48, at 310-13.

263. *Id.* at 310-11.

264. THE FEDERALIST No. 37, at 228.

265. THE FEDERALIST No. 51, at 320; *see supra* subpart II(D).

If we take a closer look at what Madison did see as practical security—his theory of allegiance—we can begin to understand just how little functional division appears to matter. Imagine a government in which powers are distributed without regard to the familiar tripartite division. Department *A* wields the power to judge but also carries out legislative and executive tasks. Department *B* wields the power to legislate but also performs adjudicative and executive tasks. Department *C* wields the power to execute but also legislates and adjudicates. (This is not very far, of course, from a description of our present government.) Now imagine that these departments each have separate memberships and that the members' allegiance to their departments is secured by a combination of appointment, removal, and tenure provisions ensuring their relative independence from interbranch manipulation. Under Madison's theory, these departments will remain just as secure and separate as if each performed along completely different functional lines.[266] If separation depends upon a division of departments with independent personnel, then *what* the departments are doing becomes far less important than *who* does it. In the example above, Department *B* will refuse to allow Department *A* to steal its powers, not because of Department *B*'s functional description, but because the members of Department *B* will fight to retain their institution's identity.

If allegiance to place propels separation in a world of rival departmental loyalties, then functional designation takes on a secondary, supporting, role. Rather than an end in itself, it becomes a means of ensuring allegiance. Imagine a case, for example, in which one department usurped the powers of another department and this usurpation was so great that it effectively gutted the first department's most important functions. Whether or not a particular functional distribution has been violated, if those in the raided department no longer have a separate institutional mission to support their allegiance, the separation of powers is threatened. Allegiance to place requires not only allegiance, but also a place.

Could this be right? Could separation be sustained under a wide variety of functional distributions? At one level, given Madison's belief that we are incapable of defining departmental boundaries with certainty,[267] this functional neutrality should not seem surprising. At another level, however, the apparent "emptiness" of Madison's proposed solution will give more than a few readers pause. It should not, however,

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266. The same exercise may be performed with three educational institutions. Take, for example, the University of Wisconsin, the University of Texas, and the University of Michigan. All of these institutions have the same "functional" description. These universities "do" similar things and yet they retain separate institutional identities and traditions. These institutional identities would soon begin to bleed into each other, however, if members of the faculty of one institution (Texas) had the power to appoint or remove members of another (Wisconsin or Michigan).

267. THE FEDERALIST No. 37, at 228.

be misinterpreted as a claim that functions may be jumbled at will. That a governmental structure radically different than our own might still maintain "separation" does not mean that the resulting structure would be wise or constitutional. Shifts in power may violate individual rights,[268] other constitutional requirements (bicameralism, for example),[269] or more basic principles of republican government.[270] For example, any system that accorded greater powers to the legislature would, for Madison, have posed serious dangers;[271] similarly, any system that permitted strong political influences in individual litigation would have posed an equally serious question.[272] One need not advocate the scrambling of functions to maintain that we must try to distinguish between functional description as necessary to separation and its utility elsewhere in constitutional law.[273] As I argue below, functional description "stands in" for norms that are crucial to the political relationships created by our constitutional structure.[274] That functional norms may be important for a whole host of reasons, however, does not mean that they describe Madison's practical security or that they maintain the separation of powers.

IV. Beyond the Canon—Toward a Different Narrative of Power

Looking at the separation of powers through the lenses of checks, shared powers, and functional division has shaped our idea of the "power" we seek to separate. Each of these approaches assumes a narrative in which "the powers" are synonymous with law and legal authority: departments enjoy the power to do that which they have the legal authority to do.[275] This idea of power is largely disembodied and apolitical. It has

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268. *See* Brown, *supra* note 8, at 1514, 1534 (arguing that structure is essential to the protection of individual rights).

269. *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 958-59 (1983) (holding that a one-house legislative veto violates constitutional bicameralism requirements).

270. *See infra* text accompanying notes 390-91 (arguing that departmental "independence" may raise questions of accountability and, hence, of republicanism).

271. *See supra* note 231 (detailing Madison's fears of legislative power).

272. *See, e.g.*, James Madison, Treasury Department (June 29, 1789), *in* 12 PAPERS OF MADISON, *supra* note 153, at 265, 265, 265-66 (noting that the comptroller of the Treasury Department, although an executive official, has duties that "partake of a judiciary quality" and thus should be insulated from political influences); THE FEDERALIST No. 48, at 311 (quoting Jefferson's lament that the legislature had decided "*rights* which should have been left to *judiciary controversy*" (emphasis in original) (quoting JEFFERSON, *supra* note 17, at 120)).

273. This might well have been understood at the Constitutional Convention. *See, e.g.*, 2 FEDERAL CONVENTION, *supra* note 1, at 78 (statement of James Wilson of Pennsylvania, July 21, 1787) ("The separation of the departments does not require that they should have separate objects but that they should act separately tho' on the same objects. It is necessary that the two branches of the Legislature should be separate and distinct, yet they are both to act precisely on the same object.").

274. *See infra* text accompanying notes 308-13.

275. *Compare* Carter, *Improprieties*, *supra* note 13, at 364, 368, 364-76 (arguing for a "de-evolutionary" or originalist approach and assuming that "the powers" are synonymous with legal or

no apparent relationship to the people who wield it; it exists independent of human agency. Power is simultaneously an institutional attribute and a definition. When we speak of "the" executive power, "the" legislative power, and "the" judicial power, we seek to describe and delineate, to define and thus possess, an "object" we imagine to correspond to "power."[276] When we bring this project to our readings of *The Federalist*, we simply engraft its limitations onto another text and thus perpetuate the very contradictions from which we seek to free ourselves.

This idea of power makes silent demands on us. It requires that we find the object we have identified[277] and that we name it, rather than focus on those who hold it. And, because we need to know the nature of the power identified, we become easily drawn into a search for power's attributes. Soon, the most important questions about the separation of powers appear to turn on the adjectives that describe legal power: whether we call something legislative, judicial, or executive becomes crucial to the analysis.[278] This focus on attributes, in turn, carries with it an implicit, albeit unexpressed, demand for uniformity. When we see power as a substance, we see it as a "substance[] of a uniform kind."[279] This uniformity demands of the object that it have hard edges—that the legislative power be "all-legislative" or the executive power, "all-executive."[280] Once attributes are important, their implicit claim to homogeneity becomes an invitation for disappointment—for power sought that cannot be described.[281]

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functional authority) *with* Strauss, *supra* note 9, at 492, 495-96 (adopting a "functionalist" position and assuming that "the powers" are synonymous with legal or functional authority).

276. *See* Elliott, *supra* note 13, at 527 ("Long ago Justice Holmes pointed out that legal concepts like 'executive, judicial, and legislative' are not 'things' that 'have' immutable existences; rather, they are constructs that we create to serve purposes, and these purposes should define their reach and measure.").

277. *See* Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 999 (1994) (describing the inevitable tendency in teaching structural issues to locate and visualize structure in terms of "concrete objects" or "building blocks").

278. *Compare* Bowsher v. Synar, 478 U.S. 714, 733 (1986) (characterizing the comptroller general's responsibilities as "executive") *with id.* at 744-45 (Stevens, J., concurring) (characterizing the comptroller general's responsibilities as both "executive" and "legislative").

279. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 25 (1980) ("Understanding our experiences in terms of objects and substances allows us to pick out parts of our experience and treat them as discrete entities or substances of a uniform kind.").

280. *See, e.g.*, *Bowsher*, 478 U.S. at 732-33 (rejecting efforts of concurring and dissenting Justices to recharacterize the comptroller general's functions as anything but exclusively "executive" in nature).

281. The tendency to overlook the relational aspects inherent in concepts may hold true at a more general level. Martha Minow has argued, for example, that all categories tacitly reflect relationships between that which is included and excluded, that which is the same and that which is different. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 227-28 (1990).

We have abstracted the idea of power from its actual exercise and, as a result, we have thought about the separation of powers in the wrong way.[282] We have subtracted those who hold power from our idea of what power is.[283] In the process, we have substituted a formal idea of power for a political and human idea of power. *The Federalist* essays suggest, by contrast, that power is not only a question of legal authority, but also a matter of personal connection and incentive.[284] Perched on the edge of modernity, Madison acknowledges power in the more modern sense of legal authority,[285] but he also embraces an idea of power that bears the stamp of an earlier day, one in which the force of social and class ties was far more powerful than any grant of legal authority.[286]

The essays themselves are the best evidence of the distance our idea of a formal, legalized ideal of power must travel to meet Madison's. Consider, for example, his argument that the legislative power was indeed the weightiest:

> The members of the legislative department . . . are distributed and dwell among the people at large. Their connections of blood, of friendships and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.[287]

Madison's fear of legislative power depended not only upon the authority granted to Congress in the constitutional document, but also upon the granting of that power to members with the closest personal ties and

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282. On the dangers of abstraction in this field, see Verkuil, *Rule of Law*, *supra* note 13, at 301, 301-03 ("The 'celebrated maxim' of separation of powers frustrates analysis because of its abstract dimensions." (quoting THE FEDERALIST No. 47, at 303)).

283. An important exception to this assumption appears in the work of those writing from an economic perspective who rightly recognize the importance of institutions' different political audiences. *See, e.g.*, KOMESAR, *supra* note 162, at 216-30.

284. *See supra* text accompanying notes 150-57, 168-76.

285. *See* THE FEDERALIST No. 47, at 301-03 (using the term power, in some cases, to signify authority).

286. *See* POCOCK, *supra* note 24, at 481 (noting the transformation of feudal ideas of homage and tenure into ideas that depended upon the "connection" offered by such arrangements as the "placemen").

287. THE FEDERALIST No. 49, at 316. Focus on the idea of "faction" presented in FEDERALIST No. 10 has led some scholars to emphasize Madison's concern with minoritarian bias. *See, e.g.*, Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 483-84 (1988) (claiming that Madison's concern about factions arose from the nullification of contracts by state legislatures in an attempt to benefit special interest groups); *see also* KOMESAR, *supra* note 162, at 217 (discussing "recent attempts to analyze the Constitution in one-force (minoritarian bias) terms"). The Framers feared majoritarian bias as much as, if not more than, minoritarian bias. *Id.* at 218.

influence among the people.[288] This is a political, rather than a formal, image of power. Power is not only authority; it is also connection, allegiance, acquaintance. (What is more "political" than a standard that depends upon who one "knows"?) Structure, in Madison's view, does not create power; indeed, law does not create power.[289] Both of these things channel power. Power exists before law and structure[290] because it depends upon human "connection"—the familial, governmental, commercial, and political ties between people.[291] Madison did not look for power as an object in the world and make a judgment about it in the abstract; nor did he assume that power always leads to corrupt motives. As Neil Komesar has argued, Madison had a far more "sophisticated perception of the systemic nature of political malfunction,"[292] and he knew the role that political participation played in forming and transforming institutions.

When Madison emptied mixed-government theory's tripartite division of social classes and replaced it with three departments,[293] he transformed the idea of "power" based on social relationship to one based on constitutional and political relationship. Electoral allegiances built upon different connections to the people filled the blank spaces in which social classes once fit. Each department thus represents a different expression of electoral relationship and responsibility, of political audience and connection.[294] The executive department, for example, "is responsible to the whole community,"[295] while the Senate (as originally elected) is "responsible to individual legislatures."[296] The House exercises power

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288. THE FEDERALIST No. 49, at 316-17; *see* KOMESAR, *supra* note 162, at 219 (arguing that "the major Federalist response to . . . majoritarian excess . . . " was to insulate "federal government decision-makers from local majorities").

289. Madison notes several incidents in which "legal barriers" to power had been ineffectual. *See, e.g.*, THE FEDERALIST No. 48, at 310-11 (recounting that legislative tyranny developed in Virginia despite an express constitutional provision enjoining separation); THE FEDERALIST No. 50, at 318 (recalling that the Pennsylvania legislature ignored constitutional pronouncements on the separation of powers).

290. *See, e.g.*, THE FEDERALIST No. 49, at 317, 316-17 (arguing that "the spirit of pre-existing parties" will distort the decisions of constitutional conventions); THE FEDERALIST No. 50, at 320 (maintaining the inevitability of parties and faction). *See generally* THE FEDERALIST No. 10, at 77-84 (describing the power and "violence of faction").

291. *See* THE FEDERALIST No. 49, at 316 (arguing that the executive and judiciary departments are less powerful because they will only be "personally known to a small part . . . of the people" and because the judiciary "are too far removed from the people"); *id.* at 317 (arguing that public decisions will be distorted because of their effect upon "persons of . . . extensive influence in the community").

292. KOMESAR, *supra* note 162, at 219 n.46.

293. *See* WOOD, *supra* note 24, at 152; text accompanying note 193.

294. *See* KOMESAR, *supra* note 162, at 202 (discussing the different electoral relationships that empower the branches).

295. Madison, *supra* note 244, at 237.

296. *Id.*

"inspired by a supposed influence over the people."[297] Both Congress and the president obtain their power from the electorate in ways barred to the judiciary, whose members are immunized from politics by life tenure.[298] In this sense, it is perhaps better to call Madison's separation a separation of political power rather than a separation of legal or functional powers.

If this understanding is correct, it is not surprising that Madison spends less time in his *Federalist* essays fretting about the definition of powers or functions than he does grappling with the dangers that "connections" between persons pose for the constitutional design.[299] For Madison, the question raised in separation of powers cases is not only what power has been grabbed or what kind of power it is, but also what kind of connections will govern its deployment. Because experience had shown that serious dangers lay in personal connections, Madison's solutions depend upon crafting structural incentives for personal independence. To prevent the corruption of members of one department by those of another, Madison advocated a "due foundation" for the separation of powers that depends upon making "members of each department . . . as little dependent as possible on those of the others . . . ."[300]

We have been unable to see this strain of Madison's thought because we bring to his essays assumptions that make it impossible to see. Today, when we read *The Federalist*, we bring to the text our search for something called "power." This leads us to look for the attributes of power—separation, sharing, and function. We find ourselves trying to cabin Madison within the ambit of one or more of these descriptions, but, soon, we find ourselves mired in apparent contradiction. Madison says separation here, and sharing there; distinctness here, and connection there. We are left in a muddle from which our assumptions provide no apparent release. If, however, we jettison the search for an attribute or description and begin to see the idea of power as both a question of law *and* politics,

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297. THE FEDERALIST No. 48, at 309.

298. *See* THE FEDERALIST No. 51, at 321 (noting that the judiciary has no electoral allegiance because judges enjoy life tenure).

299. In this, Madison was certainly not alone. Proponents and opponents of the Constitution were equally focused on the "connections" and the political "dependence" of those who would hold power under the new government. The records of the Constitutional Convention, for example, are replete with references emphasizing the importance of the "hands" in which power was held. Indeed, much of the Convention was devoted to deciding questions of institutional design, such as who would appoint judges, who would elect the president and the Senate, and how their tenure would be determined. *See* 1 FEDERAL CONVENTION, *supra* note 1, at 128-29 (June 5, 1787) (summarizing various delegates' views on how judges should be selected); 1 *id.* at 458-59 (June 27, 1787) (recording the debate on whether representation should be by "States" or "Numbers"); 1 *id.* at 474-75 (June 29, 1787) (recounting the debate over institutional design); *see also supra* notes 156-57 (discussing concerns about dependence raised during the ratification debates).

300. THE FEDERALIST No. 51, at 321.

of what is held *and* who holds it, at least some of this confusion disappears. Soon, we are able to understand passages in *The Federalist* that we have always ignored. We begin to see that Madison's "due foundation"[301] is not something to be skipped over, but something that provides important groundwork for the separation of powers. We begin to understand why Madison spends so much time in No. 47 describing the state constitutions in terms that seem so foreign—terms of appointment, payment, and removal.[302] And, finally, we begin to see why seemingly strong "exterior" solutions—constitutional prohibitions and conventions—turn out to be such flimsy ramparts should one department seek to control or corrupt the members of another.[303]

Consider the common lament that we have a system of government in which powers are both separate and shared, independent and interdependent. At least on the surface, this suggests contradiction. Indeed, the contradiction has appeared so great that it has caused some to wonder whether we should simply jettison the ideal of separation altogether. The key here is understanding the assumption about power upon which this dilemma is based. We only speak contradiction when we embrace a discourse of separated, but shared, powers if we think that what we are separating or sharing is the same undifferentiated entity called "power." We only believe that we must choose between a system of separated rather than shared or checked powers if we believe that what is being separated and what is being shared or checked is the same thing called "power." We only believe that we must describe otherwise conflicting views as "flexible"[304] if we believe that what is being shared and separated leads to conflict because we are sharing and separating the same thing.

If we focus less on the attributes (separation and sharing) of an entity called "power" and more on power's administrators, these apparent contradictions, and their fallout, tend to recede in importance. Assume, for a moment, that the separation of powers depends upon the independence of persons who maintain separate institutional allegiances. Separate and independent *persons* wielding shared or checking *powers* poses no serious contradiction. And because this assumption identifies separation as something outside of sharing or checking powers, it helps to reduce the pressure pushing us toward contradiction: if separation depends upon something different in kind from sharing or checking, then we need not give up on separation to embrace checking and sharing. We need not

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301. *Id.*

302. THE FEDERALIST No. 47, at 303-07.

303. *E.g.*, THE FEDERALIST No. 48, at 308-09; THE FEDERALIST No. 49, at 313-16; THE FEDERALIST No. 50, at 317-18.

304. *See* Mistretta v. United States, 488 U.S. 361, 381 (1989) (using the term "flexible" to describe a system of separated and shared powers).

jettison separation, nor embrace contradiction. We need only reconsider a very basic assumption about power.

This same reasoning applies, as well, to the current enthusiasm for functional descriptions of our governmental structure. Just as the idea of separate powers has led to disillusionment, so too has the idea of separate functions. It is now widely accepted, for example, that the departments each perform functions typically associated with other departments.[305] This tension between ideal and reality has prompted despair, desperation, and dramatic proposals for a revision of our governmental structure.[306] These reactions, however, depend upon the perception of a dilemma similar to the one seen above—a dilemma that may in the end be irrelevant to the construction of a viable separation of political power. If we see contradiction when executive agencies purport to exercise nonexecutive functions, it is because we assume the separation of powers separates something called a "function." If, as I have tried to show above,[307] separation may be maintained under a variety of functional distributions, then our concern for functional overlap may be misplaced. At the very least, we must do more than invoke a picture of failed descriptive purity to convince ourselves that alterations in functional distribution violate the separation of powers.

I believe that most contemporary confusions about the separation of powers—linguistic, theoretical, and doctrinal—depend in one way or another upon shared assumptions about the nature of "functional" division. Functional descriptions have become convenient, albeit misleading, shorthand for a complex set of political norms and relationships.[308] The Constitution endows each department with a separate electoral pedigree and audience.[309] It also endows each department with a different "principle of action" vis-à-vis individuals.[310] The executive department holds the

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305. *See* Strauss, *supra* note 9, at 511 ("[T]he government we have built and now live with has attained a complexity and intermarriage of function that beggars the rationalistic tripartite schemes of the eighteenth century.").

306. *See* Calabresi & Rhodes, *supra* note 13, at 1165-66 (suggesting that many of our present independent agencies are unconstitutional because the president must have political control over members of the executive branch); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 96-97 (arguing that "the independent agency is . . . an anomalous institution created without regard to the basic principle of separation of powers").

307. *See supra* text accompanying notes 245-74.

308. It takes a poet to say the obvious about "functional" description: "When we speak of the 'function' of anything, we are likely to be thinking of what that thing *ought* to do rather than what it does do or has done." T.S. ELIOT, *The Social Function of Poetry*, *in* ON POETRY AND POETS 15, 15 (1957).

309. "Underlying [the Constitution's institutional] divisions of responsibility are significant variations in the rules of election, assuring that the various parts of the political process are elected by different constituencies, by different methods, and for different terms." KOMESAR, *supra* note 162, at 202 & n.11.

310. *See* THE FEDERALIST No. 51, at 322 (discussing the different "principles of action" of the two branches of the legislature).

key to the most immediate impact on citizens: force. It may call out the army in national emergencies, send the tax collector, or sell our goods at auction.[311] The judiciary may do none of these things without the aid of the executive department—it may act upon individuals only by issuing judgments in "cases or controversies."[312] The legislative department, which speaks only in general pronouncements, must be content with even less of a direct impact on individuals. This structure of incomplete constitutional power places the departments with the strongest political connections to the People the farthest away from the use of force against any particular individual.

When we use the term "function" today, we express these relationships in bureaucratic shorthand. When we say, for example, that we do not want Congress to execute laws, we appeal to a norm of action based on a particular political relationship. For example, the member from the Twenty-first District in Texas, representing only a part of the nation and subject to its electoral whims, should not be empowered to send the sheriff to our doors. The difficulty comes when we try to capture this paradigm of action in the abstraction of functional categories. Once we move from the claim that the member from the Twenty-first District should not be able to send the sheriff to our doors to the claim that Congress should not execute the laws, we face difficult questions about the nature of the term "execution." We ask ourselves whether Congress does in fact perform executive functions when it grants power to the Architect of the Capitol, the Librarian of Congress, or the comptroller general.[313] In the process, we transform the inquiry from one of norm and relationship to one of fact and description. The question is no longer what kind of political relationship is at issue or what principle of action governs, but how to describe "execution." In the process, we not only lose our way; we also forget that what we came to decide depends, at least in part, upon those who hold the power in their hands.

My point here is not that we need to jettison "functional" description, but that we need to reconsider the purposes "functional" description serves. I have argued, above, that functional description is neither necessary nor

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311. For example, Neil Komesar writes:

> The single greatest threat to the rules and indeed to the game comes from the monopoly of force that characterizes government. The military and the police are central functionaries in any constitutional government. But they are also its major threats. Rule by the military and the secret police often turns constitutions into empty documents.

KOMESAR, *supra* note 162, at 202.

312. U.S. CONST. art. III, § 2, cl. 1.

313. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 753 (1986) (Stevens, J., concurring) (addressing the question whether the comptroller general is an executive officer and noting that the Architect of the Capitol and the Librarian of Congress "perform functions that could be characterized as 'executive' in most contexts").

sufficient to secure separate institutional identities. Although I venture no complete explanation of the role of "functional" description here, I am convinced that, as far as the separation of powers is concerned, we have become victims of our own assumptions. If we continue to believe that functions, like powers, constitute objects in the world to be described, we will never get beyond the cancelling quotations; the cancellation is inherent in the label we use and the implicit uniformity it imposes on our search.

In the end, my rereading of *The Federalist* challenges us to ask different questions about the separation of powers than we have asked before. If we are willing to put to one side the idea of power as an object to be found or a function to be described and to consider power as conduct, as acts of will, as incentives, the separation of powers becomes less a theory about the distribution of legal authority than a theory of institutional design, less an idea about the definition of function than an idea about the conduct of political relationships. Read this way, Madison's essays help us less to find an original version of the separation of powers than to break our modern frame of reference.[314] They ask us to consider our use of power as an abstraction and invite us to examine the human element in power's administration. As I argue in Part V, this transformation offers preliminary lessons for some of the more persistent academic and judicial debates about the separation of powers.

V. Contemporary Theory and the Madisonian "Foundation"

Long ago, the academic community accepted the proposition that, when it comes to the separation of powers, we have been left with an "incoherent muddle."[315] We have "adopted no theory, embraced no doctrine, endorsed no philosophy" of the separation of powers that has convinced any more than a few at a time.[316] It would be convenient, then, to leave readers to reach their own conclusions about the contemporary implications of my rereading. But "[t]o merely observe that the field is chaotic, arcane, or incoherent is to decline the work of understanding."[317] In that spirit, this Part explores some of the implications of my rereading for several persistent separation of powers controversies.

A. Lessons for Originalists: Read On

During the past decade, scholars and jurists who repose great confidence in the power of original intent to guide us toward answers to

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314. *See* Michelman, *supra* note 11, at 1495 (arguing that taking the founding ideals of republicanism seriously may entail rejecting the received wisdom).

315. Brown, *supra* note 8, at 1517.

316. *Id.* at 1518.

317. Althouse, *supra* note 277, at 1001.

modern constitutional questions have worked to revive an "originalist" account of the separation of powers.[318] Although positions vary a good deal, scholars embracing an "originalist" position generally agree upon some common principles. For example, the originalist typically argues that we have forsaken the idea of three "distinct" powers and, in the process, betrayed the Framers' intent.[319] To the originalist, there is nothing more important than "gaining an understanding of the way that those who wrote and ratified the Constitution hoped that the government structure would operate."[320] That understanding is inextricably bound up with legitimacy: a government that strays from the separation ideal, that seeks to evolve its organization to meet changing governmental need, is a government whose constitutional "existence" is in doubt.[321] As Stephen Carter has argued, "The entire point of a constitution that governs structure is to enable the government to function while restraining the ability of government to restructure itself."[322]

In an academic and political world largely hostile to the separation ideal, originalists have expended substantial resources to revive a secure tripartite division. Unfortunately, the most persuasive originalists or quasi-originalists have argued far more strenuously *for* an originalist approach than they have argued *about* the content of that approach.[323] Originalists routinely cite Madison as a disciplinarian of the separation of powers who cautioned us about the importance of maintaining departmental integrity.[324] Unfortunately, as many have noted, this is a fairly crude image of Madison's views on the separation of powers.[325] Madison repeatedly rejected the role of departmental drill sergeant. His profound pessimism that "no skill in the science of government ha[d] yet been able

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318. Strains of originalism appear in their most sophisticated and persuasive form in the work of Stephen Carter, who nevertheless rejects the label of originalism because of its cruder implications. *See* Carter, *Improprieties*, *supra* note 13, at 368 n.37, 368-76 (refusing the label of "originalist," but emphasizing the significance of the intent of the Founders). Other arguments that rely, at least in part, on originalist ideas may be found in Greene, *supra* note 13, at 153-77 (basing a claim for newly devised checks on an originalist argument); Merrill, *supra* note 13, at 255-59 (acknowledging the importance of constitutional text and structure); and Miller, *supra* note 306, at 52-58 (advocating a neoclassical approach).

319. Of course, not all those interested in original intent take this position. *See, e.g.*, Farina, *supra* note 18, at 496-97 (arguing that the Framers envisioned a flexible scheme of shared powers).

320. Carter, *Separation of Powers*, *supra* note 13, at 740.

321. *Id.*

322. Carter, *Improprieties*, *supra* note 13, at 366; *id.* at 375 ("If the courts allow governmental arrangements that run sharply contrary to the original design, they are in effect drawing upon an allegiance of the people gained by implying an institutional continuity that does not exist.").

323. *See, e.g.*, *id.* at 368-76.

324. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting) (citing Madison as a proponent of strict separationism).

325. *See, e.g.*, CAREY, *supra* note 18, at 51-56; WILLS, *supra* note 18, at 108-16 (both discussing the complexity of Madison's views on the separation of powers).

to discriminate and define . . . the legislative, executive, and judiciary" was matched only by his conviction that departmental boundaries were no real "barrier" to departmental encroachment.[326]

Originalists will point to contrary indications, such as Madison's repeated references to the "separate and distinct" exercise of powers and his praise for the "separation" of powers.[327] But these statements simply beg the question on the strength of an adjective: that *The Federalist* advocates a separation of powers does not tell us *what* powers should be separated, or as the essays put it, "the sense in which" they should be separate.[328] Madison himself tells us this when he implicitly chides the antifederalists for assuming that "separateness" and "distinctness" are self-evident, uncontroversial concepts.[329]

It is ironic, but true, that in their effort to find a disciplinarian Madison, originalists have routinely ignored the very text they revere. Nowhere in Nos. 47 through 51 does Madison use the precise term "separate and distinct power." When Madison discusses separateness and distinctness, he does so repeatedly by making reference to the "hands" in which power is held,[330] to the separate departments or offices of

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326. THE FEDERALIST No. 37, at 228; THE FEDERALIST No. 48, at 308-09.

327. *See, e.g.*, Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1081 (1989) (relying on Madison's praise for the separation of powers).

328. It was the purpose of No. 47 "to investigate *the sense in which* the preservation of liberty requires that the three great departments of power should be separate and distinct." THE FEDERALIST No. 47, at 301 (emphasis added).

329. *See id.* (arguing that it is not sufficient to invoke the general concept of separation). Even those originalists who recognize that Madison's allegiance to "separation" is complex still rely on *The Federalist* to support "disciplinarian" outcomes. *See, e.g.*, Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 45-46 (1995) (arguing that *The Federalist* essays "necessarily" lead "to the idea of a 'unitary executive'"). Calabresi's reading of the essays is, in my view, inconsistent with the text. Madison did not propose a unitary executive to check legislative power; he proposed quite the opposite—a "qualified connection" between the president and the Senate ("the weaker branch of the stronger department," THE FEDERALIST No. 51, at 323). Madison is referring here to the powers (*e.g.*, the advice and consent power) that link the president to the Congress. He is not arguing that the executive needs exclusive control over its employees, but that its "joint" control, with the Senate, restrains the legislative zeal of the House. *See id.* ("May not this defect of an absolute negative [the veto] be supplied by 'some qualified connection' between this weaker department [the executive] and the [Senate], by which the [Senate] may be led to support the constitutional rights of [the president]."). The idea is that, if the House attempts to undermine the powers shared by the president and the Senate, the Senate will, to preserve its own interest in the process, take the president's side. *See supra* text accompanying notes 242-44. Madison is forced into this strained position by the antifederalists' persistent attacks against the Constitution's connections between the Senate and the executive. *See supra* notes 156-57, 242.

330. *See* THE FEDERALIST No. 47, at 301 ("The accumulation of all powers, legislative, executive, and judiciary, *in the same hands*, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); *id.* at 302 ("There can be no liberty where the legislative and executive powers are united *in the same person or body* . . . ." (quoting Montesquieu)); THE FEDERALIST No. 48, at 310-11 ("All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these *in the same*

power,[331] or the separate "administration" and "exercise" of powers.[332] These terms are far more consistent with a reading that stresses the importance of those who hold power than they are with a vision of the separation of "powers" conceived as legal power or authority alone. Obviously, it would be folly to rest any argument about *The Federalist* upon this precise terminology, but it is certainly worthy of more attention from those who claim to place substantial reliance upon the Founders' texts.

This is but one example of the way in which some originalists have assumed the question that I have sought to ask throughout this Article: what is it that the separation of powers separates? To originalists (and formalists of all stripes), the answer to this question is self-evident. The separation of powers separates constitutional authority—the legal prescriptions provided in the constitutional document. The constitutional text is not as confident: the text creates both a set of legal authorities (kinds of things that departments may do)[333] and a political structure that

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hands is precisely the definition of despotic government." (quoting Thomas Jefferson)); *id.* at 311 ("For this reason that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, *so that no person should exercise the powers of more than one of them at the same time.*" (quoting Thomas Jefferson)); *id.* at 313 ("[A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government *in the same hands.*") (emphasis added throughout).

331. *See* THE FEDERALIST No. 47, at 307 ("In citing these cases, in which the legislative, executive, and judiciary *departments* have not been kept totally separate and distinct . . . ." (emphasis omitted and added)); THE FEDERALIST No. 49, at 314 ("But there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several *departments of power* within their constitutional limits."); THE FEDERALIST No. 50, at 317 ("I confine myself to their aptitude for enforcing the Constitution, by keeping the several *departments of power* within their due bounds . . . ." (first emphasis in original)); *id.* at 319 ("It is at least problematical whether the decisions of this body, do not, in several instances, misconstrue the limits prescribed for the legislative and executive *departments*, instead of reducing and limiting them within their constitutional *places.*"); THE FEDERALIST No. 51, at 320 ("To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several *departments*, as laid down in the Constitution? The only answer that can be given is that . . . its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper *places.*") (emphasis added throughout).

332. *See, e.g.*, THE FEDERALIST No. 48, at 308 ("It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely *administered* by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the *administration* of their respective powers."); THE FEDERALIST No. 51, at 321-22 ("But the great security against a gradual concentration of the several powers in the same department consists in giving to *those who administer each department* the necessary constitutional means and personal motives to resist encroachments . . . ."); *id.* at 322 ("We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several *offices* in such a manner as that each may be check on the other . . . .") (emphasis added throughout).

333. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."); art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . .").

creates the political power to do those things.[334] By failing to see both as sources of power, too many have inadvertently forsaken an important part of the history that has in fact helped us to maintain separate centers of institutional power.

In the end, my rereading suggests two lessons for the committed originalist. First, it suggests that originalists must consider more seriously questions about the nature of the Founders' intent before asking *whether* that intent should apply. When the Founders sought to separate "powers," what did they consider the "powers" to be? I have given one answer to these questions. I have argued that, in the Madisonian scheme, power is created by the relationship of governors to the governed, power is distributed according to its perceived weight, and departments are kept separate by separate political allegiances. These are facts about the political world, not lines in the sand. My rereading may not be the only available reading of *The Federalist*'s text, but, at the very least, it raises questions that deserve greater attention from those who urge us so strenuously to "remember the Founders."

Second, my rereading suggests that originalists are correct in their call to maintain the separation ideal, but mistaken in the content of that ideal. Originalists have been right to insist that separation is important; they have been less successful at explaining why. Too often, they have sought to defend the ideal by proposing a departmental purity that saves separation for its own sake: we seek departmental purity because we find quotations in texts that tell us that the separation of powers is important even if we no longer understand what the texts or the quotations mean by "separation" or by "powers." Although Madison's thought on the separation of powers often seems muddy, we know this: separation is important *and* it is important for good reasons—to prevent governmental corruption and institutional collapse. Originalists have not been wrong in searching for a plausible and stable ideal of separation; they have simply been looking for that ideal in all the wrong places.

B. Lessons for Functionalists, Lessons for Formalists: Functional Assumptions Matter

Those not busy waging the war for an "original" separation of powers have focused instead upon the warring concepts of "formalism" and

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334. U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."); art. II, § 1, cl. 2 (providing that the president shall be elected by a majority of electors appointed by the States); *see* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 80 (1982) (noting that structural argument is "grounded in the actual text of the Constitution" but not "the passages" that involve "express grants of power or particular prohibitions").

"functionalism."[335] Like the originalist, the formalist typically stresses the importance of maintaining three departments as "distinct," although that commitment does not necessarily hinge upon historical pedigree.[336] Formalists are unwilling to tolerate modifications to an idealized schematic of three separate departments performing three unique functions.[337] The functionalist position, on the other hand, accommodates significant deviation from the norm. Functionalists are willing to tolerate any arrangement that does not interfere with "core" functions of existing departments.[338]

Formalists and functionalists differ primarily in their sense of whether a strict separation of powers is a question of authority or legitimacy. Formalists urge us to play by a consistent set of rules,[339] arguing that, without such an approach, our government rests on little more than shifting political sands.[340] Attempts to cross departmental boundaries are inherently suspect because they violate the sense of order required by legal rules uniformly applied.[341] By contrast, functionalists do not see the question so much as one of legitimacy or authority as one of pragmatism. The question for functionalists is whether our government should constitute a "workable" whole. If a governmental innovation does no obvious damage to the underlying structure of the government, the functionalist is unwilling to oppose such an innovation simply because it violates an idealized notion of departmental purity.[342]

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335. *See, e.g.*, Krent, *supra* note 13, at 1254-57 (discussing the formalist and functionalist approaches); Merrill, *supra* note 13, at 227, 230-35 (arguing that "neither formalism nor functionalism provides a satisfactory account of the constitutional principle of separation of powers"); Strauss, *supra* note 9, at 520-26 (advocating a functionalist approach to resolving separation of powers issues); Tushnet, *supra* note 13, at 597-603 (arguing that formalism and functionalism converge).

336. The formalist position overlaps, but does not require, the originalist emphasis on the Framers' "intent." *See, e.g.*, Redish & Cisar, *supra* note 13, at 494-97 (criticizing "selective originalism," but embracing "pragmatic formalism").

337. *Id.* at 453 (explaining that the formalist position is "grounded on the deceptively simple principle that no branch may be permitted to exercise any authority definitionally found to fall outside its constitutionally delineated powers").

338. This distinction is laid out in several works, most notably in Brown, *supra* note 8, at 1522-31, and Strauss, *supra* note 9, at 489, 512-22. *See also* Merrill, *supra* note 13, at 230-35 (explaining both the methodological and substantive differences between functionalism and formalism). One of the most incisive critiques of this position is contained in Tushnet, *supra* note 13, at 581, 582-85, 603-05 (arguing that "there are no substantive differences between [formal and functional] approaches").

339. *See* Redish & Cisar, *supra* note 13, at 476 ("No doctrinal model other than a formalistic approach can assure that a system of separation of powers will perform its prophylactic function.").

340. Without embracing a crude formalism, Stephen Carter makes this point in his defense of a "de-evolutionary" approach. *See* Carter, *Improprieties*, *supra* note 13, at 365 ("If the structural provisions of the Constitution evolve freely as the felt political needs of the country change, then we might as well say that the federal government controls the Constitution rather than, as we teach schoolchildren, the other way around.").

341. *See* Redish & Cisar, *supra* note 13, at 454 (asserting that pure formalism requires a commitment to strict definitional boundaries).

342. *See* Tushnet, *supra* note 13, at 583, 582-83 (asserting that functionalists will accept the constitutionality of a statute as long as the statute does "not substantially alter the general balance of power among the branches").

Although approaching the problem from different perspectives, formalists and functionalists share more than is generally assumed. They both make a crucial assumption about the importance of functional description to the separation of powers. A "formal separation of powers analysis begins with an abstract definition of the tasks of legislation, execution of the law, and adjudication."[343] These descriptions are then used to "test" the challenged action. Functional analysis conducts a similar intellectual exercise, but proceeds in reverse: it asks whether the challenged action interferes with a "core function" or the successful performance of an essential function of an existing department.[344] From whichever direction they proceed, formalists and functionalists agree upon one thing: the idea that an institution may be reduced to its functional "essence." Whether one's goal is to fit new entities within the essential identity of an existing institution or to test whether the new entity leaves the essential identity of that institution intact, both approaches necessarily assume that functional description is both possible and desirable.[345]

In their continuing debate, neither formalists nor functionalists have questioned the shared assumption upon which they proceed. As I have argued above, if allegiance propels separation, functional purity becomes irrelevant and core integrity becomes a derivative, or secondary, goal of any effort to maintain structural integrity. Functional divisions stand in for other goals—the protection of individual rights, the construction of an efficient government, the security of incomplete power. But if what we are interested in is exclusively "separation," then functional purity is neither a necessary nor a sufficient explanation of why the departments retain separate institutional identities.

Rather than focusing on function, I have argued that we must focus first on questions of political relationship. If a structural innovation permits members of one department to manipulate members of another department, the innovation may be dangerous to structure whether or not it interferes with a core function or violates an ideal of functional purity. Consider, for example, a case in which Congress creates a new agency it locates in the executive department. The enacting legislation requires Congress to appoint three members of the agency's governing board. Put

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343. *Id.* at 584.

344. Krent, *supra* note 13, at 1255, 1254-55; *see, e.g.*, Mistretta v. United States, 488 U.S. 361, 384, 382-84 (1989) (applying a functional approach in upholding the Sentencing Reform Act of 1984); Morrison v. Olson, 487 U.S. 654, 677-85 (1988) (applying a functional approach in upholding the Ethics in Government Act of 1978).

345. Mark Tushnet has also argued that these positions are not as divergent as they seem. His claim is different than mine, however; it rests upon the idea that "functionalism" is simply a "more defensible formalism" because functional analysis is, by its terms, nearly impossible for courts to perform in anything but a "formalistic" way. *See* Tushnet, *supra* note 13, at 596 ("Because judges are neither political scientists nor prophets, they cannot be functionalists either.").

to the side questions of the Appointments Clause[346] and focus, instead, on how the contemporary debate would characterize the separation of powers questions. The formalist will argue that this arrangement violates the separation of powers because the "appointment" function resides in the executive branch and the statute vests this function in Congress, where it does not belong.[347] Because the function crosses departmental lines, it is inconsistent with the separation of powers. The functionalist will arrive at the opposite conclusion, chiding the formalist for failing to recognize that Congress frequently exercises the appointment function by helping to name or actually naming a variety of persons, such as the director of the Congressional Budget Office, the capitol police, and various other congressional personnel.[348] The functionalist will argue that the statute impairs no "core" function of the executive because the executive does not lose its institutional integrity by parting with such a minor "function" as appointing three persons in an otherwise massive bureaucracy.[349]

Now, let us look at the same problem from a different perspective. Consider the possibility that the issue is not one of function, but of allegiance. From this perspective, the question is not whether Congress has taken for itself an improper function, but whether Congress's proposal creates the risk that the officers appointed will serve two masters. The focus is no longer on what the Congress "does" or what the executive "does," but on political incentives and constitutional structure. Under this approach, the statute raises questions not because it violates some formal ideal or undermines a "core" function, but because it permits one department—the Congress—to exercise a political influence—the influence of patronage—over the members of another department that the

346. U.S. CONST. art. II, § 2, cl. 2. The Supreme Court has never precisely delineated the relationship between the Appointments Clause and the separation of powers. More often than not, it has sidestepped Appointments Clause questions and resolved cases on separation of powers grounds. *See, e.g.*, Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 277 n.23 (1991) (expressing no opinion as to whether the appointment of members of Congress to an airport governing board violates the Appointments Clause).

347. *See Metropolitan Wash. Airports Auth.*, 501 U.S. at 271-77 (holding that Congress may not delegate decisionmaking authority to a group of its members or agents when such a group exercises "executive" power); Bowsher v. Synar, 478 U.S. 714, 726-27 (1986) (holding that Congress may not control an officer exercising "executive" power).

348. 2 U.S.C. § 601(a)(2) (1994) (providing that the Speaker of the House and president pro tempore of the Senate appoint the Congressional Budget Office director); 40 U.S.C. § 206 (1988) (providing that the capitol police are to be chosen by the sergeants at arms of the House and Senate); 44 U.S.C. § 740 (1988) (authorizing the sergeant at arms of the Senate and the doorkeeper of the House of Representatives to appoint superintendents of the Senate Service Department and the House Publications Services). Indeed, the Constitution expressly provides that the Senate exercise the power to "chuse their other officers." U.S. CONST. art. I, § 3, cl. 5.

349. *See Metropolitan Wash. Airports Auth.*, 501 U.S. at 286 (White, J., dissenting) (making a similar pragmatic argument that it was "absurd" to suggest that Congress's control over an airport review board was a "legislative usurpation" amounting to "tyranny").

Constitution does not otherwise permit. Unless other provisions were made, such a practice could, in effect, collapse the departments by rendering persons in the executive branch effectively answerable both to Congress and to the president.

The lesson my rereading offers for the debate between formalists and functionalists is that they share more than meets the eye. The labels dichotomize, but formalists are less formal and functionalists more formal than their insignia suggest. When formalists reach for purity, they reach for purity based on functional description—a conceptual process that hardly leads to formal, in the sense of determinate, results.[350] At the same time, when functionalists reach to protect the "core" of a department, they depend at least in part upon an ideal of separation that seems distinctly formal—a separation that depends upon three distinct descriptions. Both share an assumption similar to the one originalists make: that the separation of powers is the separation of legal power (generalized as "function"). Neither considers the possibility that what they are separating may be different in kind.

C. *Lessons for the Court: Protecting Allegiance to Place*

What, then, should this rereading tell us about the Supreme Court's approach toward separation of powers cases?[351] At the most obvious level, it suggests that the Court's penchant for indiscriminate reliance on *The Federalist*—Madison as pragmatist, Madison as disciplinarian, Madison as confused—is both unwise and misleading. The essays ask and answer a question different from the one the Court routinely asks. Because the essays assume a given distribution of power, they tell us very little about whether the president may run the steel mills or whether Congress may give away the legislative store.[352]

At the same time, this rereading does provide significant lessons for the Court when it comes to the "due foundation" for the separation of powers. To use Madison's terms, separation requires independence, and independence means protecting the hands in which power is held from

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350. *See Bowsher*, 478 U.S. at 749, 736-59 (Stevens, J., concurring) ("[G]overmental powers cannot always be readily characterized with only one of . . . three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned.").

351. For the purposes of this essay, I assume that the Court will continue to consider such claims justiciable. *Cf.* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260-379 (1980) (arguing that many separation of powers issues should be considered nonjusticiable).

352. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (deciding whether President Truman's seizure of the nation's steel mills was constitutional); *Bowsher*, 478 U.S. at 714 (deciding whether Congress could give its budget-making authority to a congressional agent). *The Federalist* essays on the separation of powers do not offer much help in deciding the questions raised in either case.

corrupt manipulation. This represents a significant advance in our understanding about the relationship between appointment and removal powers and the separation of powers. Although the Supreme Court has frequently addressed such issues, it has never explained why or how facts about "office" affect the institutions we seek to separate. Indeed, the Court has seesawed from one extreme to another, embracing at one moment the importance of attributes such as the removal power[353] and, in the next, rejecting them as stuffy formalism.[354]

My rereading helps us to see that some of this confusion may be dispelled, but only if we reject both the formalists' enthusiasm and the functionalists' indifference to the attributes of office. Removal and appointment powers are not simply "technical details."[355] They may be crucial to maintaining a system in which the "interest of the man" is aligned with the "constitutional rights of the place."[356] I emphasize, however, that the attributes of office (including removal and appointment) are only crucial in certain cases—cases in which they pose a risk of structural collapse (when one department has sought to monopolize power by, in effect, "stealing" another department's employees).[357] This does not mean that all questions about removal and appointment, nor all questions of cross-departmental influence, raise separation of powers questions. If one department has not used the attributes of office to inject itself into another department—to breach the union of "the place" and the

353. *See Bowsher*, 478 U.S. at 723 (striking down the provision of the Gramm-Rudman-Hollings budget law that allowed Congress to remove the comptroller general, largely because "[a] direct congressional role in the removal of officers charged with the execution of laws beyond [impeachment] is inconsistent with the separation of powers").

354. Morrison v. Olson, 487 U.S. 654, 689 n.28 (1988) (rejecting application of the stringent focus on removal adhered to in *Bowsher*). Traditionally, the Court's opinions focusing on the removal power have been criticized as "formalistic." *See, e.g.*, Strauss, *supra* note 9, at 488; Gewirtz, *supra* note 247, at 348, 349 n.21 (both characterizing the Court's opinion in *Bowsher* as "formalistic"). My rereading suggests that the removal power raises more than purely formal questions; at the same time, my rereading rejects the approach toward removal taken in cases such as *Bowsher*. *Bowsher* was not a case in which one department sought to manipulate the employees of another and, as such, does not raise the risk that one department will infiltrate another. *Bowsher* raises two different issues: (1) whether the president may anticipatorily alienate his veto on questions of importance such as the budget and (2) whether Congress may avoid hard decisionmaking by creating its own set of agents to make decisions it would otherwise delegate to the executive department. On this second issue, see Gewirtz, *supra* note 247, at 349, 348-49 (arguing that removal was not the crucial issued raised by Gramm-Rudman-Hollings; rather, it was whether Congress may "bind[] itself with a series of mechanical across-the-board spending cuts rather than making considered value choices on an ongoing basis").

355. *Contra Morrison*, 487 U.S. at 703 (Scalia, J., dissenting) (complaining that the majority opinion rests on "such technical details as the Appointments Clause and the removal power" instead of the separation of powers doctrine).

356. THE FEDERALIST NO. 51, at 322.

357. I do not mean to suggest by these terms that the department intentionally sought to inject itself into a rival institution; I use the terms "monopolize" and "steal" for emphasis.

"interest[s] of the man"[358]—restrictions on removal or appointment may pose no threat of improper dependence. Thus, this analysis leaves standing a variety of influences on the attributes of office[359] as well as a variety of cross-departmental influences that do not undermine allegiance.[360]

To see how this analysis differs from the Supreme Court's current approach toward such issues, let us look at *Morrison v. Olson*,[361] perhaps the most important case on the removal power in the past decade. In *Morrison*, the Supreme Court was asked to adopt a formal position toward removal, barring Congress from any effort to limit the president's control over so-called "independent" agencies or officers. The Court declined the invitation, upholding Congress's power to limit the president's political control over the office of the "independent counsel"[362] created by Title VI of the Ethics in Government Act.[363] The Supreme Court reached this conclusion using a classically "functional" analysis. The Court reasoned that, whatever interference Congress may have placed between the president and the independent counsel, it did not undermine the president's performance of his functions.[364] As the Court put it,

> Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.[365]

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358. THE FEDERALIST No. 51, at 322.

359. For example, it leaves Congress free to determine the terms of removal of executive branch employees. *See infra* text accompanying notes 388-89.

360. Informal contacts between the departments frequently cross departmental lines and may be directed at specific officeholders. The difference between such cases and those I posit here is that in none of the former cases are the "attributes of office" used to undermine the allegiance of political rivals to their own department. At the end of the day, the executive department employee who has been lobbied by a member of Congress knows that she may not be fired by a member of the legislative branch. This does not mean that Congress does not affect the tenure of exeeutive department employees; it does. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 80-83 (1991) (detailing informal congressional efforts that lead to the dismissal of executive officers). This informal power, however, has limits—limits that prevent Congress from determining the membership of the executive branch. *Id.* at 83.

361. 487 U.S. 654 (1988). I take no position here on the application of Article II to the question of a "unitsry executive," basing my arguments solely on the separation of powers. I see nothing in *The Federalist* Nos. 47-51, however, to support a "unitary executive" theory. *See supra* note 329.

362. *Morrison*, 487 U.S. at 696-97.

363. 28 U.S.C. §§ 591-599 (1988). Although this law lapsed in 1992 when Congress failed to reratify it, the Independent Counsel Reauthorization Act was passed on June 30, 1994. Pub. L. No. 103-270 S2, 108 Stst. 732.

364. *Morrison*, 487 U.S. at 685-97.

365. *Id.* at 691-92 (footnote omitted).

From the perspective of departmental allegiance, this rationale is problematic. If accepted, it would permit Congress to grant itself powers that pose a significant threat to departmental allegiance.[366] Imagine a statute in which Congress granted itself the power to remove particular inferior officers.[367] Each individual removal would appear unimportant enough to pass the "functional" test—none alone would seem "so central to the functioning of the Executive Branch" as to interfere with the president's constitutional authority.[368] At the same time, each might be quite effective in signalling to other employees that Congress might try to remove them as well. If an executive department employee knows that a member of Congress may remove her, the officer will be sorely tempted to allow her personal "interest" in maintaining her job to determine the public obligations of her department. If Congress did in fact grant itself such authority and it were upheld under *Morrison*'s rationale, Congress could in effect "create" its own agents or representatives throughout the executive department. Extended to more and more individuals, such a power would pose a very serious threat to the continued political separation of the departments.

That the *Morrison* analysis is faulty does not, however, mean that we must embrace the argument on the other side—that Congress may never limit the president's removal power. The difficulty with *Morrison* and its critics is that both see the removal power in precisely the same way. Both positions fail to distinguish between "removal" issues that allow a department to "rig" the rules of the political game and "removal" issues that do not. When Congress passes a statute barring the president from dismissing an officer except upon "good cause," it undeniably circumscribes the president's power of removal.[369] This limits the political power of presidents. But it does not allow one department to

366. By emphasizing departmental competition, I do not mean to embrace the position that any and all measures that might enhance competition are consistent with the separation of powers. My analysis suggests that the role for the Court is not in regulating political competition but in ensuring that it is not "rigged" before it starts. My proposal is far more analogous to an antimonopoly standard than economic substantive due process.

367. Such an effort would not be without precedent. During the nineteenth century, Congress made significant efforts to insert itself into the removal process. The Tenure of Office Act of 1867 provided that Cabinet officers "shall hold their offices . . . during the term of the President . . . subject to removal *by and with the advice and consent of the Senate*." This statute led, eventually, to political war between the departments and the impeachment trial of President Andrew Johnson. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS 210-16 (1992) (describing President Johnson's attempt to remove the Secretary of War, who was allied with Johnson's congressional opponents, and his subsequent impeachment for defying the Tenure of Office Act).

368. *See* Strauss, *supra* note 9, at 513 ("At best, 'core function' analysis can guard against a sudden demarche, but not against the step-by-step accretion of 'reasonable' judgments over time.").

369. *See Morrison*, 487 U.S. at 691 (acknowledging, implicitly, a reduction in presidential power in stating that "we cannot say that the imposition of a 'good cause' standard for removal by itself *unduly* trammels on executive authority" (emphasis added)).

infiltrate another. Separation implies a qualitative, not a quantitative, difference in structure. If what we are concerned with is maintaining a base level of institutional separation, rough judgments about the quantity of power shifted tell us very little about whether separation is at issue at all.

We can see this more clearly if we consider Madison's position on removal, which incorporates the distinction I am drawing. During the removal debate of 1789, Madison opposed those who sought a role for the Senate in removing executive branch officers. At the start of the debate, Madison urged that the "removal power" was in its "nature" an executive power and that the Take Care Clause[370] meant that the president should hold the removal power.[371] This claim, however, ran right into another textual provision—the Senate's power of advice and consent to the appointment of executive officers.[372] Under traditional interpretive practices of the time, Madison had to concede the plausibility of the argument that the "removal" power followed the "appointment" power.[373]

Confronted with conflicting texts (neither of which explicitly resolves the issue), Madison shifted tacks, focusing on the separation of powers.[374] The "sacred" principle of separation was at its most important, Madison told Congress, "when it relates to officers and office."[375] The legislature sets the terms of office: "[it] creates the office, defines the powers, limits its duration, and annexes a compensation."[376] This done, it "*ought to have nothing to do with designating the man to fill the office.*"[377] We would be "insecure" if Congress could do otherwise, Madison urges, for the practice would soon threaten the constitutional "independence of each branch of the government."[378] The danger Madison feared was the same one he had noted in *Federalist* No. 48.[379] To allow Congress a role in naming or removing particular executive branch officers was to risk departments

370. U.S. CONST. art. II, § 3 (requiring the president to "take Care that the Laws be faithfully executed").

371. James Madison, Removal Power of the President (June 16, 1789), *in* 12 PAPERS OF MADISON, *supra* note 153, at 225, 226, 228; Madison, *supra* note 244, at 233.

372. U.S. CONST. art. II, § 2.

373. *See* Madison, *supra* note 244, at 233 ("[I]f nothing more was said in the constitution than the president, by and with the advice and consent of the senate, should appoint to office, there would be great force in saying that the power of removal resulted by a natural implication from the power of appointing.").

374. *Id.* at 234.

375. Madison, *supra* note 153, at 255.

376. *Id.*

377. *Id.* (emphasis added).

378. *Id.* at 255-56.

379. THE FEDERALIST No. 48, at 308-13.

wedded to each other by personal interest. It was to risk the legislative tyranny Jefferson had decried:[380] "What security have they [the people] but offices will be created to accommodate favorites or pensioners subservient to their [Congress's] designs?"[381] Thus, in private, Madison warned Edmund Randolph that, if the Senate were to be given a voice in the removal of individual officers, "the Ex[ecutive] power would slide into one branch of the Legislature."[382]

This aspect of Madison's argument rejects the most prevalent, contemporary understandings of the removal power. The unitary executivists emphasize Madison's references to the "unity" and "responsibility" of the executive department, to the Take Care Clause, and to the president's inability to perform his functions if forced to rely upon "agents" of the Congress.[383] But this ignores Madison's explicit distinction between a congressional role in setting the "terms" of office and a congressional role in "designating" the man.[384] Shortly after the removal debate, Madison was to make good on this distinction, explicitly urging that Congress reduce the president's political control over the comptroller general by limiting this officer's tenure.[385] Although Madison urged a limit on the *president*'s control over the comptroller's office,[386] he never suggested during this debate that *Congress* be permitted the right to decide whether a particular comptroller would stay or go.

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380. *Id.* at 310-11.

381. Madison, *supra* note 153, at 256.

382. Letter from James Madison to Edmund Randolph (June 17, 1789), *in* 12 PAPERS OF MADISON, *supra* note 153, at 230.

383. *See, e.g.*, Calabresi & Prakash, *supra* note 13, at 643 (invoking Madison's arguments to support the unitary executivist position). *But see* Lessig & Sunstein, *supra* note 13, at 17-20 (disputing the unitary executivists' view that Madison opposed all limitations on the president's removal power). On the debate about the Take Care Clause, compare A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994) and A. Michael Froomkin, *Still Naked After All These Words*, 88 NW. U. L. REV. 1420 (1994) with Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994).

384. Madison, *supra* note 153, at 255.

385. The precise nature of Madison's proposal regarding the comptroller general is not clear, and this has raised quite a bit of controversy. *Compare* Lessig & Sunstein, *supra* note 13, at 17 (arguing that Madison's proposal demonstrated a willingness to accept a joint executive-legislative role in the removal process) *with* Calabresi & Prakash, *supra* note 13, at 652-55 (responding that strong opposition and Madison's subsequent withdrawal of the proposal make "the proposition that the First Congress contemplated an executive/administrative distinction seem[] rather suspect"). My argument does not depend upon the significance of the proposal but, rather, upon Madison's apparent justification for it.

386. Madison appears to have argued that the comptroller general's tenure be limited because his duties were quasi-judicial. *See* Madison, *supra* note 272, at 265 ("[T]here may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government."). Note that my argument does not rely solely on this provision, but upon an interpretation of Madison's removal speeches consistent with his position on the separation of powers. *Cf.* Lessig & Sunstein, *supra* note 13, at 17 n.70 (suggesting it unwise to rely simply upon Madison's position on the comptroller general issue to argue against the "unitary executive").

The error made by those who resist Congress's attempt to limit the president's political dismissals is identical to the one made in the context of the separation of powers—the tendency to see the removal power as a question of undifferentiated legal authority rather than of political relationship across departments.[387] By focusing on the "removal power," critics of independent agencies construct an object that may be described either one of two ways—as "executive" or "legislative." There are only two questions and two answers posed by the "removal power": "Yes," Congress may limit the removal power, or "No," Congress may not limit that power. Under this approach, Madison's position represents pure contradiction: one day, he urges presidential unity, and days later he is willing to undermine that unity.

If I am correct that we should focus our attention first on whether one department has attempted to rig the rules of political rivalry and allegiance, the "removal" question is not an all or nothing proposition. One may quite consistently claim that Congress should have no share in the removal power of particular officers and, at the same time, that it may limit the terms of any particular office. For Congress to limit the executive's removal power may alter the political calculus *within* the executive department—it may even reduce the president's political power vis-à-vis Congress[388]—but it does not rig the rules of the political game. It does not permit a rival department—Congress—to infiltrate the membership of the executive branch directly or indirectly. It is only in those circumstances that Madison would have been willing to say, as he did of Congress's efforts in 1835 to inject itself into individual removal decisions,

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387. The unitary executivist will no doubt pick up on the term "political relationship" and suggest that the important political relationship is from the "top down"—from the president to his subordinates to the people. *See* Calabresi & Prakash, *supra* note 13, at 594 (concluding that the Constitution creates a "subordinate/superior relationship" between the president and the other officers of the executive branch). My analysis suggests precisely the opposite approach—that the important point for the separation of powers is not the president's control of "his men and women," but the allegiance of the "men and women" to the president, from the "bottom up." When Congress seeks to interfere with that allegiance—by "connecting" to itself members of the executive department—that threatens separation. The same cannot be said for congressional actions that simply reduce the strength of political connections within the executive department by weakening the president's political hold over his "men and women." *See, e.g.*, Madison, *supra* note 244, at 236 ("If the president should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the president . . . .").

388. If what we are considering is the raw quantum of power, a significant argument may be made that the "independent counsel" does in fact reduce the power of the executive department. Like Mark Tushnet, I doubt whether claims about the "quantum" of power exchanged are effectively justiciable because judges have no way to weigh or measure such claims. *See* Tushnet, *supra* note 13, at 601 (expressing doubt that courts could judge close separation of powers cases without effective criteria to determine when shifts in power "threaten either to weaken the government below the constitutionally prescribed level or to make it tyrannical").

that the relationship of the Constitution and Congress had been reversed: Congress had become "the creator of the Constitution," rather than its "creature."[389]

Understood this way, the Supreme Court was right to reject the removal argument in *Morrison*, albeit for the wrong reasons. If the separate exercise of power is our goal, then the independent counsel, like other independent agencies, poses little threat of structural collapse. By limiting the president's removal power, Congress does not gain, for itself, the ability to infiltrate the executive department. No one doubts, or should doubt, that the counsel's independence "separates" it from other departments. Indeed, it is ironic but true that the very idea of independence enshrined in the independent-counsel law replicates the underlying principles of the *separation* of powers—the idea that independent persons achieve separate powers.[390] If there is a problem with the independent counsel, it is not that it is not "separate" from other departments[391]—it is that it is "too separate" from the people and thus raises important questions of accountability. Those questions are different in nature and kind, however, from questions about what separates the departments.

My analysis obviously leaves significant questions unanswered. The "foundation" I have highlighted provides a basic level of insurance against departmental collapse. It leaves for another day, however, important questions about the political relationships between the departments and their constituents.[392] It is these relationships, relationships of accountability,

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389. DREW R. MCCOY, THE LAST OF THE FATHERS 104 (1989) (quoting Letter from James Madison to Charles Francis Adams (Oct. 12, 1835), *in* IX THE WRITINGS OF JAMES MADISON 562-63 (Gaillard Hunt ed., 1910)).

390. *See supra* text accompanying note 1 (quoting Madison on "independence" as a foundation for the "separation" of power).

391. In theory, at least, this still leaves open a significant question with respect to the independent counsel. Presumably, if it could be shown that Congress was using the independent counsel law to "remove" particular executive department officials by threat of criminal prosecution, then it might be likened to a statute in which Congress determined the removal of individual officers. Note, however, that this argument depends not at all upon the "removal power" in the abstract, unitary executive theory, or a formalist's enthusiasm for the removal power—the standard reasons the independent-counsel law has been seen as suspect.

392. Larry Kramer has recently presented an important new argument about the role of politics and federalism that has interesting implications for my thesis. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994). Just as I argue here that political allegiances maintain the Constitution's departmental structure, Kramer argues that political allegiances have created a meaningful relationship between the states and the federal government. *Id.* at 1519-42. Unlike my analysis here, however, Kramer focuses primarily on the role of political parties in forging alliances between state and federal political figures. Where the separation of powers is concerned, political party influence may work two ways—it may enhance the working relationship of the departments or it may provide a reason why departments agree to forsake the separation of powers. Whether party loyalties enhance or detract from the separation of powers seems, in the end, to depend upon whether party ties reinforce or undermine institutional allegiance. In my view, the same holds true for federalism—if

that will ultimately determine many of the more burning questions about the separation of powers. Protecting allegiance may prevent one department from infiltrating another, but it provides no answers to questions about whether Congress may delegate its budget-setting powers to the executive, whether the line-item veto will withstand judicial scrutiny, or whether executive branch agencies may adjudicate common-law claims. Those are questions not of *separation* but of *power*. As such, they cannot be resolved by simple resort to a model of political competition, but require us to build a better understanding of the relationships of accountability the Constitution creates and how shifts in those relationships should affect the separation of powers.

The lesson I leave for the Supreme Court to consider is this: before we reject structural innovations on the strength of functional or other descriptions, consider whether one department has, in effect, attempted to cleave to itself the members of another branch and thus driven a wedge between the "interest of the man" and the "place." This will not answer all separation of powers questions, but, at the very least, it offers us a "due foundation" that preserves structure for a reason, not for structure's sake.

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political parties allow state and federal officials to forge alliances, these alliances only work to preserve a meaningful role for the states if the state actors' maintain a powerful allegiance to the state. (I thank Allan Stein for bringing Prof. Kramer's article to my attention.)