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## Toward a New Constitutional Anatomy

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TOWARD A NEW CONSTITUTIONAL  
ANATOMY

V. F. Nourse\*

*There is an important sense in which our Constitution's structure is not what it appears to be—a set of activities or functions or geographies, the “judicial” or the “executive” or the “legislative” power, the “truly local and the truly national.” Indeed, it is only if we put these notions to the side that we can come to grips with the importance of the generative provisions of the Constitution: the provisions that actually create our federal government; that bind citizens, through voting, to a House of Representatives, to a Senate, to a President, and even, indirectly, to a Supreme Court. In this Article, I contend that the deep structure of the Constitution is not a set of functions or geographies, but rather a political economy of relations between the governed and the governing. Based on standard assumptions common in institutional economics, I argue that these relations create incentives that can help us predict real (rather than simply theoretical) risks to structural change in actual cases involving both the separation of powers and federalism. By considering the risk from shifting relations not to activity-description but instead to majorities and minorities, we may come closer to understanding real risks to shifting power, from states to nation and from one national department to another. To this end, against the backdrop of constitutional law, I bring to bear the converging meanings of history, political science, and lost constitutional text, all of which reveal that the canonical view of our Constitution is quite partial to courts and provides an incomplete picture of our Constitution as a whole.*

INTRODUCTION.....	836
I. RETHINKING CONVENTIONAL STRUCTURAL WISDOM .....	841
A. <i>The Matching Game</i> .....	842

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B. <i>The Constitution of Power</i> .....	845
C. <i>Shifting Power, Shifting Relations</i> .....	850
II. SEPARATION OF POWERS .....	857
A. <i>Categorical Conflict and Embedded Relations</i> .....	857
B. <i>Change, Baselines, and Relative Shifts in Power</i> .....	862
C. <i>Implied Federalism and the Separation of Powers</i> .....	865
III. FEDERALISM .....	871
A. <i>Lopez: Risks to Majorities</i> .....	873
B. <i>Morrison: Where Inequality Meets Commerce</i> .....	879
IV. IMPLICATIONS OF VERTICALITY .....	886
A. <i>The Question of Constitutional Ontology</i> .....	886
B. <i>The Case of the Empty Constitution</i> .....	890
C. <i>Political Economy, History, and Convergence</i> .....	894
D. <i>Popular Constitutionalism: A Coda</i> .....	899

## INTRODUCTION

*"A thinking being can, accordingly, act on the basis of the absent and the future."*<sup>1</sup>

*"The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject, and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone. . . ."*<sup>2</sup>

By the end of the twentieth century, constitutional law and commentary had been preoccupied for decades with the question of judicial review.<sup>3</sup> This preoccupation focused courts and commentators on the subject of the question—the judiciary. Theories of judicial review soon became theories of judicial interpretation and theories of judicial interpretation became questions about judicial function (analysis of texts, history, and precedent).<sup>4</sup> This focus

1. JOHN DEWEY, *HOW WE THINK* 14 (1910).

2. THE FEDERALIST NO. 46, at 315 (James Madison) (Jacob Cooke ed., 1961).

3. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

4. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) (setting forth a set of interpretive modalities); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of*

should seem odd if one is concerned about the *structure* of the Constitution as a whole. After all, the courts are only one of three departments and arguably the least powerful. Indeed, one must wonder whether a theory that begins with the courts' view of the Constitution will simply end there. Put another way, the risk is that, in the name of *judicial review*, courts will look into a Constitution with three departments and find only one—the *judicial one*.

This question of structure has become only more important now that scholars have begun moving away from what I will call the "judiciocentric position"—the search for a theory of judicial review. New work on popular constitutionalism (emphasizing that constitutional interpretation is undertaken outside of courts<sup>5</sup> and that judicial review has its origins in popular ideals)<sup>6</sup> makes this question particularly salient. For if constitutional meaning is poliocentric,<sup>7</sup> if other institutions are capable of deciding and likely to decide constitutional questions, how are basic structural matters to be determined? Should Congress decide questions about the separation of powers? Should the people, in their multivalent social movements,<sup>8</sup> decide questions of the allocation of power between states and nation? Popular constitutionalism thus raises important and unaddressed questions for constitutional structure as a whole. In this Article, I offer a way of implementing a more holistic, more populist view of structural matters. I reject the judiciocentric position that the separation of powers and federalism require recourse to descriptive texts or

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*Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (disputing Bobbitt's interpretive matrix); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (critiquing interpretive approaches); see also Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067 (1980) (defending a theory of the Constitution intended to protect fundamental values against process-based interpretations).

5. MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

6. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (forthcoming May 2004) [hereinafter KRAMER, *POPULAR CONSTITUTIONALISM*].

7. On the definition of poliocentric constitutional interpretation, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Poliocentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003):

The poliocentric model holds that for purposes of Section 5 power the Constitution should be regarded as having multiple interpreters, both political and legal. The model attributes equal interpretive authority to Congress and to the Court. The model thus entails (1) that Congress does not violate principles of separation of powers when it enacts Section 5 legislation premised on an understanding of the Constitution that differs from the Court's, and (2) that Congress's action does not bind the Court, so that the Court remains free to invalidate Section 5 legislation that in the Court's view violates a constitutional principle requiring judicial protection. This account of Section 5 power combines a robust legislative constitutionalism with a vigorous commitment to rule-of-law values.

8. I am referring here to the work within the "Constitution outside the courts" field that has focused on social movements. See, e.g., William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

functions<sup>9</sup> and argue, instead, that our government *is*, in important structural senses, a set of popular relations. Once one takes that view, one can predict with far greater confidence real risks *to the people* from structural change.<sup>10</sup>

The Constitution was created first and foremost to govern, not for the sake of constitutional interpretation.<sup>11</sup> The revolution of 1787 was hailed as the moment not of the courts' arrival or the advent of a new interpretive regime, but rather of a new relation between the people and their government. In this sense, the Constitution is not only a text for interpreting, but is also an "act," a "constituting."<sup>12</sup> "[C]onstitutions not only limit power and prevent tyranny, they also construct power."<sup>13</sup> For all one would know from theories of constitutional interpretation and judicial review, however, this constituting, this activity of generating a government, is unimportant; according to the judiciocentric position, the Constitution conveys meanings rather than constructs power, it refers to the past and dictionaries rather than to the future and our real-life relations to one another. I believe that the judiciocentric view of the Constitution is partial and I believe that the Constitution—the *whole* Constitution—*itself* tells us this.<sup>14</sup>

To get a quick sense of how unrealistic the view from the judiciocentric

9. Please note that when I use the term "function," I am *not* referring to "functionalism," which is a particular school of thought associated with the analysis of separation of powers questions. See *infra* text accompanying note 37. Instead, I am referring to the idea that a department or a doctrine might have a "purpose" we tend to think of as a "function." That includes doctrines that are typically associated with the separation of powers (executive, legislative, judicial) as well as doctrines typically associated with federalism (the "truly local" or "truly national," see *United States v. Morrison*, 529 U.S. 598, 617 (2000)).

10. Of course, the "people" is an abstraction that requires a temporal qualifier. JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF SELF-GOVERNMENT* 168 (2001) (arguing that "written constitutionalism holds that a people achieves self-government not by conforming governance to the authoritative democratic will at any given time, but by laying down and holding itself to its own democratically authored foundational commitments over time"). Indeed, I think one of the major advantages of a constitutive view is that it permits a kind of dynamism about the "people," while seeking to ensure against major dislocations of the representative relation.

11. The most recent and eloquent claim in this regard is that made by Larry Kramer. See KRAMER, *POPULAR CONSTITUTIONALISM*, *supra* note 6.

12. Akhil Reed Amar, *The Supreme Court 1999 Term: Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 35 (2000).

13. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 6 (1995); see also HANNAH ARENDT, *ON REVOLUTION* 143 (1963) ("The word 'constitution' . . . means the act of constituting as well as the law or rules of government that are 'constituted.'"); *id.* at 148 (arguing that the founders aimed to understand "the constitution of power"); *id.* at 150 ("[T]he principle of the separation of power . . . actually provides a kind of mechanism . . . through which new power is constantly generated. . .").

14. In the effort to insist on this position, I am standing on the shoulders of many, including, most especially, Professors Ackerman and Black. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

position can be, just focus on a few key structural terms: the words “executive,” “judicial,” and “legislative,” as they appear in the vesting clauses.<sup>15</sup> These are the terms that form the central focus of structural controversies and academic commentary on those controversies.<sup>16</sup> Now commit interpretive heresy: eliminate these terms from the document. Do courts cease deciding cases? Does the government halt its operations? Hardly. Indeed, very little happens to our government if these three words are excised from the text’s vesting clauses. Now, eliminate the *practices* of government generated by the text—the practices of voting and representation—and what happens? There is no Congress, there is no one in the White House, and there is no one to appoint Supreme Court justices; in fact, there is no government at all.<sup>17</sup>

This raises an important question: Why is it that lawyers and courts have subordinated these practices to other texts, why have they subordinated relations that “govern” to words “to be interpreted?” One answer is that the judiciocentric position tends to privilege *parts* of the document; those parts that seem most like “ordinary” statute-law,<sup>18</sup> that look as if they can or should be

15. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States. . . .”); U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); U.S. CONST. art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). Despite the scholarly focus on these clauses, they have little impact on constituting government and its practices. By contrast, clauses such as those instituting voting and describing the manner of elections have not received the attention they deserve. See *infra* note 17.

16. Academic commentary, conservative and liberal alike, has tended to take the functional terms in the vesting clauses as a starting point. See, e.g., Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343 (1989) (taking a functional and liberal position); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989) (using a traditionally conservative position (reliance on history) to advocate a different view of the meaning of “executive”); Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991) (taking a pragmatic formalist position). Most if not all of the Supreme Court’s cases on separation of powers tend to proceed from understandings that depend upon the idea of function. See, e.g., *Clinton v. Jones*, 520 U.S. 681 (1997) (concluding that an individual lawsuit would not impermissibly interfere with “judicial” or “executive” functions); *Bowsher v. Synar*, 478 U.S. 714 (1986) (concluding that “executive” power had been entrusted to an officer over whom there was “legislative” control); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (opinions disagreeing over whether the legislative veto should be characterized as legislative, adjudicative, or a standard delegation to the executive).

17. U.S. CONST. art. I, §§ 2-3 (establishing the process by which members of the House of Representatives and the Senate are elected); U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII (creating the process by which presidents are elected); U.S. CONST. amend. XVII (providing for the direct election of senators). It is these bodies, in turn, which nominate and confirm Supreme Court justices. U.S. CONST. art. II, § 2, cl. 2 (granting the President the power, subject to Senate approval, to appoint justices to the Supreme Court).

18. On the important difference between the Constitution as fundamental law and as ordinary law, see KRAMER, POPULAR CONSTITUTIONALISM, *supra* note 6. For a full

"interpreted," or that fit with an ideal of what the judiciary does and can do (reading texts and precedents). In such a world, however, it seems fair to ask whether our government has been imagined by courts in their own image.<sup>19</sup>

In this Article, I try to show that an alternative view—a constitutive view—of the Constitution can better enable us to understand important questions about constitutional structure. At the center of the idea of a constitutive position is the notion of an economy of vertical relations between the governed and the governing, relations that create what we conventionally call the separation of powers and federalism. I then apply basic principles drawn from the literature on political economy (and, in particular, institutional economics) to flesh out an alternate view of the implications when we shift power from one set of governing relations to another. To this end, I take the unusual position of considering risks both to majorities *and* minorities from shifting structural relations (thus considering risks found in the literature on public choice and positive political theory along with the more conventional constitutional concern regarding risks to minorities). I then apply this analysis to some traditional problems surrounding separation of powers and federalism caselaw. I have chosen rather well-known problems because I want to show not only that this theory improves our understanding of the "whole" text, but also that understanding the constitutive Constitution can do important work in predicting *realistic risks to governance*.

In Part I, I recount a conventional way of viewing structural problems, shared in the law of federalism and the separation of powers, and offer a competing vision—one which conceives constitutional structure less as an allocation of functions or textual descriptions (executive, judicial, etc.) than as an allocation of real-life constituencies and their relationships to different parts of our government. In this Part, I develop a model that focuses on the way in which the constitutive provisions of the Constitution<sup>20</sup> create relations between the governed and governing, and I argue that "function" (whether it be the function denoted by the term "executive" or "judicial" or that by the "truly

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exposition of this argument, see *infra* Part IV.

19. I confess that I have feared this for some time, see Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401 (1997), because it is in the nature of all institutions to "think themselves." See MARY DOUGLAS, *HOW INSTITUTIONS THINK* 55 (1986) ("Nothing else but institutions can define sameness. Similarity is an institution. Elements get assigned to sets where institutions find their own analogies in nature.").

20. By "constitutive provisions," I mean the provisions of the Constitution that provide for elections of Congress and the President and appointment of Supreme Court Justices. These provisions include: Article I, Section 2, creating a House of Representatives whose members are to be elected by the people aggregated by population; and Article I, Section 3, creating a Senate whose members are to be elected, now, by the people of the states; Article II, Section 1, providing for the election of the President by the nation through an electoral college; and Article II, Section 2, providing for the appointment of the Supreme Court justices by the nationally elected President and their confirmation by the state population-elected Senate.

local” and the “truly national”) serves as too crude a proxy for more refined, off-stage, and often-conflicting, normative judgments about risks to majorities and minorities.

In Parts II and III, I illustrate how this all “works,” by applying it to familiar, but recurrent, problems of categorical contradiction in both separation of powers and federalism cases (specifically, *Chadha* and *Morrison*). It is here that I argue that a political economy of relations is more predictive of real structural risk than current linguistic contenders. If we look not at functions but instead at shifting political relations, we can far better assess risks to the people, whether these are risks to majorities or minorities. In both of these parts, I urge that structural issues conventionally considered to be quite distinct (federalism and the separation of powers) are implied in each other—that separation of powers cases have implied federalism dimensions and federalism cases have implied separation of powers dimensions. Finally, in Part IV, I consider the most important question: Why has the judiciocentric position helped us to create theories that silence the Constitution’s generativity, its creation of power? For in such silencing, we have (inadvertently or not) ended up privileging dictionaries over voting, interpretive modes over representational relations, and judicial supremacy over popular governance.

### I. RETHINKING CONVENTIONAL STRUCTURAL WISDOM

If there is a shared problem in the doctrines of federalism and the separation of powers, it is due at least in part to a shared assumption about the constitutional text. Although the relevant texts in federalism and separation of powers cases are thought to differ, judicial approaches toward these problems share an assumption that there *are* governing descriptive texts and that these texts must be matched with the activities under review. The relevant constitutional language is viewed as a set of descriptive labels, a set of terms like “executive,” “state,” or “judicial” (terms that seem ripe for definition or drawing boundaries), and texts are then matched against the challenged practice under review. In structural cases, whether ones of federalism or the separation of powers, it is thought enough for a court, for example, to dub the President a lawmaker;<sup>21</sup> to find a “traditional governmental function”;<sup>22</sup> or to insist that a particular activity involves “executive” power.<sup>23</sup>

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21. See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

22. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (“We hold that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress. . .”).

23. *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (describing the President’s power as unitary: “[T]his does not mean *some* of the executive power, but *all* of



### A. *The Matching Game*

It is precisely this effort, this "matching game," that has created such difficulty with the Supreme Court's structural decisions. In both separation of powers cases and federalism cases, the twentieth century has seen repeated failures of doctrine; almost every critical adjective imaginable has been thrown at structural doctrine, from "unpredictable" to "abysmal" to "contradictory."<sup>24</sup> In the past fifty years, the law of constitutional structure has vacillated between categorical enthusiasm and distaste; aggressive judicial enforcement and contrite deference to the political branches; judicial review and no judicial review. In both federalism<sup>25</sup> and separation of powers cases,<sup>26</sup> courts and commentators have moved from formalism to functionalism and back to formalism again.<sup>27</sup>

the executive power").

24. Stephen L. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L. REV. 719, 760-61 (stating that the courts' conflicting traditions in the separation of powers amount to "muddling through," leaving one "rarely able from one year to the next to predict how the Justices will view the next problem to arise"); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989) (suggesting, as the article's title indicates, the poverty of the case law); Philip Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 601 (1986) (arguing that the doctrine is not consistent and that its coherency, if any, comes from the actions—often contradictory—which spur the doctrine's consideration).

25. The post-New Deal academic cycle in federalism begins with Wechsler's claim that courts should defer to the political process. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). This is met with Van Alstyne's disbelief. See William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 n.64 (1985) (indicating that the Wechsler political process argument (adopted by Justice Blackmun in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)) was little better than "a good hearted joke"). The Wechsler argument has been ever so elegantly resurrected by Larry Kramer, with the aid of some standard political science. See Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) [hereinafter Kramer, *Understanding*]; see also WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* (1964).

26. In the separation of powers area, the post-New Deal embrace of functionalism (tantamount to deference) begins with the embrace of *Steel Seizure's* "workable" government formula. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring). That formulation is met by the unitarians, on the one hand, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992), and by the originalists on the other, see Stephen L. Carter, *The Supreme Court, 1997 Term: The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988) [hereinafter Carter, *Independent Counsel*], only to have pragmatism reworked by Lawrence Lessig & Cass Sunstein (in translated mode), see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

27. The distinction between formalism and functionalism is a staple of much academic commentary on both federalism and the separation of powers. See Rebecca L. Brown,

Indeed, the stock stories academic commentators tell about both federalism and the separation of powers are moralized as tales of the wisdom and dangers of formalism. For example, in federalism matters, there is the cautionary narrative of the New Deal, where the Court reversed the grave indignity of earlier attempts to corral "commerce" as "manufacture." That narrative, however, has hardly discouraged the Supreme Court from flirting once again with formalism. In the 1980s, the Court attempted to revive the Tenth Amendment through the rubric of "traditional state functions,"<sup>28</sup> an attempt that soon failed once the rubric became too difficult to manage.<sup>29</sup> More recently, we have seen evidence of a new kind of formalist cycle, with categories ascendant in *United States v. Lopez* and *New York v. United States*, cases that have given us new tests for "economic" activity and "anticommandeering."<sup>30</sup> Only time will tell how long it will be before this Supreme Court finds that its new federalism categories cannot be managed.

A similar tale can be told about the separation of powers cases. By the decade after the New Deal, it was thought that formalism had been routed in the law of separated powers. The move toward a more pragmatic view was canonized in casebooks with Justice Jackson's celebrated concurrence in the *Steel Seizure* case.<sup>31</sup> With the fame of Justice Jackson's call for a "workable government"<sup>32</sup> came judicial decisions that were far more deferential to politically inspired structural innovation.<sup>33</sup> But, as was the case with federalism doctrine, this temporary equilibrium did not last. By the middle of the 1980s,

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*Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522-31 (1991) (contrasting formal and functional approaches in separation of powers cases); Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 92-95 (1995) (contrasting formal and functional approaches in federalism cases). For a wonderfully illuminating dialogue on these conflicting views, see H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171 (1998).

28. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

29. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

30. *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992). For more recent usages of these categories, see *United States v. Morrison*, 529 U.S. 598 (2000) (applying the *Lopez* economic/commercial standard) and *Printz v. United States*, 521 U.S. 898 (1997) (applying *New York's* anticommandeering rule).

31. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

32. *Id.* at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

33. *See, e.g., Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (using the "workable government" principle announced in *Steel Seizure* to reject the President's claim of absolute privilege as against a subpoena); *see also United States v. Cowan*, 396 F. Supp. 803, 805 (N.D. Tex. 1974) (holding that the "appointment by a court of special prosecutors to prosecute a valid existing indictment is not incongruous with the separation of powers doctrine" and citing the "workable government" formulation).

categorical formalism was on the rise again. In a series of decisions, the Supreme Court appeared to reinvigorate a formal tripartite branch division.<sup>34</sup> The movement was never as uniform as in the federalism sphere,<sup>35</sup> but it was distinctive, turning the law full circle to the categorical days when Justice Black and, before him, Chief Justice Taft, declared that powers simply *were* "lawmaking" or "executive" and that this was sufficient to resolve the dispute.<sup>36</sup>

Much of the academic commentary on both federalism and the separation of powers has tended to suggest that "functionalism" must be the wiser, more liberal approach. But, as others have pointed out, and as I have tried to demonstrate elsewhere, there is a kind of formalism built into this aspiration toward a kinder, gentler functionalist doctrine.<sup>37</sup> Functionalism, too, relies upon categorical boundaries: One must compare some descriptive or labeling claim with another—whether it is labeling the challenged practice or labeling the status quo as "executive," "legislative," or as a "traditional state function." The formalist asks how to describe the challenged practice and then seeks a close match between that description and "existing" descriptions of the departments. The functionalist asks a similar question, but differs in the degree of the "match" required, asking whether the challenged practice undermines the definition of an existing department or state function defined, again, by descriptive label. As Mark Tushnet wrote long ago, formalism and functionalism in structural matters are not opposed in their methodology but only in their advocated results and attitude toward structural change.<sup>38</sup> The

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34. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down the Gramm-Rudman-Hollings budget act); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto).

35. There were notable lapses in the formal model, lapses that have since come to be regretted by many. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (applying a "functional" approach after the Court had begun to adopt more "formal" analyses). Similarly, the functionalist "period" was more of an assumption than a set of holdings—an assumption based largely on cases generated by the controversy over the Watergate tapes. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (adopting a formal approach in the "functional" era).

36. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 587 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *Myers v. United States*, 272 U.S. 52, 135 (1926) ("The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.").

37. Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) [hereinafter Nourse, *Vertical Separation*]; see also Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 596 (1992) [hereinafter Tushnet, *Bowls and Plateaus*].

38. Tushnet, *Bowls and Plateaus*, *supra* note 37, at 604. For a different, and

formalist looks for perfect descriptive symmetry while the functionalist is willing to tolerate greater structural innovation. Functional analysis aspires, clearly, to a greater realism and yet, too often, it simply shifts the burden, beginning and ending with a greater tolerance for change, no matter the consequences of that change.

### B. *The Constitution of Power*

I seek to investigate the constitution of power as much as its *description* and thus, to understand the effects of shifting governmental structure on *relations* between the governed and the governing.<sup>39</sup> To undertake this inquiry, one need not give up on text or history, nor don the hat of a political scientist.<sup>40</sup> One must simply give up the judiciocentric position—the idea that the only constitutional texts worth applying or understanding are what I will call the “descriptive texts,” the texts that describe the departments or levels of government (either in terms of “functions” or what we call “powers”). Instead, one must focus on a different set of texts that, quite literally, “constitute” government,<sup>41</sup> that create practices that I call the Constitution’s “vertical” and “horizontal” relations.

Let us begin with an effort at imaginative reconstruction. Imagine that you were at the Constitutional Convention. And imagine further that you were trying to form a government. Would you begin to determine the contours of

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illuminating, view to the contrary, see Powell & Rubinfeld, *supra* note 27, at 1204-05.

39. This is an attempt at “explanation by embodiment,” one that looks to the practice of governing and the relations embedded within it. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 5-6 (2001).

40. Having said this, I cast no aspersions on the discipline of political science. Indeed, many of my conclusions are quite consistent with the predictions of positive political theory. See *infra* notes 80, 81, 148; see also Jenna Bednar, William N. Eskridge, Jr. & John Ferejohn, *A Political Theory of Federalism*, in *CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE* 223 (John Ferejohn, Jack N. Rakove & Jonathan Riley eds., 2001) (arguing that our constitutional structure and, in particular, federalism, is attractive but problematic, given the claims of positive political theory that a decentralized system best satisfies popular preferences). It is simply that I reject the notion that these cases are “too hard” for courts because courts lack the capacity to understand the political departments. See, e.g., Tushnet, *Bowls and Plateaus*, *supra* note 37, at 596 (doubting that judges have the political experience or capacity to use “social science” information to apply “functional” models of the separation of powers). The Supreme Court has a constitutional obligation to understand the entire Constitution, including those parts of the Constitution that constitute the political departments.

41. These provisions include Article I, Section 2, creating a House of Representatives whose members are to be elected by the people aggregated by population; and Article I, Section 3, creating a Senate whose members are to be elected, now, by the people of the states. See also U.S. CONST. amend. XVII. The representational texts also include Article II, Section 1, providing for the election of the President by the nation through an electoral college and Article II, Section 2, providing for the appointment of the Supreme Court Justices by the nationally elected President and their confirmation by the state-population-elected Senate.

federalism by defining the term "commerce?" Or would you begin by trying to determine who would have the right to vote for your new government?<sup>42</sup> Would you begin by defining "executive" or would you spend most of the summer determining who would elect the President?<sup>43</sup> Would you seek first to define judicial power or worry more about how judges would be selected?<sup>44</sup> To any student of the Constitutional Convention, the answers to these questions are obvious. Any quick survey of the debates from the Convention or the ratification will reveal that, in fact, the founders did not spend most of their time debating precise terminology; the debates were dominated by general constitutive or structural questions. Indeed, notes of the debate and ratification are pregnant with silences about the terms that so engage courts today. The debates are filled, by contrast, with questions about rule by the few and the

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42. See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 60 (1996) (describing how "it was Madison's insistence on solving the problem of representation first that set the course of debate"). See also *id.* at 76 ("Thus when a conciliating Gerry suggested that 'it might be better to proceed to enumerate and define the powers to be vested in the Genl. Govt.' before deciding the rule of voting, Madison repeated that such determinations had to await resolution of the rule of representation.") (discussing debate of July 13, 1787). The question of whether the national legislature would represent the states or the people occupied much of the early part of the convention and, to avoid complete rupture, the large states eventually agreed to "compromise," leaving representation by the states in the Senate and representation by population in the House. On this familiar story, see *id.* ch. 4 at 57-93. Compare 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 151 (Max Farrand ed., rev. ed. 1966) (Madison's notes, June 7, 1787) (statement of James Wilson) (urging popular representation in both houses) [hereinafter *FEDERAL CONVENTION*], with 1 *id.* at 154 (Madison's notes, July 7, 1787) (statement of Roger Sherman) (moving to allow state legislatures to elect Senators), and 1 *id.* at 154-55 (Madison's notes) (statements of Elbridge Gerry and Charles Pinckney) (supporting election by the state legislatures).

43. The question of how to elect the President was repeatedly addressed by the convention. Indeed, up until the last month or so, the President was still to be elected by the House of Representatives. See, e.g., 2 *FEDERAL CONVENTION*, *supra* note 42, at 29-36 (Madison's notes, July 17, 1787) (debating the election of the President by the Congress). Compare 2 *id.* at 29 (Madison's notes, July 17, 1787) (reporting statements of proponents, like Mr. Sherman of Connecticut, who thought that "the sense of the Nation would be better expressed by the Legislature, than by the people at large"), with 2 *id.* at 30 (Madison's notes, July 17, 1787) (reporting statements of opponents, like Mr. Wilson of Pennsylvania, that the President under such a system "would be too dependent" on the House); see also 2 *id.* at 497 (Madison's notes, Sept. 4, 1787) (reporting the Committee of Eleven's resolutions proposing an electoral college-type alternative).

44. On judicial selection, see, for example, 1 *FEDERAL CONVENTION*, *supra* note 42, at 220, 232-33 (Madison's notes, June 13, 1787) (resuming debate on a resolution that had struck out the provisions relating to the jurisdiction of courts "in order to leave full room for their organization"); *id.* (motion of Mr. Pinckney and Mr. Sherman to have the national judiciary appointed by the "national legislature"). But see 2 *id.* at 233 (statement of Mr. Madison) (urging that the appointment of the national judiciary should be by the Senate); 2 *id.* at 40-44 (Madison's notes, July 18, 1787) (debating, without resolution, the "mode of appointment" of the Judges and, whether it should be by the Executive or the Senate or a combination of the two).

many,<sup>45</sup> dependence and independence of political actors,<sup>46</sup> and, inevitably, representation.<sup>47</sup> Indeed, it seems fair to say that it was the conflict over the

45. See, e.g., Brutus, No. III, N.Y. J., Nov. 15, 1787, reprinted in CREATING THE CONSTITUTION: A HISTORY IN DOCUMENTS 157, 159 (John P. Kaminski & Richard Leffler eds., 1991) [hereinafter CREATING THE CONSTITUTION: DOCUMENTS] (arguing against the Constitution that “[i]t will literally be a government in the hands of the few to oppress and plunder the many”); IX THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: VIRGINIA, Vol. 2, at 1113-14 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (statement of James Monroe, June 10, 1788) (arguing against the proposed composition of Congress on the ground that neither the Senate nor the House would be “responsible” to the people); X THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: VIRGINIA, *supra*, at 1376 (statement of George Mason, June 18, 1788) (criticizing the “marriage” of the Senate and the President effected by the Constitution: “We know the advantage the few have over the many. . . . They may join scheme and plot against the people without any chance of detection.”); *An Officer of the Late Continental Army*, PHIL. INDEP. GAZETEER, Nov. 6, 1787, reprinted in CREATING THE CONSTITUTION: DOCUMENTS, *supra*, at 151 (arguing against the Constitution that, “The most important branches of the EXECUTIVE DEPARTMENT are to be put into the hands of a *single magistrate*, who will be in fact an ELECTIVE KING.”). But see 1 FEDERAL CONVENTION, *supra* note 42, at 94 (Madison’s notes, July 19, 1787) (statement of Mr. Gouverneur Morris) (arguing for the Constitution that “[t]he Executive therefore ought to be so constituted as to be the great protector of the Mass of the people”).

46. On the importance of these concepts, see Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 456-57, 460-63 (1996) [hereinafter Nourse, *Due Foundation*]; see also 1 FEDERAL CONVENTION, *supra* note 42, at 59 (Pierce’s notes, May 31, 1787) (statement of Roger Sherman) (arguing that appointment of Senators by the House and out of its ranks “would make [the Senators] *too dependent*, and thereby destroy the end for which the Senate ought to be appointed”) (emphasis added); 1 *id.* at 58-59 (Pierce’s notes, May 31, 1787) (statement of James Wilson) (arguing for popular election of the Senate so as to insure its *independence* from the national legislature) (emphasis added); 1 *id.* at 59 (Pierce’s notes, May 31, 1787) (statement of George Mason) (expressing the opinion that drawing the Senate out of the first branch “would make the Members *too dependent* on the first branch,” in addition to being impractical and “improper”) (emphasis added). Dependence was an important theme of the debate over a variety of other issues, from the method of payment for government officials to the manner of their election. See, e.g., 1 *id.* at 215-16 (Madison’s notes, June 12, 1787) (statement of James Madison) (arguing that payment of the members of the national legislature by the states would “create an improper *dependence*”) (emphasis added); 2 *id.* at 292 (Madison’s notes, Aug. 14, 1787) (statement of Daniel Carroll) (likening a Congress paid by the State legislatures to a mere “second edition” of the Articles of Confederation’s federal legislature, in its “*dependen[ce]* on . . . the States”) (emphasis added); 1 *id.* at 175 (Madison’s notes, June 9, 1787) (statement by James Madison) (arguing that appointing the President by the legislature would lessen that *independence* which ought to prevail” among the branches of government) (emphasis added); 1 *id.* at 68 (Madison’s notes, June 1, 1787) (statement of Roger Sherman) (favoring legislative appointment of the President so as to make him “absolutely *dependent*” on the legislature) (emphasis added); 2 *id.* at 102 (Madison’s notes, July 24, 1787) (statement of Elbridge Gerry) (arguing that the President should serve for as many as 20 years to diminish his “*dependence*” on the legislature if elected by that body) (emphasis added); 2 *id.* at 102 (Madison’s notes, July 24, 1787) (statement of James Wilson) (agreeing to “almost any length of time” for presidential tenure to eliminate the “*dependence*” that will result from appointment by the legislature) (emphasis added).

47. Representation itself was much debated. Compare II THE DOCUMENTARY HISTORY

relation between the governed and their new federal government, as reflected in the classic struggle over the relation between the states and the nation, that served as one of the most significant factors in framing the Constitution's horizontal as well as vertical structure, the separation of powers as well as federalism.<sup>48</sup>

If we are to take seriously the original structure then we must understand that the framers were *creating* a government, not *interpreting* it. The framers did not come to the convention armed with dictionaries but, instead, with political experience.<sup>49</sup> They faced real dangers of political failure, popular rebellion, and governmental impotence; they had to worry that their new Constitution would be transformed in a sudden flash of violence, a rebellion, or a coup—or, worse yet, a return to monarchical subjugation.<sup>50</sup> Indeed, it was

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OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: PENNSYLVANIA 343-44 (John P. Kaminiski & Gaspare J. Saladino eds., 1993) (statement of James Wilson, Nov. 24, 1787) ("[T]he world has left to America the glory and happiness of forming a government where representation shall at once supply the basis and the cement of the superstructure. For, representation, sir, is the true chain between the people and those to whom they entrust the administration of the government . . ."), with Brutus No. III, N.Y. J., Nov. 15, 1787, reprinted in *CREATING THE CONSTITUTION: DOCUMENTS*, *supra* note 45, at 157 ("The very term, representative, implies that the person or body chosen for this purpose, should resemble those who appoint them . . . . In this respect, the new Constitution is radically defective."); *id.* at 159 ("[I]n reality, there will be no part of the people represented, but the rich, even in that branch of the legislature, which is called the democratic."). Debates about representation were also debates about consolidation, one of the Antifederalists' major objections to the Constitution. See, e.g., II *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: PENNSYLVANIA*, *supra*, at 425 (statement of Robert Whitehill, Nov. 30, 1787) ("I have said, and with increasing confidence I repeat, that the proposed Constitution must eventually annihilate the independent sovereignty of the several states. In answer to this, the forms of election for supplying the offices of the federal head have been recapitulated . . .").

48. See, e.g., Harry Scheiber, *Federalism and the Constitution: The Original Understanding*, in LAWRENCE M. FRIEDMAN & HARRY N. SCHEIBER, *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 85, 88 (1988 ed.) ("In a sense, every succeeding decision of the convention flowed from this decision on representation."). Even debates about the judiciary were carried on in terms of the state/federal relation and popular control. For example, in the Virginia ratification debates, George Mason argued that Article III would "destroy" the states. X *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: VIRGINIA*, *supra* note 45, at 1402 (statement of George Mason, June 19, 1788) ("When we consider the nature of these Courts, we must conclude, that their effect and operation will be utterly to destroy the State Governments."). James Madison responded that the judiciary's power was the least likely to be abused because it would raise the "indignation of all the people of the States. I cannot conceive that they [the judges] would encounter this odium." *Id.* at 1416 (June 20, 1788).

49. See generally RAKOVE, *supra* note 42, at 29-31 (discussing the influence of the political experience with state constitutions on the formation of the federal Constitution); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 467 (1998) (arguing that the experience of politics in the states, which led one contemporary to dub them the "vile state governments," was as important a spur to reform of the Articles of Confederation as was the weakness of the central government).

50. See X *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*:

their experiences of state constitutional failures that were the "crucial lessons" applied in their deliberations.<sup>51</sup> It was those experiences, for example, that foretold that "parchment barriers" were insufficient to protect the government from dissolution into an excess of democracy or its opposite number, aristocracy. Time and time again, the state constitutions had demonstrated the weakness of lawyers' text when it came to the most cherished of structural principles. Constitutions, like that in Virginia, had explicitly demanded that each department remain "separate and distinct."<sup>52</sup> And yet no matter how insistently the word aimed to "structure" government, life disobeyed, yielding routine failures and legislative corruption.<sup>53</sup> The only way to cabin power, in Madison's view, was to understand its *dynamics*—to understand its incentives and its risks in the hands of those who hold it.<sup>54</sup> The only way to counter power was to make a *self-executing* system of competing relations and incentives.

This brief history, which I and others have told at greater length, should give one pause about modern structural theory, but it should not send us into despair. The standard questions about constitutional structure depend upon a claim of authority based on a particular set of words drawn from constitutional texts.<sup>55</sup> Write them down, if you care to: "executive," "judicial," and

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RATIFICATION BY THE STATES: VIRGINIA, *supra* note 45, at 1287 (statement of James Madison, June 14, 1788) ("What is the situation of this country at this moment? Is it not rapidly approaching to anarchy? Are not the bands of the Union so absolutely relaxed as almost to amount to a dissolution? What has produced despotism and tyranny in other parts of the world?"). See generally WOOD, *supra* note 49, at 464-65 (discussing the collapse of Congress and political rebellion in the states as among the reasons for constitutional reform). See also *id.* at 466 ("The ability of America to sustain any sort of republican government seemed to be at issue.").

51. RAKOVE, *supra* note 42, at 30-31 ("By far the greatest influence that the experience of the states exerted on the deliberations of 1787 lay . . . in the area of constitutional theory itself. For when the framers set about designing the new national government, the crucial lessons they applied were drawn from their observation of the state constitutions written since independence . . . By the mid-1780s . . . all [the state constitutions] had come in for careful scrutiny and mounting criticism as the experience of war and the dissatisfactions of peacetime generated complaints about the shortcomings of state government.").

52. See THE FEDERALIST NO. 48, at 335 (James Madison) (Jacob Cooke ed., 1961) (detailing the Virginia provision on the separation of powers).

53. See *id.* at 335-36 (borrowing Jefferson's argument that a strict separation of powers text had failed to provide for an adequate separation of powers in practice and, indeed had devolved into legislative tyranny, because the other departments were too dependent upon the legislature). For a more extended argument on these essays, see Nourse, *Due Foundation*, *supra* note 46, at 468-70.

54. THE FEDERALIST NO. 51, at 349 (Alexander Hamilton or James Madison) (Jacob Cooke ed., 1961) ("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. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.").

55. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (concluding that the independent counsel was exercising "executive" power); *I.N.S. v.*



"legislative"; add "commerce," "state," and "reserved," if you will.<sup>56</sup> Now, think of the absent and the future<sup>57</sup>—what one has for a government. There is no room in this list for voting or elections or representation. Indeed, there is no room for either the governed or the governing. And, as a result, if these words are all there is to constitutional federalism and the separation of powers, then the White House is empty, the Congressional chambers silent, and there are no Justices. The same cannot be said of the constitutive provisions of the Constitution—strike Article I, Section 2, and you have no House of Representatives;<sup>58</sup> strike Article I, Section 3,<sup>59</sup> and you have no Senate; strike Article II, Section 1, Clauses 2 and 3,<sup>60</sup> and you have no President. Strike all of these, and Section 2 of Article II, and there is no one to nominate or confirm anyone to the Supreme Court.<sup>61</sup> Indeed, there is no federal government at all because one has severed the relation of the people to their government.

### C. *Shifting Power, Shifting Relations*

The Constitution's constitutive texts link the people to their government in vertical relation.<sup>62</sup> The people vote, directly, for members of the House<sup>63</sup> and

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Chadha, 462 U.S. 919 (1983) (seeking to assess whether the legislative veto was in fact "legislative" action).

56. See U.S. CONST. art. I, § 1 ("legislative"); U.S. CONST. art. II, § 1 ("executive"); U.S. CONST. art. III, § 1 ("judicial"); U.S. CONST. art. I, § 8, cl. 3 ("commerce"); U.S. CONST. art. IV, § 4 ("State"); U.S. CONST. amend. X ("States" and "reserved to the States").

57. See DEWEY, *supra* note 1, at 14 ("A thinking being can, accordingly, act on the basis of the absent and the future.").

58. U.S. CONST. art. I, § 2 (creating a House of Representatives whose members are to be elected by the people aggregated by population).

59. U.S. CONST. art. I, § 3 (creating a Senate whose members are to be elected by state legislatures). This provision has, of course, been amended. The Senate is elected by the people of the states, per the Seventeenth Amendment. U.S. CONST. amend. XVII.

60. U.S. CONST. art. II, § 1, cl. 2-3 (providing for the election of the President); see also *id.* at amend. XII.

61. U.S. CONST. art. II, § 2, provides that the President shall "nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme court." If one eliminates the Senate and the President, of course, this provision would be inoperable.

62. There are, of course, a variety of complex social, cultural, and even economic factors that go into making these relations "live." One cannot, for example, have a working representative relation without the people having a basic sense of trust in their government. See, e.g., SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM* 26 (1999) (stating that pervasive corruption undermines the legitimacy of government); Amy Chua, *Markets, Democracy & Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 56 (1998) (noting, in the context of developing democracies, how "too much corruption effectively can subvert the political process, replacing democracy with kleptocracy"). These factors, however important, do not undermine the claim I make here that relations of representation, in the thin sense of the term "relation," constitute government.

63. The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the

the Senate; they vote and, through the Electoral College, elect a President and, in far more attenuated fashion, they authorize the Senate and the President to choose Supreme Court justices.<sup>64</sup> These are central constitutional “doings” or “practices”; they are acts that create relations between the people and their federal government.<sup>65</sup> Those relations—between citizens and the federal government—affect the relations between state citizens and their state governments. We fought a civil war to establish the simple proposition that no one may be deprived, by a state, of national citizenship.<sup>66</sup> We also know that the federal Constitution “guarantees” a relationship between the states and the people, a relationship characterized as “republican.”<sup>67</sup> Finally, we know that there are intersections of these intrafederal and federal-state relationships: that citizens, organized in states rather than a nation, elect the House and the Senate, and that this feature of the Congress, as an institution, makes it relatively more likely (than the executive) to respond to locally aggregated constituencies and to find its political fortunes tied to those of state political officials.<sup>68</sup>

The vertical relations created by the Constitution, invite us to ask very

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present Congress, and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges with all other offices of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves.

THE FEDERALIST NO. 39, at 252 (James Madison) (Jacob Cooke ed., 1961).

64. See U.S. CONST. art. I, § 2 (creating a House of Representatives with members to be elected by the people aggregated by population); U.S. CONST. art. I, § 3 (creating a Senate with members to be elected, now, by the people of the states); U.S. CONST. amend. XVII (providing for the electoral process for Senators); U.S. CONST. art. II, § 1 (providing for the election of the President by the nation through an electoral college); U.S. CONST. art. II, § 2 (providing for the appointment of members of the Supreme Court by the nationally elected President and confirmation by the state-population-elected Senate).

65. Amar, *supra* note 12, at 35 (emphasizing the constitutive aspects of the document). See JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33-34 (1969), for a discussion of the difference between constitutive and regulative rules:

[R]egulative rules regulate antecedently or independently existing forms of behavior; for example, many rules of etiquette regulate inter-personal relationships which exist independently of the rules. But constitutive rules do not merely regulate, they create or define new forms of behavior. The rules of football or chess, for example, do not merely regulate playing football or chess, but as it were they create the very possibility of playing such games.

66. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

67. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . .”).

68. On the responsiveness of members of Congress to more local constituencies, see R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 7 (1990) (“[W]hen legislators have to make a decision they first ask which alternative contributes more to their chances for reelection...”). For some of the political links between members of Congress and state officials, see Kramer, *Understanding*, *supra* note 25, at 1523-29 (arguing that political parties create “relationships” and establish “obligations among officials that cut across government planes” and thus tie local to federal officials).

different questions of power than do traditional theories of federalism and the separation of powers. They invite us to ask—not how power is described in the Constitution (as, for example, “judicial,” “executive,” or “state”) but, instead—how changing power shifts constitutional relations between the governed and the governing. Let me emphasize, however, the limited reach of this claim. My argument is *not* that we should jettison functional categories as such; they are often useful shorthand. (Indeed, to the extent I am asked to put myself within the traditional academic camps on structural questions, I identify myself as a functionalist—where that is defined as giving “reasons,” rather than raw labels, to explain structural decisions.) My claim is that the notion of a “function” is often a poor proxy and that no constitutional anatomy can be complete without understanding that structural ideals like federalism and the separation of powers do more than protect the linguistic integrity of the functions described in the vesting clauses—they also protect the people and their relation to government.

This “constitutive approach” may sound abstract, but it is grounded in uncontroversial intuitions about constitutional power. For example, let us imagine that some oddball proposed shifting the war power from the Congress to the Supreme Court. If we are worried about such a decision, we are worried not because of the definition of power at issue—we do not go running to a dictionary, for example, to investigate the meaning of “war” nor do we sit pondering the question of the “function” of war. We are worried, instead, because of the political relations that govern its decision: We are worried that the Court will go to war without the people. A similar analysis applies to federalism decisions. Assume that our oddball proposes to shift the power to declare war to the states. Again, our worries are unlikely to be resolved by struggling over the meaning of the war power or whether the militia is a “traditional state function.” We worry not because of definitions or descriptions but because, when the planes are in the air, we wonder whether the states could agree to go to war at all.

And, lest this example seem outlandish and academic, consider the similar effects of a more modest and plausible case—for example, if Congress were to give to the federal courts the power to nominate inferior officers in the Executive Department.<sup>69</sup> The Constitution specifically provides that the Congress may grant the power to appoint “inferior officers” not only to the “heads of departments” (where it is normally lodged) but also to the “courts of law.”<sup>70</sup> Would not then the relations and dynamics of the federal executive, not to mention the federal judiciary, change substantially, if to obtain a position working for the Energy Department or the Army, one had to be appointed by a judge? Certainly, the judiciary would have far greater power over the

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69. Special thanks to Jerry Mashaw for suggesting this example.

70. U.S. CONST. art. II, § 2, cl. 2 (“[B]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

administration of law, indeed over the entire federal government, if it could appoint a significant portion of those people who worked for the President (arguably far more power than that under the judiciary's Article III review of administrative cases). Who would the "courts of law" appoint, after all, as an assistant to the Joint Chiefs of Staff or as an inferior officer in the Department of Health and Human Services? Former judges, prominent lawyers, friends of the judiciary? Surely, incentives and relations, rather than the "function" of appointment, explains why Congress rarely grants judges the power to appoint lesser officers in the executive branch.

It is one thing to say that shifting power amounts to shifting political relations between the governed and the governing. It is another to determine the kind of risks entailed in such shifts. Indeed, one of the great problems of the doctrines of separated powers and federalism has been the dispute about their aims. Are these doctrines aimed at protecting individuals?<sup>71</sup> Are they aimed at protecting "traditional" allocations of authority?<sup>72</sup> Are they aimed at protecting some other "value" such as balance or impartiality or unity or efficiency?<sup>73</sup> Each of these aims seems to me to have some plausibility but each fails to provide much of a predictive tool for measuring structural risk.

My approach eschews a search for the "values" of our constitutional structure; it considers, instead, constitutional structure as a dynamic process channelling political voice, in an interplay that seeks only to avoid the perils of a form of government in which the voices of the many are too strong or the voices of the few are too weak. It seems to me that we can all agree that a government in which the few rule is a form of aristocracy and that a government in which the many oppress the few yields a form of tyranny; we can also agree that both of these imagined ends pose grave risks to a republican form of government.<sup>74</sup> These were, after all, the fears with which the Framers wrestled. These are the risks to which we should today attend. They are not risks encompassed in descriptive failures (in whether this is really "commerce" or really "economic" or really "executive") but in relations between the people and their government.<sup>75</sup>

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71. See, e.g., Brown, *supra* note 27 (arguing that the separation of powers serves to protect individual liberty).

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

73. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 433-37 (1987) (listing various values sought to be promoted by the separation of powers, including limited government, containment of factions, and reducing conflicts of interest); see also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997) (discussing various values of federalism).

74. Note that I never use the term "democracy" in this paper because the term is simply full of normative confusions. On this idea, see Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795 (1999).

75. See, e.g., THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob Cooke ed., 1961):

The texts describing vertical relations are important for what they *do* as much as what they *mean*, for the incentives they generate as much as the precise dictionary definitions they invoke. From changes in these relations and incentives (from shifts between representational ties to the people) we may make a set of pragmatic inferences: inferences that aim to *predict* the stakes of *shifting* governmental decisionmakers, where the stakes involve real life majorities and minorities. We must ask whether any particular structural innovation risks serious changes in our form of government, where by "form," I mean representational form as a republic. What is an aristocracy, after all, but a government in which the few rule the many; what is the tyranny of the mob but a government in which the many oppress the few? Put in other words, for any particular structural innovation, we must identify the baseline relations that govern, how those relations change with the proposal, and what the new relations and incentives mean for risks to majorities and minorities.

This approach, however contrary to traditional views of constitutional structure (in particular the judiciocentric view), finds substantial support in more general understandings of constitutional politics, understandings ancient and modern. One can find concern for risks to majorities and minorities not only in a modern day article on institutional economics, but also in Madison's infamous tenth essay of *The Federalist*. The first risk, and the one most easily seen in the context of constitutional law generally, is the risk that a majority poses to a minority.<sup>76</sup> Madison and the founding generation more generally were quite concerned with majorities that acted as a "faction," (where a majority faction is a group united by a common interest or passion committing unjust violations of the rights and interests of the minority, or of individuals, so that they may further their own majoritarian interests). Today, we tend to be familiar with this risk in constitutional law because of its emphasis in the "rights" area, where the work of John Hart Ely has had its most pronounced influence.<sup>77</sup> The second risk runs in just the opposite direction—the possibility that minorities will oppress majorities, that the few will oppress the many.<sup>78</sup>

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[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people . . . . It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.

76. As James Madison put it: "Complaints are every where heard . . . that our governments are too unstable . . . and that measures are too often decided not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob Cooke ed., 1961); see also *id.* at 60-61 ("When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

77. See ELY, *supra* note 3, at 73-104 (emphasizing the ways in which majorities may "tyrannize" minorities).

78. "By a faction I understand a number of citizens, whether amounting to a *majority*

The Founders were acutely aware of this risk because this was the risk they associated with "aristocracy."<sup>79</sup> Today, public choice scholarship has made clear how small, highly concentrated minorities may wield power disproportionate to the voting strength of their members. By virtue of the relative ease of organization, and lower transaction costs, small groups may in fact come to dominate large, relatively more dispersed, majorities.<sup>80</sup> If these risks are generalized, they become more than risks, but changes in the "form" of government—rule by the "few" or the "mob."<sup>81</sup>

If this is right, then the question in structural controversies—whether they be controversies about federalism or separated powers—should be the same. The question should be whether the proposed structural innovation yields

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or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob Cooke ed., 1961) (emphasis added).

79. See, e.g., Brutus, No. III, N.Y. J., Nov. 15, 1787, reprinted in CREATING THE CONSTITUTION: DOCUMENTS, *supra* note 45, at 159 (arguing against the Constitution that "[i]t will literally be a government in the hands of the few to oppress and plunder the many"); IX THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: VIRGINIA, *supra* note 45, at 1376 (statement of Mr. Mason) (criticizing the "marriage" of the Senate and the President effected by the constitution: "We know the advantage that the few have over the many. . . . They may scheme and plot against the people without any chance of detection."). On the role of aristocracy in debates over constitutional provisions, see WOOD, *supra* note 49, at 484-85 ("Both the proponents and opponents of the Constitution focused throughout the debates on an essential point of political sociology that ultimately must be used to distinguish a Federalist from an Antifederalist. The quarrel was fundamentally one between aristocracy and democracy."); *id.* at 488 ("Nothing was more characteristic of Antifederalist thinking than this obsession with aristocracy.").

80. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUP 5-64 (1971) (emphasizing the power of small groups: "[t]he greater effectiveness of relatively small groups—the 'privileged' and 'intermediate' groups—is evident from observation and experience as well as from theory . . . .") This greater effectiveness is a power which corresponds to the risk of the "few," as I am using that term here. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 112 (1962) (discussing the various decisionmaking costs of organizing groups, and the detrimental effect of the costs on the construction of a majority in a larger group). For recent work casting doubt on the universality of the Olson principle that small groups are always more effective, see Joan Esteban & Debraj Ray, *Collective Action and the Group Size Paradox*, 95 AM. POL. SCI. REV. 662, 663-72 (2001).

81. I rely heavily here on the institutional economics of Neil Komesar who has developed a two-force model of politics. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY, ch. 3 (1994) (describing the two-force model of politics, which depends upon risks both to majorities and minorities). This model refuses to view government as always or never virtuous, but considers the far more moderate and plausible claim that sometimes governments do, and sometimes they do not, reflect majority will. This moderation obviously flies in the face of both the extreme pessimism of public choice scholarship and the extreme optimism of the pluralist or deliberative democracy models.

substantial increased risks to majorities and minorities. This view finds support not only in historical, but also modern understandings of politics. A focus on incentive and institutional relation is the stuff of positive political theory and institutional economics. Neither an economic theory of the Constitution and its institutional structure, nor one focused on the positive political effects of institutions, can ignore the incentives created by the document. By focusing on the relations between the governed and governing, I am trying to put institutional incentives at center stage—for it is those incentives from which we may make predictions of future structural risk.<sup>82</sup>

If this is right, it is right because, at least in part, it challenges what law has assumed to be the nature of power (as a set of generic activity descriptions) and suggests that there is something more to be considered. The idea that I am pursuing here is that courts' traditional vision of power as *activity-description* is incomplete; that the constitutional text itself tells us that the power created by the document inheres in something more than activity or function.<sup>83</sup> The document itself tells us that the power it creates is not only a set of words but also a set of practiced relations between the governed and the governing. These constitutive relations (typically referred to as representation) should be more important to contemporary structural theory if for no other reason than that they live—every time someone votes, every time a person criticizes his or her congressman, every time a man or woman pickets the White House.<sup>84</sup>

In what follows then, we will imagine power built not from dictionaries, but from the people. We will imagine that the doctrines of separated powers and federalism aim not only to describe our government but also to constitute relations between the people and their government. From this vantage point, when we look at questions of structural innovation our focus shifts from *what* is being done to *who* is doing it (where the "who" is a relation between the governed and the governing). If we move a decision from Congress to the Court we have not only moved an activity, we have moved a decisionmaker (a decisionmaker whose incentives are governed by a particular relation to the people). For example, a shift from Congress to the Supreme Court means that a decision once governed by the representation of locally aggregated constituencies (states and districts) will now be governed by no constituency at

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82. For further discussion of the relevance of political economy to this model, see *infra* Part IV.B.

83. For a demonstration of this, see *supra* notes 56-62 and accompanying text.

84. I believe Charles Black relied upon this notion of relation at least as much as on the more general notion of structure. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). This notion of relation is rather an ancient idea. See, e.g., MONTESQUIEU, *THE SPIRIT OF THE LAWS* 7 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds., Cambridge Univ. Press 1989) (1748) (describing the laws of "political right" as those governing the "relation between those who govern and those who are governed," and the notion of "civil right" as between the governed themselves).

all. This, in turn, raises particular kinds of risks, risks to majorities which may, in turn, create risks to our form of government. We do not want the Supreme Court ordering the Marines to deploy because we fear that the Court will go to war without the support or will of the people. And we do not want the Court to go to war without the consent of the people because this risks changing our form of government—toward rule by the judicial few.

In actual cases, of course, the relational calculus may be far more complex. This story will require that we keep simultaneous hold of risks that might otherwise appear conflicting (risks we conventionally conflate by using terms like “politics” and the “rule of law”).<sup>85</sup> If, for example, we were to move tort litigation from the courts to Congress, we would not worry that majorities were being ill represented, rather, we would worry that minorities and/or individuals’ rights were at risk. More importantly, however, both risks might arise in any particular case. This is particularly true in any case in which an activity is shifted from the President to Congress or from Congress to the President. Indeed, it will become clear that this is the source of much confusion generated by the traditional approach where the issue is a conflict between the President and Congress.

In what follows, I consider some of the more controversial structural decisions of the past. Although the cases are well-worn territory, the analysis is not. Indeed, it is precisely because the cases are well-worn, that I believe we can best see the relative advantages of an unfamiliar recourse to the constitutive relations created by the constitutional text.

## II. SEPARATION OF POWERS

I begin with a classic separation of powers “category” problem. My aim is to show how and why a constitutive view of the Constitution may help to relieve the pressures of categorical homogeneity implicit in conventional judiciocentric approaches. This brings me to consider the interplay between the separation of powers and what I will call “implied federalism,” a first step in elaborating the intersections of horizontal and vertical constitutional structure.

### A. Categorical Conflict and Embedded Relations

*INS v. Chadha*<sup>86</sup> is one of the chestnuts of separation of powers law, a case

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85. The “rule of law” is an ancient concept which harbors rather contrary meanings. On the one hand it is invoked as a reason for the law to restrain majorities; on the other hand, it is invoked as a reason to defer to majorities. In such a case, the “rule of law” poses the problem, it does not answer it. On the rule of law generally, see PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 10 (1997) (noting that the Supreme Court’s claim to act in the name of the rule of law “does not reflect a fact; it states an ambition, a point from which it will enter a contest of political meaning”).

86. 462 U.S. 919 (1983).



as famous for its overruling of hundreds of statutes as for its obvious categorical riddles. The Court's opinions striking down the legislative veto yielded no less than three very different categorical descriptions of the legislative veto. For Chief Justice Burger, the veto was obviously *legislative*. For Justice Powell, it was *adjudicative*. And for Justice White, who rejected the majority and concurring opinions as wildly formalistic, the veto was simply another conditional delegation of power to the *executive* branch to exercise "quasilegislative" powers.<sup>87</sup>

As if this were not enough, the majority opinion seemed to adopt a definition of "legislative" power that was overly broad at best and potentially destructive at worst. The holding of the case was that the legislative veto violated the Constitution's Bicameralism and Presentment Clause. To reach that conclusion, the majority believed that it had to categorize the veto as "legislative" in character.<sup>88</sup> But, in making that categorical determination, the Court invoked a definition that was highly problematic, finding that any action that "had the purpose and effect of altering legal rights, duties, and relations of persons," was legislative in nature.<sup>89</sup> That definition almost immediately raised questions: questions about whether courts (which decide "legal rights") somehow violate the bicameralism clause, and, more importantly, whether administrative agencies that "legislate" rules and regulations without bicameralism are unconstitutional.<sup>90</sup> Exacerbating the problem, the Court tried to ameliorate such conflicts by suggesting that the decision to deport Chadha was "legislative" in character when exercised by Congress and yet was "executive" in nature when exercised by the Justice Department.<sup>91</sup> Not surprisingly, commentators tended to be mystified by *Chadha* and its categories.<sup>92</sup> The continued invocation of these categorical dilemmas is

87. See *id.* at 952 (Burger, J.) (characterizing the legislative veto as "essentially legislative in purpose and effect"); *id.* at 960, 964 (Powell, J., concurring) (characterizing the legislative veto in *Chadha* as prima facie "adjudicatory" action); *id.* at 986, 989 (White, J., dissenting) (characterizing the legislative veto as a retained legislative check on a grant of quasilegislative power to an executive agency, similar to Congress' broad power to delegate legislative authority to executive agencies).

88. "Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *Id.* at 952 (quoting S. REP. NO. 54-1335, at 8 (1897)).

89. *Id.*

90. Congress' lawyers argued that if the veto was legislative in character, then the Attorney General's initial action was also legislative, raising constitutional questions about whether administrative agency action was constitutionally possible without violating the Bicameralism and Presentment Clauses. See *id.* at 952 n.16.

91. See *id.* (acknowledging that "some administrative agency action—rulemaking, for example, may resemble 'lawmaking,' . . . but that when the Attorney General performs his duties pursuant to § 244, he does not exercise 'legislative' power," and therefore is not required to satisfy the bicameralism requirement) (internal citations omitted).

92. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*,

evidence of what Professors Eskridge and Ferejohn have called *Chadha's* "wooden formalism."<sup>93</sup>

Looking at the case as one about shifting relations, as opposed to one about texts, may help to illuminate the constitutive risks of the legislative veto. But to get there, one must understand a few things about the functional categories themselves. The categories of adjudication, legislation, and execution tend toward the essentialist; they imply a descriptive homogeneity that we know to be false in fact. It is a staple of the literature on constitutional structure that all of the departments can be found "functioning" in ways that look like the appropriate functions of other departments.<sup>94</sup> What is often missed in this is that the Constitution's own text, for example, provides evidence contrary to functional discreteness (and indeed this was known to Madison and the founding generation).<sup>95</sup> For example, the "legislative" power may be vested in the Congress but the Senate's powers clearly include "adjudicative" activity (Senate impeachment trials) and "executive" activity (confirming appointments).<sup>96</sup> Most importantly, the "executive" power is vested in a President but the President is granted "legislative" power (the "veto").<sup>97</sup> Since there is no unique functional/activity description enumerated by the text itself it should be no surprise that attempts to apply such a descriptive approach should fail—both in a textual and a realist sense.

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80 GEO. L.J. 523, 523-26 (1992) (noting a variety of inconsistencies between *Chadha* and other decisions depending upon a definition of "lawmaking").

93. See *id.* at 527 ("Chadha assumes a wooden and unnecessarily formalist operation of bicameralism and presentment, as simply hoops that bills must jump through before they become law.").

94. See Peter Strauss, *Comment: Was There A Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

95. The President's veto power appears in Article I (the article vesting "legislative" power), not Article II (the article vesting "executive" power). It was feared, for example, that the veto power would allow the President to "legislate"; similarly, there was worry that the appointment and treaty powers of the Senate, when joined with the powers of the President, made the departments less than "separate and distinct." See, e.g., THE FEDERALIST NO. 47, at 328 (James Madison) (Jacob Cooke ed., 1961) (arguing that state constitutions blended powers and using as an example of blended or mixed power the executive veto); THE FEDERALIST NO. 51, at 350 (James Madison) (Jacob Cooke ed., 1961) (defending the "qualified connection" between the Senate and the President in appointments and treaty making); see also 1 FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 68 (John P. Kaminski & Richard Leffler eds., 1989) ("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.").

96. U.S. CONST. art. I, § 3 ("The Senate shall have the sole Power to try all Impeachments."); U.S. CONST. art. II, § 2, cl. 2 (providing the Senate's "advice and consent" power in the article on "executive" power).

97. See U.S. CONST. art. I, §§ 1, 7 (vesting "legislative power" and providing for the executive's veto: "Every bill . . . shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it with his Objections to that House in which it shall have originated, who shall . . . proceed to reconsider it.").

Accounts of constitutional structure that depend upon governmental function not only generate a bad descriptive account of the Constitution, they also fail to predict what we know to be real shifts in power. I can easily perform an intellectual experiment in which I hold function constant but can make mincemeat of the balance of power of our current form of government. Just have the House elect the Senate and see what happens to the Presidency; the departments are still "doing" the same things and performing the same "functions," but the "balance" of power changes dramatically. With a Senate beholden to House members, we have a far more unified legislative body and thus a far greater threat to the President.<sup>98</sup> Function alone cannot predict significant changes in constitutional structure. Perhaps more importantly, functional labels are not only descriptively impoverished but also are often normatively confused. For example, sometimes, when we call something "adjudication," we mean "good, that is what a court should do to restrain majorities"; but sometimes when we call something "adjudication," we mean precisely the opposite, "good, that is what a court should do to legitimate or defer to majorities." Thus, it is possible that when we say that something is "adjudication," we are already implicitly defining what that "function is" by reference to an unacknowledged offstage, and potentially conflicting, moralization.

If we move beyond the question of functional activity toward vertical relation and constituency, we tend to reduce potential descriptive conflicts for no other reason than that electoral methods are not fungible across the departments. Congressmen are elected in particular ways and those ways are not repeated in the selection of the President or members of the Supreme Court. At the same time, however, this approach adds considerable flexibility in our accounts because it permits us to see the possibility that the functional/activity categories are really crude proxies for different and even conflicting governance risks. Put in other words, once one gives up on the categorical/descriptive ideal, it is possible to see that there are very *different risks to the people* posed by the legislative veto in *Chada*.

Let us begin with the easiest risk to see: the risk to popular majorities. Had Congress sought to deport Chadha on its own, it would have had to pass a bill through the House, the Senate, and have it signed by the President. In *Chadha*, the Supreme Court's majority repeated this fact over and over again but did little to explain how this related to the meaning of bicameralism.<sup>99</sup> From a

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98. For a more complete analysis of this, see Nourse, *Vertical Separation*, *supra* note 37, at 761-63.

99. "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also id.* at 944 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").

vertical perspective, however, there is more to bicameralism than meets the eye, particularly if one cares about the relations between the people and their government. Imagine a law providing that only Arizona would, in the future, decide budgetary questions for the nation. Our concern about such a proposal is not about *function*: The reasons that we think such proposals are unconstitutional has very little to do with whether the members from Arizona are legislating or executing or adjudicating. We fear such a proposal because there is a distinct risk to *popular majorities*: Would we really want nationally important decisions to be made only by a few states or districts? What better way to create an elective aristocracy?

It is no answer to this to say that, in *Chadha*, there was full representation because there was a vote by the entire House of Representatives. A one-house veto may cover the nation geographically but still presents risks of *partial* constitutional representation, because the Constitution demands the agreement of two different forms of constituency, one reflected in the Senate and the other in the House.<sup>100</sup> Decisions by the House alone, and thus by population alone, will tend to reflect the majoritarian preferences of the larger population centers; by contrast, a decision by the Senate alone will tend to prefer the smaller states. As a general rule, then, congressional action requires bicameralism not for some reason-without-reason but because of vertical, representational concerns—that congressional decisions should be representationally redundant (that they satisfy the majoritarian preferences of *both* larger and smaller aggregations of voters).<sup>101</sup> Some may question whether that mix of interests favors the few,<sup>102</sup> but it is unquestionably a representative structure that the bicameralism requirement seeks to enforce.

This understanding does a better job not only of giving popular meaning to

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100. Although wrapped in the rhetoric of function, the majority opinion does in fact refer to this representational history:

[T]he Framers were also concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people. . . . It need hardly be repeated here that the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states. We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions.

*Id.* at 950-51 (citations omitted).

101. "The Framers admired the legitimacy of popular republican decisionmaking, but rejected systems of lawmaking by simple majority votes, either in the form of direct democracy or of a unicameral parliamentary system . . ." Eskridge & Ferejohn, *supra* note 92, at 528. The point was to retard "factional" legislation at the same time as creating multiple sites for the reflection of majoritarian sentiment.

102. It is widely known that the structure of the Senate allows a minority of the population (in some cases a very small minority), to veto legislation. See Lynn Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone*, 13 J.L. & POL. 21 (1997). The Senate's structure and internal rules require, in effect, a significant supermajority before any piece of legislation even reaches the desk of the President.

the *Chadha* Court's apparent formalistic reliance on the bicameralism clause, but also limits the Court's rationale in ways that the categorical model does not.<sup>103</sup> To say that Congress needs to act with the full complement of the people's representatives (state and local, House and Senate) says absolutely nothing about what distinguishes legislation from execution in some abstract dictionary sense. As a result, such a determination does not require any agency or department, other than Congress, to satisfy bicameralism requirements. (One wonders, of course, how an administrative agency could ever satisfy such a requirement: Would it have to convene "two houses" of the agency?). Similarly, the focus on the vertical relation tends to alleviate any apparent inconsistency between the decision to deport Chadha as "legislative" in Congress but "executive" when determined by the Justice Department. One need not characterize the decision to deport as legislative or executive, to conclude that, when Congress acts, it must act in ways that are consistent with the representational demands of the Constitution.

#### B. *Change, Baselines, and Relative Shifts in Power*

Now consider Justice Powell's concurring opinion in *Chada*: He concludes that the legislative veto was neither legislative nor executive, but, instead, *adjudicative*.<sup>104</sup> From the perspective of the typical "matching game" story, this seems to be quite incompatible with the majority's views.<sup>105</sup> A function that is legislative one moment cannot suddenly be transformed into a function that is adjudicative the next. If I am right, however, there may be nothing inconsistent in the Burger and Powell opinions: Both may simply raise different risks to the people.

Chief Justice Burger's opinion assumes that the category "legislation" is a proxy for a feared risk to majorities (a fear of "partial representation" of the whole); for Justice Powell, the category "adjudication" serves as a proxy for a different fear—a risk to the few. As a general rule, Congress may not and does not decide individual cases, as Justice Powell noted. There are good reasons for this; the fear is that such a power, in the hands of a representative body, poses

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103. If, after *Chadha*, all "lawmaking" must be subject to the bicameralism requirement, then questions arise whether, for example, Congress' delegation of lawmaking authority to the Comptroller General violated the bicameralism requirement in *Bowsher*. For this and other questions based on *Chadha*'s equation of "lawmaking" with bicameralism, see generally Eskridge & Ferejohn, *supra* note 92, at 524-26; *id.* at 526 ("Chadha's conceptual framework is in tension with the results or the reasoning of the Court's practice in other areas: it is strikingly inconsistent with *Dames & Moore*; arguably inconsistent with *Alaska Airlines*, *Mistretta*, *Chevron*, and the Court's frequent endorsements of legislative history; and suggests a different analysis than that followed by the Court in *Bowsher*.").

104. See *Chadha*, 462 U.S. at 958 n.22 ("Justice Powell's position is that the one-House veto in this case is a *judicial* act . . .").

105. See *id.* (rejecting this view: "[T]he attempted analogy between judicial action and the one-House veto is less than perfect.").

grave risks to individuals and minorities.<sup>106</sup> A Congress that adjudicates will be a Congress that protects favorites and punishes scapegoats. Chadha, who the Justice Department had ruled should stay, had been handpicked out of hundreds<sup>107</sup> to have his case reversed by the head of a subcommittee whose judgment appeared to have been rubberstamped.<sup>108</sup> Justice Powell was concerned lest the decision represent the kind of unfairness that the Constitution aims specifically to prevent through the Bill of Attainder clause—trial by legislature.<sup>109</sup>

Viewed in this light, the Powell and Burger opinions do not conflict, even if their descriptive, functional, judgments do. The reason is that the risks to representation implicit in the functional judgments are quite different (indeed, they are the opposite risks). This is due, in large part, to the fact that the opinions conceive of the shift in constitutive relations quite differently. The majority opinion appeared to worry about a shift *from* a full Congress *to* a partial Congress—and thus struck the statute down based on a shift of political power from the many to the few. Justice Powell's concurring opinion saw the case differently, as a shift *from* a relatively insulated executive branch employee (or even a judge) *to* members of Congress. The risk was not to majorities but to minorities. Justice Powell and Chief Justice Burger thus do not see the same risk, but both do see significant constitutional risks from the legislative veto, one for Chadha, the other for the rest of us.

106. See *id.* at 966 (Powell, J., concurring) ("In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights.").

107. "In addition to the report on Chadha, Congress had before it the names of 339 other persons whose deportations also had been suspended by the Service." *Id.* at 964. (Powell, J., concurring).

108. According to Justice Powell, the "normal procedures" for considering resolutions were not complied with in Chadha's case. *Id.* at 964 n.6 (Powell, J., concurring). In the case of Chadha's bill, the simple resolution "was not distributed prior to the vote, but the Chairman of the Judiciary Subcommittee on Immigration . . . explained . . . [that] it was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet the statutory requirements, particularly as it relates to hardship . . . ." *Id.* at 964 (Powell, J., concurring). The majority's opinion notes that in a prior veto bill, Representative Eilberg appeared to make the claim that he had "worked" with the Attorney General's office on the "vetoes," thus suggesting to the members present that the veto was not controversial. See *id.* at 927 n.3.

109. As Justice Powell explained:

[The Framers'] concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions, such as the Bill of Attainder Clause, Art. I, § 9, cl. 3. As the Court recognized in *United States v. Brown* . . . "the Bill of Attainder Clause was intended . . . [as] a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."

*Id.* at 962 (Powell, J., concurring) (internal citations omitted).

Viewing *Chada* in this way highlights the possibility that the problem with *Chadha* is not that the categories conflict but that the risks are overdetermined: that there is more than one risk from the legislative veto. This can only be seen, however, if one focuses attention on change rather than stasis, shifts in relations rather than essentialist functions. It is this aspect of the relational analysis that differs from the traditional "matching game" we know as categorical analysis. Focusing on *shifting* stakes to the people reveals that which categorical analyses seek to hide—it makes the question of the appropriate "baseline" quite explicit and realistic. What we should want to know in structural cases is what effect structural innovations will have on the people—whether our government will veer too far toward a rule of aristocrats or tyrants. To focus on change and shifting power is to make explicit one's starting point in a way that categorical analyses seem to defy or at least obscure. The "matching game" offers a static, essentialist inquiry, the activity always "is" or "is not" some "function." A constitutive analysis mediates this essentialism not only by shifting to a notion of risk (which does not "locate" a power in any geographic space or bureaucratic essence), but also asks about the dynamic movements of power "from" and "to."

The Burger and Powell opinions perceived different risks, one to majorities, the other to minorities. This reflects decidedly different "baseline" judgments. Justice Powell viewed as the appropriate baseline the decision of individual cases by independent decisionmakers;<sup>110</sup> Chief Justice Burger viewed the baseline as a full-dress Congress.<sup>111</sup> Relative to the decision of the full Congress and the President, the decision by Representative Eilberg's subcommittee to deport Chadha was *less* likely to reflect majoritarian concerns; but relative to a decision by a court or independent decisionmaker, that very same decision was *more* likely to increase majoritarian influence to the detriment of individuals. There is, in the end, a common sense to this. To put it simply, Representative Eilberg was *more than a judge but less than the Congress*. He was a politicized decisionmaker, not an independent one, deciding the fate of an individual; and yet, at the same time, his district had no right to speak for the nation, for Congress and for the President. It is in this sense that the risks to majorities and minorities identified by Chief Justice Burger and Justice Powell may both exist, even if the categorical proxies for those judgments appear to contradict each other.

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110. See, e.g., *id.* at 966 (Powell, J., concurring) ("Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal.").

111. See, e.g., *id.* at 958 ("To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action; passage by a majority of both Houses and presentment to the President.").

*C. Implied Federalism and the Separation of Powers*

There will be those who will find this story incomplete or unacceptable because it offends a rather conventional account of *Chadha*—one which rejects the Court's opinion as both formalistic and unpalatable. The debate about *Chadha* has been and continues to be focused on whether Congress should use the legislative veto to "control" broad delegations of lawmaking power to administrative agencies. In this vein, the legislative veto has been seen as a "workable" or "fresh" check on runaway agencies.<sup>112</sup>

All of this, however, tends to begin from the baseline presumption embedded in the notion of "lawmaking." The argument's assumption is that "lawmaking" authority is somehow improperly in the hands of the agency and therefore the proper, accountable authority (Congress) needs to be put back "in charge." To say, at the start, that one is moving "lawmaking" authority to the agencies is to run the risk of begging the question (that one means by "lawmaking" actually "congressional lawmaking"). After all, as Jerry Mashaw has pointed out, the President is an elected official too—and when Congress grants power to agencies, it does not send its missives into space or to judges;<sup>113</sup> it sends them to the President, an official responsive to an electoral audience, albeit one that is differently constituted than the congressional electorate. All of this simply supports the view that I have been taking—that the shift of decisionmaker to administrative agencies is not the transfer of a particular kind of power (lawmaking or executive or adjudicative) but, instead, is a shift of relations to the public. To see more clearly how this model works and what it reveals about the conventional story of *Chadha*, let us turn to

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112. The term "fresh check" hails from Professor Stephen Carter. See, e.g., Carter, *supra* note 24, at 746. For a powerful game-theoretic argument that the legislative veto may be a wise use of congressional power to check administrative agencies, see Eskridge & Ferejohn, *supra* note 92, at 540-43. One must note that the "fresh check" theory, however elegantly expressed, and whether important in the context of agency decisionmaking, has not appeared so attractive outside of this context. It is the growing consensus, for example, that "fresh checks," like the Independent Counsel and the Sentencing Commission, may raise rather serious constitutional questions.

113. "If this description of voting in national elections is reasonably plausible, then the utilization of vague delegations to administrative agencies takes on significance as a device for facilitating responsiveness to voter preferences expressed in presidential elections." JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152 (1997) (emphasis added). As Mashaw argues, delegation may actually "improv[e] the responsiveness of government to the desires of the general electorate." *Id.* at 153. Moreover, Mashaw adds:

If congressional statutes were truly specific with respect to the actions that administrators were to take, presidential politics would be a mere beauty contest. . . . [S]pecific statutes would mean that presidents and administrations could respond to voter preferences only if they were able to convince the legislature to make specific changes in the existing set of specific statutes. Arguments for specific statutory provisions constraining administrative discretion may therefore reflect a desire merely for conservative, not responsive, governance.

*Id.*



Justice White's dissent, in which the "fresh check" claim seems to find its natural home.

We have already seen Chief Justice Burger's focus on the shift from a full Congress to a partial Congress and Justice Powell's focus on a shift from an independent decisionmaker to a politicized one. There is as well another shift that must be considered. For Justice White, the important shift was not at the time Congress decided *Chadha*'s fate but, rather, when it reserved part of the delegated power from Congress to the Executive to decide immigration matters. It is this temporal framing of the case to which I now turn so that we may see how many separation of powers cases carry a dimension of what I will call (for lack of a better term) "implied federalism." (Later, we will see the more obvious incarnation of "implied" separation of powers concerns in federalism cases.) It is here that the case takes a turn away from the nature of the legislative veto, toward the President's veto.

In considering power shifts from Congress to the President and vice versa, it seems obvious but is worth remembering that the representational or vertical structure of the American legislature and the American presidency are not the same. As noted above, standard kinds of structural analyses tend to plunk both departments in the "politics" camp without recognizing the different incentives and structures in these institutions.<sup>114</sup> Indeed, anyone who watches television on the night of Presidential elections is likely to know that the way in which votes are aggregated geographically matters not only to outcomes but to the incentives of the particular players. The Congress and the President both represent national majorities, but they represent them differently—and that is because members of Congress represent more fragmented and localized constituencies.<sup>115</sup>

One way in which the Congress and the President represent the nation differently is that members of Congress speak to a much smaller constituency. Senators speak to state-aggregated constituencies, and House members speak to district-aggregated constituencies. It is this dimension that serves as a principal difference between the representative institutions of our federal government. The President does not represent the Third District of Connecticut or the state of Alaska; he represents the nation, just as it is also true that the Senator from Oklahoma does not represent the nation. This yields an "implied" federalism component to the separation of powers because any shift from the Congress to the President or vice versa is likely to involve a relative shift away or to state and locally aggregated electorates (albeit at the national level).

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114. See, e.g., BICKEL, *supra* note 3, at ch.1 (referring to the different constituencies of the President and the Congress but emphasizing the court's similar role with respect to each); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

115. A 51% majority may lead to a Presidential policy, for example, that will never pass Congress because of the geographical concentration of the 51% of the population.

This “implied federalism” dimension of national structure is, of course, well known in federalism scholarship<sup>116</sup> and was well known, indeed crucial, to the adoption of the Constitution;<sup>117</sup> here, however, we consider it in a rather different place—the separation of powers. Lest there be confusion, my claim is not the traditional Wechslerian position that the Court need not review federalism cases because the states are in fact represented in the Congress.<sup>118</sup> I am interested, here, in something different; I am interested in the separation of powers, the entire constitutional structure, where that structure is conceived of as separate forms of popular representation. In a sense, then, I am simply beginning with a truism: Members of Congress are elected in a different way from the President. And that way is distinguished by one body’s reliance upon more local electorates. As Charles Black once put it, the member from the Fifth of Texas lives and breathes based on what they think of him in the Fifth of Texas.<sup>119</sup> Add that up 535 times and one gets 535 states and localities; and that is the “implied federalism” dimension of the separation of powers.

The actual representational picture is, of course, more complex<sup>120</sup> and

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116. See, e.g., Weschler, *supra* note 25.

117. RAKOVE, *supra* note 42, ch. 4 (discussing the ways in which questions of representation influenced the structure of the Congress, the Presidency, and their relationship).

118. Briefly, here is my position on the Wechsler thesis: First, and foremost, I reject the notion that we can best determine questions of structure by looking at them initially as questions of “judicial review”—there is more at stake in this than the decisionmaking of courts. As for the Wechsler thesis, itself, however, I have stated before that I believe the Wechsler argument is unpersuasive in its given form but may ultimately have some resonance. Like Larry Kramer, I believe that there are important ways in which the electoral structure of the Senate does in fact link national and local politicians. See Kramer, *Understanding*, *supra* note 25, at 1523-29 (emphasizing the role of political parties in forming ties across planes of government). National politicians need votes in localities and so they find organizations that are capable of mobilizing those votes (whether those organizations are churches or unions or local party officials). As the political economists have told us, small groups are often better at catalyzing a majority than a broad-based appeal to the majority. The most notable difference between my position and the current contenders is my claim that state governments are to be protected under the constitution as a proxy for the interests of the people of the state; there is no independent constitutional interest in any particular form of state bureaucracy, other than the minimal condition that it be a “republican” form of government and the more substantive condition that it not violate federal constitutional guarantees. This does not mean that the federal government can interfere with the form of state governments at will; it means quite the opposite, namely, that the federal government should resist strongly any intervention in the form of state governments precisely because the choice of state structure reflects the deep structure of the people’s wishes for self-governance.

119. Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 16-17 (1974).

120. I refer here to changes in the election of Senators and to the fact that congressional districts are not constitutionally mandated. Neither of these complications, however, changes the relative calculus in the text. Even if all House members were elected by state-wide votes, and the Senate had no allegiance to state governments (as opposed to state voters), it would still be the case that the Congress would be at a relative advantage in reflecting the interests

subject to all of the regularly identified political pathologies. As I have said before, separation of powers doctrine cannot cure the government of all political pathologies, only particular structural pathologies.<sup>121</sup> If the member from the Fifth forsakes his constituents, there is nothing that the separation of powers can do to rectify those failures. What constitutional structure may do is identify risks separate and apart from the standard agency risks. Thus, even if we were to assume the most gloomy view of electoral politics produced in the past twenty years, in which politicians regularly forsake majorities for minorities, it would still be the case that we should worry about the separation of powers—not because it could cure agency problems or eliminate special interests—but because it regulates relations between political institutions.<sup>122</sup> Regarding shifts from Congress to the President, and vice versa, the question remains whether a shift from a nationally aggregated constituency to a more locally aggregated one (and again vice versa) raises significant risks to our form of government. But to assess that we cannot begin assuming that because the President and the Congress are political entities, they somehow have the same representational incentives. As a general rule, the President has a more national focus and members of Congress a more local one.

There will be those who will insist that this presumption does not always hold; the skeptic will note that, in any particular case, for example, our member from the Fifth may actually take a “national” position or the President may take a position that favors some states over others. Of course that is true. But a presumption is a presumption (rather than a rule) because its truth is subject to rebuttal. I am aiming to capture, not all of the incentives of any particular actor in the system, but a simple and thus predictive take on relative incentives, with emphasis on the term “relative.” The point is not to reinvent the essentialist question in the elective nature of the Presidency or the Congress but, instead, to determine their *relative* structural incentives. And as a *relative* matter, it seems fair to conclude that the President has greater incentives to speak to the nation than the member from the Fifth of Texas. As Professor Mashaw tells us: “The President has no particular constituency to which he or she has special responsibility to deliver benefits . . . . [I]ssues of national scope and the candidates’ positions on those issues are the essence of presidential policies.”<sup>123</sup>

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of more local electorates than would the President. This holds true, moreover, even though there are links between the President and the states that are periodically forged by the demands of the electoral college since such links are far weaker than those between the “member from the Fifth” and the electorate of the Fifth, in part because of the difference between a two-year and a four-year election cycle and in part because of the contingency of voter distributions.

121. Nourse, *Vertical Separation*, *supra* note 37, at 786-87.

122. Of course, if one thinks that all political decisions are always and inevitably corrupt or bought, just as if one thought they were all wise and pluralistic, there would be little to argue about.

123. MASHAW, *supra* note 113, at 152.

If, as I have detailed, we view the departments as representing different constituencies, then it seems fair to conclude that *any* shift to Congress shifts decisions from an audience that is nationally dispersed to one whose wishes are more locally aggregated. Shifting in the opposite direction (taking a task or decision away from Congress and giving it to the President) raises precisely the opposite risk: reducing the relative power of state and locally aggregated constituencies. Put more colloquially, the question posed is whether the President and his "men" will be as responsive to local concerns as would be the Senate or the House or their combination (or whether the Senate and House will be as responsive to national majorities as is the President).

In *Chadha*, both of these "implied federalism" risks were present at different points in the legislative process and this is what, in the end, separates the majority opinions from the dissent. Justice White, in his dissent, emphasized "time one," when the original immigration statute was passed, including the legislative veto. *At that time*, the relevant shift was from Congress to the executive (shifting decisionmaking power away from locally aggregated constituencies) to decide individual deportation matters.<sup>124</sup> As Justice White makes clear, at time one, the statute's problems are similar to any other delegation of authority to the executive.<sup>125</sup> And, on this question, he is certainly correct. The problem is that this does not answer the question *at time two*—when the legislative veto is exercised.<sup>126</sup> At that time, the relevant shift is in

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124. The obvious implication of this is that "delegation" cases reflect "implied federalism" concerns, as I have defined them here. There is a common sense to this: One of the conventional complaints about the delegation of broad powers to the federal government is the claim that broad delegation takes power away from the states. Delegation doctrine, however, is generally not viewed as a federalism issue.

125. If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting text. In both cases, it is enough that the *initial* statutory authorizations comply with the Article I requirements.

*INS v. Chadha*, 462 U.S. 919, 986-87 (1983) (White, J., dissenting) (emphasis added).

126. Justice White argues, for example, that the legislative veto does not undermine the separation of powers because it requires the agreement of all three departments: "[Section] 244(c) (2) did not alter the division of actual authority between Congress and the Executive. . . . [A] permanent change in a deportable alien's status could be accomplished only with the agreement of the Attorney General, the House, and the Senate." *Id.* at 994 (White, J., dissenting). In fact, the Attorney General did *not* agree to *Chadha's* deportation and had the case ended with his decision, it would not have led to *Chadha's* deportation while, because the decision ended with the Congress, he was to be deported. White's argument based on "agreement" conflates the order in which the parties are to decide the matter. This is achieved in part by assuming a baseline of deportability and reconstituting the Attorney General's decision as a "proposal for legislation," and the Congress' decision as a failure to act on that proposal. *See id.* at 997. This act/omission framing issue does not change the ultimate order of decisionmaking which still (even if Congress is construed as "failing to act") ends with Congress. That gives priority in the individual decision to deport

precisely the *opposite* direction (shifting power from a nationally aggregated audience to a locally aggregated constituency).<sup>127</sup> And that question involves more than delegation—indeed, it involves more than the Congress; it becomes one of the President's power to veto.

If Congress had passed a traditional piece of legislation to deport Chadha, the President would have had the opportunity to veto it. But, with the legislative veto, at "time two," the President can do nothing. The skeptic will reply that the President already had his opportunity because his agent, the Department of Justice, had previously acted. But that inverts the traditional, temporal order of action under the Constitution. And temporality *is relevant* where the separation of powers is concerned, because it matters to popular representation. The Constitution is structured so that a national audience typically has the last say on a piece of legislation (subject to an override by a congressional supermajority). That structure has an impact on the relative power of constituencies. Just imagine that we eliminated the President's veto and you will see that this would shift significant power to the states and localities. (After all, it was one of the Anti-Federalists' objections during the ratification debates, that the President's veto would shift power to the nation and away from the states).<sup>128</sup> From this perspective, the legislative veto is problematic because it shifts the "last say" away from the President and his national constituencies, toward the Congress and its state and locally aggregated audiences (without a supermajority). It is no answer to this to say, as Justice White did, that, at "time one," in the original passage of the Act, that the President acquiesced in such an arrangement. We would hardly say that the President and the Congress could agree anticipatorily to give away the veto, in part or in whole.

The important point is not whether you are convinced by this argument that the *Chadha* statute must be judged at "time two." The important point for my purposes is to show how and why the question in *Chadha* comes down to one of "implied federalism." If one judges the case at "time one," when the original immigration statute was passed, then there is no question that the action appears like any other delegation; but if one judges it at "time two," then there is a significant question about whether state and locally aggregated constituencies have gotten "another bite at the apple" (one that they would not get typically unless they could gather a supermajority to override the President).

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to relatively more local constituencies and thus still risks parochialism.

127. For example, return to our example of a Constitution without a presidential veto. It seems fairly easy to predict that if the Congress were to have the final word on legislation, such a system would increase the relative power of those whom Congress represents (state and local interests) relative to the power of the president's national constituency. See Nourse, *Vertical Separation*, *supra* note 37, at 765-66.

128. See *id.* at 765 & n.57 (providing citations for sources documenting the Anti-Federalist perspective during the debates).

Many self-styled “liberals” have tended to find little troubling in the legislative veto and have excoriated the Supreme Court for applying a formalistic analysis. Yet, often times, it is these same “liberals” who worry about federalism; they view devolution to the states with some skepticism, skepticism inspired by the fear that state majorities will oppress minorities. Those two positions are inconsistent: If you worry about federalism (meant as devolution to the states), you should also worry about the legislative veto. And you should worry about it for the reasons that were so apparent in the case: that bodies aggregated by relatively more local constituencies—states and districts—are likely to be relatively more parochial than nations. Surely, this is what realism tells us about Representative Eilberg’s decision to deport Mr. Chadha. Would you really want your personal claim to citizenship to depend upon the whims of a single congressional representative?

### III. FEDERALISM

So far, I have tried to show that the idea of function serves as a proxy, albeit a crude one in structural matters. Even though we might essentialize a government innovation as legislative, or judicial, or executive, we have seen that these characterizations may not in fact contradict each other. Indeed, they may reflect consistent judgments, albeit judgments not about function or activity but about risks to the decisionmaking relations between the people and their government. Here, I extend this analysis to more recent structural problems, problems typically denominated as questions of federalism. Just as in the separation of powers context, the relevant activity descriptions (the “local” and the “national”) serve, in my view, as proxies for judgments about the kinds of electorates that we want to decide matters of institutional structure. Thus, the “truly local” and the “truly national”<sup>129</sup> will be considered as different relations between citizens and their governments.

The federalism debates begin, today, with the Supreme Court’s decision in *United States v. Lopez*.<sup>130</sup> Prior to *Lopez*, it was thought that the commerce power was virtually without limit.<sup>131</sup> Congress could reach seemingly local activities if, by aggregating those local activities, there was a significant effect on interstate commerce.<sup>132</sup> In *Lopez*, however, the Court held that the aggregation principle only applied to “economic” or “commercial” activities.<sup>133</sup>

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129. I am referring here to the terms used most recently by the Supreme Court in one of its more controversial federalism decisions. See *United States v. Morrison*, 529 U.S. 598, 617 (2000).

130. 514 U.S. 549 (1995).

131. See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 685 (1995) (“Before *Lopez* many academics and lower court judges speculated that the Commerce Clause no longer imposed any limits on congressional action.”).

132. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

133. *Lopez*, 514 U.S. at 561 (interpreting prior cases, such as *Wickard*, as “upholding

The Court thus struck down Congress' attempt to regulate the "possession" of weapons within a certain radius of a school zone on the ground that this was a matter of crime, not commerce.<sup>134</sup>

*Lopez's* solution to the problem of congressional aggrandizement—the embrace of a new category of "economic" or "commercial" activities—has already led to predictable descriptive difficulties.<sup>135</sup> Like the traditional state function test before it, the *Lopez* standard leads to framing issues. If the "commercial" function test is applied at the most narrow, fact-bound level, then the growing of wheat in *Wickard* was not economic (planting and growing do not depend upon a national economy), nor the eating of food at Ollie's barbecue,<sup>136</sup> nor sleeping at *Atlanta Motel*,<sup>137</sup> nor even perhaps the sawing of a piece of wood in *Darby*.<sup>138</sup> Of course, in these cases, the court opened the "subject frame,"<sup>139</sup> asking whether planting or dining or sleeping led to an economic effect—overhanging the market or restraining travel. But, might not the frame be widened "just a bit" in *Lopez*, wide enough to encompass the defendant's intended sale of the gun?<sup>140</sup> As commentators have noted, subject

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regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce").

134. *Id.* ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.") (internal citations omitted).

135. For an incisive critique of the categorical approach, see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619, 621 (2001) ("[C]ategorical federalism ought to be understood as a political claim, advancing an argument that certain forms of human interactions should be governed by a particular locality, be it a nation-state or its subdivisions . . . . Categorical federalism's attempt to buffer the states from the nation, and this nation from the globe, is faulty as a method and wrong as an aspiration."). For an amusing yet insightful one, see John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998) (discussing problems of aggregation and similarity of activities in the context of an endangered species act question).

136. *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding Congress' power under the Commerce Clause to enact Title II of the Civil Rights Act of 1964 as applied to a restaurant).

137. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Congress' power under the Commerce Clause to enact Title II of the Civil Rights Act of 1964 as applied to a hotel).

138. *United States v. Darby*, 312 U.S. 100 (1941) (upholding Congress' power under the Commerce Clause to prohibit the shipment in interstate commerce of lumber manufactured by a Georgia company which paid its employees less than a minimum wage or required working more than a maximum of hours prescribed by law).

139. I borrow the notion of framing from Mark Kelman and his idea of "time-framing." See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

140. See, e.g., *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995) (describing *Lopez's* testimony that he brought the gun to school so that he could deliver it after school to one "Jason," who planned to use it in a "gang war," for which *Lopez* would receive "\$40 for his services").

framing may well cause problems in cases far afield from *Morrison* and *Lopez*—in cases of debt repayment and child pornography and the protection of endangered species.<sup>141</sup>

However persuasive this critique, it is an ancient one, one that repeats the cautionary tale of the New Deal and of *National League of Cities*—a tale typically told as one about the vanities of categorical pretension. Nothing in the critique, however, addresses the animating fears of those attracted to the categories. At various points in the twentieth century, the Supreme Court has predicted that, unless courts define the constitutional term “commerce,” the states will suffer dire consequences and even be “obliterated.”<sup>142</sup> Of course, this is a deeply exaggerated position; as far as I last checked, the states did not disappear after the New Deal. Moreover, a single gun statute, however overbroad, is unlikely to change that. Yet, like many fears, this one is particularly revealing. Given that the states have in fact shown a certain robustness in the face of this judicial fear, even in periods when the Supreme Court has failed to exercise review,<sup>143</sup> one must consider the possibility that by “constitutional” limits, the court really means not “constitutional” limits but “judicial” limits—limits that courts (as opposed to a different institutional entity) may enforce. Opponents of the categorical view have often asserted that questions of federalism are best left to the political process. The idea, associated first with Herbert Wechsler, is that Congress and the President reflect the interests of the states, including state sovereignty. This view suffers from a variety of defects but it does hint at the possibility that there is something more involved here than the definition of what is truly “local” or “national.” It hints at the idea we have been considering—the consequences to the people of shifting a decision from state to nation, or nation to state.

#### A. *Lopez*: *Risks to Majorities*

Federalism implicates two different *relations* between constituents and

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141. See, e.g., Resnik, *supra* note 135, at 634-38; *id.* at 634 (“In *Morrison*’s wake, the category of ‘the economic’ has taken on a vitality that opens up challenges to many federal statutes . . .”).

142. See, e.g., *United States v. Butler*, 297 U.S. 1, 77 (1936) (predicting that if the Court were to accept New Deal arguments in favor of the Agricultural Adjustment Act that “the independence of the individual states [would be] *obliterated*, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.”) (emphasis added). Presumably, if members of Congress really did not care about state populations, then we would have seen greater challenges from the legislative department before the second century of our government’s history.

143. See, e.g., Bednar et al., *supra* note 40, at 255 (“But it seems to us that American federal practices have been enormously robust in the face of massive changes in the nature of the society and the economy. The states and localities are still vibrant sources of policy determination. . .”).



their government. We are citizens of both state and nation. Although today we take this dual set of relations for granted, in 1787, the application of the federal government to individuals was considered one of the principal innovations of the Constitutional Convention. The "great vice" of the confederation was its operation on the states in their "corporate or collective" capacities.<sup>144</sup> The great remedy was to "extend the authority of the union to the persons of the citizens,—the only proper objects of government."<sup>145</sup> Then, a rather simple assumption was made about this dual relation: that the people would have a closer relationship to their state governments than to the federal. This was considered, by the Federalists at least, a simple matter of geography and acquaintance. Repeatedly, proponents of the Constitution insisted on the closeness of the people to their state governments relative to the federal:

Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger byass [sic] towards their local governments than towards the government of the Union.<sup>146</sup>

Today, of course, we are tempted to complete this passage and conclude that the loyalties that lie with a state may easily stray when the nation does a better job of governing. We recognize, at one level at least, that national power has grown with crisis, war, and recovery. We know, as well, that technological revolutions in communications and transportation have made us a different, and closer, nation. And, yet, there is a kernel of truth that remains to the proposition that the state governments are, at least relatively, closer to the people than is the federal government. Just ask yourself whether you would want your child's school assignment or your own parking permit issued from Washington and you will see that localism still lives and matters in people's lives (and this despite, and perhaps even because of, the communications revolution). My point is not that geography matters so much as that geography is often a crude surrogate for a sense of control and agency in citizenship.

Localism matters because of the simple pressure that numbers seem to pose for our relationship to our government: With fewer numbers, we have a greater sense of control over our local government.<sup>147</sup> This sense is mirrored in what we know about numbers and the transaction costs of governing. As a general rule, it is easier for a majority to be constructed in a town than a city, a state than in a nation (even if there may be exceptions to that rule). Notice that this result does not arise from the essence or presumed "nature" or "value" of locality or even from strong notions of either sovereignty or geography. Instead, it arises from the effect of numbers on the transaction costs of

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144. THE FEDERALIST NO. 15, at 93 (Alexander Hamilton) (Jacob Cooke ed., 1961).

145. *Id.* at 95.

146. THE FEDERALIST NO. 17, at 107 (Alexander Hamilton) (Jacob Cooke ed., 1961).

147. There are other reasons, of course, including a political culture that has always prized decentralization.

governing, an effect that in turn finds itself expressed as the common sense "closeness" of individuals to smaller rather than larger governments.

From this rather simple starting point of size, we may reconceive the question in modern federalism cases *not* as a question of descriptive categories but, rather, as a question about the *shift* from the citizen's relation to their federal government to their state government. When we transfer the power to decide—about guns or schools or violence—from the state (with its smaller constituencies) to the nation (with its larger constituencies), political incentives shift. A decisionmaker representing more people is less likely, relative to one who represents fewer people, to be sensitive to citizen preference. Indeed, as a variety of modern scholarship in political science and economics has shown, a disaggregated system is far more sensitive to citizen preference than a completely unified, national system.<sup>148</sup> Of course, this sensitivity to majorities is presumptive; it may not hold in any individual case. Most importantly, it is a *relative* risk. Both state and nation may betray the people's wishes in any particular case (the so-called "agency" risks always persist). But if we are worried about predicting structural risk, then it seems uncontroversial to begin, at least, with a presumption that a relatively more disaggregated set of citizens is more likely, on average, to reflect more sensitive accounts of majoritarian preference.<sup>149</sup> Indeed, it seems to me that this addresses in a straightforward manner some of the "anxieties" of federalism that are rather poorly and cheaply dressed as geography.<sup>150</sup>

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148. See Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19, 21 (1969) ("[T]he smaller the governmental unit the more influence any one of its citizens may expect to exert, consequently, the smaller the unit, the closer it will come to fitting the preference patterns of its citizens."); see also, e.g., Eskridge, Bednar & Ferejohn, *supra* note 40, at 226-29 (marshalling normative and positive arguments for the proposition that "[a] decentralized polity will usually end up with fewer dissatisfied citizens"); Oliver E. Williamson, *Hierarchical Control and Optimum Firm Size*, 75 J. POL. ECON. 123, 123-38 (1967) (arguing that there are diminishing returns to scale in almost all organizations; the larger the organization, the greater the loss of control over subordinates, which increases the cost of organization).

149. One might well argue at this point that there are conflicting "majoritarian" claims here—the federal majority that created the statute and the majority of a state or collective of states that may disagree. That is true. It still remains the case, however, in deciding what power Congress has vis-à-vis the states, that the states are closer to the people than is the national government. This closer connection is, of course, relative and presumptive; the states may, in fact, be acting quite unlike a majority and rather like a "minority." That the analysis may well be, in reality, quite complex, does not however undermine the general notions outlined here as presumptions.

150. Judith Resnik has argued quite persuasively in her *Categorical Federalism* piece that geography has been placed in the service of the gender status quo. Resnik, *supra* note 135, at 630-34, 643-54. I agree wholeheartedly with Professor Resnik that geography may mask normative claims. The difference between my argument and Professor Resnik's is that I focus on a story about the people's *relation* to their government. There is a persistence to the federalism anxiety and that persistence, I believe, suggests a concern about the people's connection/relation/control over a growing federal (and indeed global) government. The fear is, at least in part, that all connection to government will be lost in the "indifference" of a

Localism may provide benefits, but it also creates obvious costs and a simple comparison makes this quite clear. If it is true that smaller constituencies are likely to be more sensitive to majoritarian preferences, it is also true that they are more likely to be oppressive.<sup>151</sup> If it is easier to gather a majority in a town hall than in a nation, it is also easier to gather a lynch mob in a town than in a nation. *For every benefit obtained by a more local decision, there is a corresponding increase in risk—to minorities.* If this is true, and we will see it as true in the next case, we cannot confidently end the analysis in praise of localism. We must worry, as Madison once did, about risks both to majorities and minorities.<sup>152</sup> This is where dynamism enters the picture; this is where a dualist theory of political risk is revealed as embedded in federalism's idea of function, just as we saw it embedded in the separation of powers' idea of function. But let us return to the initial position, and see how it works itself out in real cases.<sup>153</sup>

Applying this framework to *Lopez* yields some interesting results, suggesting that *Lopez* was a rather easy (if perhaps trivial) case. This is not because such a law would violate a "categorical" rule about crime, nor even because it would mean an "end of the states," or even because it might coerce the large states for the benefit of the small.<sup>154</sup> It is because one should worry about federalism if one cares about majoritarianism. But the worry must be articulated correctly—it is not to a set of values or traditions or descriptions, to accountability<sup>155</sup> or even state sovereignty—and it is not unalloyed.<sup>156</sup> It is a

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distant bureaucracy. Put another way, I believe that these anxieties are ones we might call anxieties of voice, that is, fear that, in all this globalizing and nationalizing, the people will have lost a place where their voice counts. It is this that prompts me to embrace the notion of federalism as a question of majoritarian will.

151. KOMESAR, *supra* note 81, at 81-82 (discussing the costs of majoritarian biases and their ability to generate "atrocities" against minorities, and their more pervasive character in local decisionmaking, such as local decisions about land use).

152. THE FEDERALIST No. 10 (James Madison).

153. I am not urging, nor do I believe, that every congressional decision affecting the states raises a risk to majorities. Moreover, as I try to articulate later, this is only the first level of analysis—in some cases, we must ask whether the states' claim to majoritarianism is really an attempt to thwart citizens' relation to their national government.

154. On the persistence of the importance of state government, see Bednar, Eskridge, & Ferejohn, *supra* note 40, at 225, 255.

155. On the differences between questions of accountability and representation, see Jane S. Schacter, *Accounting for Accountability in Dynamic Statutory Interpretation and Beyond*, in DYNAMIC STATUTORY INTERPRETATION (2002), available at <http://www.bepress.com/ils/iss3/art5> (last visited Jan. 31, 2004).

156. The Supreme Court has increasingly relied upon the notion of "accountability" to resist or modify congressional claims. See, e.g., *Printz v. United States*, 521 U.S. 898, 922, 929-30 (1997); *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 169 (1992). Accountability is a difficult concept and one that differs from representation. It implies an actual effort to "call one to account" that resists the kind of thin, presumptive analysis I have suggested here. To eliminate, as much as possible, the "off-stage" moralizations equated with accountability (that someone

risk to *popular representation*, more specifically to the representational relation between citizens and their state government (a relation assumed and relied upon in the constitutive texts).

One reason that *Lopez* seemed to raise little concern in many minds was precisely because state majorities appeared not to be substantively at risk: Many states had the very same no-guns-outside-schools policy, so it seemed that the interests of state majorities were not put at risk by a similar federal policy. Of course, the mere existence of state laws on the topic does not eliminate the possibility of a risk to state majorities. Parallelism in general policy does not warn us of the different ways in which states could choose to enforce the particular policy—whether by way of penalties or by way of actual application of the statute. Imagine a federal government that aimed to repeat all state criminal laws but with higher penalties, and one will easily see that such differences could have serious majoritarian effects. Thus, although it should not be overemphasized, even seemingly parallel policies may still raise risks to state majorities.

Risks do not end the analysis, however. For, in the end, almost all constitutional risks may be undertaken for a decent enough reason. And, here, the case pretty much decides itself. However serious the risk to majorities in such a case (and relative to many cases, it seems it was fairly minor), *Lopez* was effectively decided by the fact that Congress had asserted absolutely *no* contemporaneous justification for running it.<sup>157</sup> Of course, the government offered a plausible post hoc connection between the statute and commerce; but that is not the question asked by an analysis based on popular representation. The risk of failing the “categories” is a dictionary risk, a risk for the coherency of law perhaps, but not the real world. The risk I am talking about lives and votes; it is a risk to the people of the states that their preferences will, in a momentary burst of national political vanity, be disregarded. To respond to such a claim, one cannot simply stamp one’s foot and announce “commerce.”

*Lopez* in this sense was a rather simple case: Because of the way that the statute was initially passed—as a last minute technical amendment to a large omnibus crime bill<sup>158</sup>—there was no rationale offered to explain the need for

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has done something “improper” for which he or she must be called to account), I have preferred the terms “representation” and even better “relation,” which tend to have relatively greater resistance to such off-stage moralizations.

157. As the Court put it, “the Government concedes that ‘neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.’” *Lopez*, 514 U.S. at 562 (quoting Brief of the United States at 5-6). Similarly, the Court rejected the post hoc attempt of Congress to add findings in a later Congress on the question of interstate commerce. *See id.* at 563 n.4.

158. In the Senate, the Gun-Free School Zones Act was passed as a last minute set of amendments that were added en masse to a major crime bill. *See Omnibus Crime Bill*, S. 1970, 101st Cong. § 39 (1990); *see also* Biden/Managers Amend. No. 2104, of which the Gun-Free School Zones Act is a part, and which begins with a variety of amendments

federal, as opposed to state, intervention.<sup>159</sup> This in turn reflected the Court's fears that the statute was simply a way to gain political favor in an election year without any consideration of the constitutional questions at issue. There was nothing in the record of Congress' nondeliberation<sup>160</sup> to suggest

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deemed "technical" and "conforming." S. 1970, 101st Cong. § 39 (1990). Like many other amendments in that package, it was an "easy" political call in the Senate: Since many states had the same legislation, it was likely Senators would not consider the proposal controversial. When I have asserted this in public, some scholars have expressed concern that federalism surely must have been a concern for some Senators because the 1000 feet mark might have made densely populated areas, like New York City, into one continuous "gun-free" zone. However true that interpretation may be as a post hoc lawyer's reading of the statute, the argument misunderstands the Senate's political dynamics and incentives. The Senate's political structure strongly favors rural areas, rendering this argument largely irrelevant to those who are the ultimate decisionmakers. Moreover, even the Senator from a state that includes a large city, like New York, not only has a large urban area to represent, but a rural area as well. In the rural area, this kind of policy might sell very well outweighing whatever concerns there were about the city or, as in real life, it may simply mirror the wishes of many city-dwellers for more, rather than less, gun control. Having been on the floor of the Senate at the time, as counsel to the manager of the bill, I can say that there was *no* concern expressed to me by any Senator or staff member, Republican or Democrat, about federalism issues related to the Gun-Free School Zones Act. Overbreadth, in crime politics, is hardly ever regarded as a political sin and is rarely the basis of political objection. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

159. One cannot generalize, as a matter of fact, that Congress always or never considers the interests of the states or the people of the states. Sometimes, as in *Lopez*, time and political pressure align in ways that make it very unlikely that the impact of federal legislation on the states or state majorities will be considered. On legislative pressures that lead to ambiguity or lack of attention, see Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002). In other cases, however, federalism concerns may be openly debated. During roughly the same time period that the Congress considered the Gun-Free School Zones Act, it also considered a proposal to "federalize" almost all gun crimes, known then as the "D'Amato amendment." See Amendment No. 387 to S. 1241, the Violence Crime Control Act, 137 CONG. REC. S8846 (1991). The proposal initially passed the Senate handily, despite opposition on federalism grounds. See 137 CONG. REC. S8848 (1991) (statement of Sen. Bingaman) ("I think this is the greatest example of preemption of state law that I have encountered since I have been in the Senate."). That proposal ultimately died but was raised again in 1993 and was opposed, again, on federalism grounds. See 139 CONG. REC. S15384 (1993) (statement of Sen. Biden) (stating that the "premise of federalism [is] that where the States can do something on their own as well as the Federal Government can do it, you should let the States do it.").

160. There were hearings in the House but, as others have noted, although the constitutional issues were raised briefly, these were not the focus of the hearings. See Vicki Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2239 n.255 (1998) (stating that "[o]nly one set of hearings was held on the legislation, and it focused on guns and education" and citing the few instances where the federalism issue was raised); Brief for the United States at 5, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260) (stating that "although the hearings extensively addressed the impact of increasing firearms violence upon the educational system, the witnesses did not specifically discuss the effect upon interstate commerce of firearms possession on or near school property").

counterbalancing factors—there was no debate of the issue or public investigation of the need for national as opposed to state action. In such circumstances, one can easily see why *Lopez* was chosen as the first of a set of federalism targets; it was an easy case. One can also see, however, why it is a trivial case in terms of its actual limits on Congress' actions. *Lopez*, in this view, amounts to the announcement of a clear statement rule<sup>161</sup>—which Congress may, through a variety of means, satisfy. This, of course, does not answer the question of what might have happened had Congress attempted to provide a better rationale for its actions; I leave that harder question for the moment so that we may see how this analysis works itself out in the more recent case of *United States v. Morrison*.

### B. *Morrison*: Where Inequality Meets Commerce

Many doubted the lasting power of *Lopez*, suggesting that it would have little resonance in future federalism decisions.<sup>162</sup> Anyone following Congress' efforts during this period could not have mistaken the possibility that there were other statutes in the wings awaiting their federalism turn. Indeed, there were strong indications that *Lopez* was simply the warm-up act for a major confrontation between the courts and Congress that had been brewing over the Violence Against Women Act (VAWA). There was little surprise, for example, among its advocates, when the court agreed to decide *United States v. Morrison*, a case challenging the constitutionality of the VAWA's civil rights remedy.<sup>163</sup> The federal judiciary had lobbied against the bill for some time, and the Judicial Conference had targeted it as an improper exercise of "federalization" by Congress.<sup>164</sup> Once the statute reached the Court, the Justices stood by *Lopez*'s categorical approach. The Supreme Court held that Congress had no power to create VAWA's private civil rights remedy.<sup>165</sup> The statute was about crime, said the Court and thus not of the "economic" sort sanctioned by *Lopez*.<sup>166</sup> According to the Court, Congress had relied on an

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161. See, e.g., Louis H. Pollak, *Foreword, Symposium: Reflections on United States v. Lopez*, 94 MICH. L. REV. 533, 552-53 (1995) (noting how easy it is to add an interstate nexus requirement as a constitutional "bumper-guard," avoiding the question of economic impact).

162. See, e.g., Larry Kramer, *What's A Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885, 885 (1996) ("[A] growing number of experts have concluded that sweeping judicial revolution [after *Lopez*] is unlikely."); Pollak, *supra* note 161, at 553 (noting that "there is less in *Lopez* than meets the eye").

163. 529 U.S. 598 (2000).

164. See Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 271 (2000).

165. *Morrison*, 529 U.S. at 602.

166. *Id.* at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); see also *id.* at 618 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in

improper aggregative rationale that would justify any federal criminal remedy. That, the Court said almost apocalyptically, would destroy the line between the "truly local" and the "truly national."<sup>167</sup>

In easy cases, it might be sufficient for the Court to rely on definitional boundaries—such as the commercial "function"—to draw a firm line between local and national sovereignties. If Congress sought to use the Commerce Clause to wage war, there would be an easy answer. But, *Morrison* was not an easy case in this sense. Congress had worked on the Act for four years and had articulated, albeit under the pre-*Lopez* cases then applicable, a rational basis for connecting gender-based violence to commerce.<sup>168</sup> The argument was one that had been made before in the context of the 1964 civil rights remedies—that national commerce was "tainted" by discrimination. In a series of reports, the Senate Judiciary Committee explained that the fear and incidence of violence disadvantaged women as participants in a national economy (a disadvantage manifested educationally, in employment, and otherwise economically).<sup>169</sup> The Supreme Court, however, found this rationale insufficient; it saw *Morrison* and *Lopez* as parallel cases because both involved functions the Supreme Court associated with the states ("police power" and "crime").<sup>170</sup>

There is no question that the Supreme Court was right to consider the risks to state majorities in *Morrison*. As we have seen above, parallel state and federal criminal remedies do raise federalism issues.<sup>171</sup> But there are good

interstate commerce has always been the province of the States . . .").

167. We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

*Id.* at 617-18 (internal citations omitted).

168. As Justice Souter wrote in his dissent, one obvious difference from *Lopez* was the "mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. Passage of the Act in 1994 was preceded by four years of hearings . . ." *Id.* at 628-29 (Souter, J., dissenting) (internal citations omitted); *id.* at 635 ("Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges."); see, e.g., H.R. REP. NO. 103-711, at 385 (1994) ("[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . , by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . .").

169. And, indeed, the petitioner, Christy Brzonkala, had "dropped out" of college, citing emotional disturbances because of a rape. See *Morrison*, 529 U.S. at 602-03.

170. "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618.

171. I suspect that what motivated the Court was the suspicion, voiced in the press and

reasons to doubt whether this was the same problem in *Morrison* as it was in *Lopez*. VAWA's civil rights remedy created no parallel *criminal* penalties; it created no cherry-picking license for federal prosecutors—it was a private civil remedy. Perhaps more importantly, this was why state officials (presumably representing the affected “federalism parties”) supported the remedy both in Congress and in the Supreme Court: because it was *not* a parallel federal criminal law.<sup>172</sup> The remedy was a supplementary civil rights action initiated by private parties. In much the same way that Title VII's sexual harassment remedies *supplement* rather than *supplant* state tort remedies, so too would VAWA's civil damage remedies have supplemented state civil and criminal laws. Although evidence of state support is—and cannot be—constitutionally determinative, any realistic assessment of the risk to state majorities presented by the *Morrison* statute should take into account the states' own asserted position.<sup>173</sup>

There is, however, a far more glaring omission in the *Morrison* opinion. The states may be relatively *more* sensitive to majoritarian preferences, but

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privately, that VAWA was not a truly majoritarian remedy. There was the fear that the federal government, although shrouding itself in the mantle of majoritarianism, was in fact acting on behalf of a few feminists who had bamboozled the Senate into passing the statute. See Ruth Shalit, *Caught in the Act*, NEW REPUBLIC, July 12, 1993, at 12 (reporting that feminist activists were promoting the VAWA but that at least some feminists thought the Senate had no idea what it was passing). Knowing a bit about the remedy, myself, I know that this story is wrong. But, even if I had not worked for the Senate at the time, I would doubt it in large part because it is so incredibly difficult to pass any piece of legislation. In the end, however, if this were the basis for the judicial opposition either in Congress or on the Supreme Court, it should have been addressed as such, allowing there to be a fair response.

172. Amici curiae representing 36 states filed briefs arguing that the civil rights remedy in the Violence Against Women Act did not impinge on states' rights. See Brief of the States of Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the Commonwealths of Massachusetts and Puerto Rico, as Amici Curiae In Support of Petitioners' Brief on the Merits, Nos. 99-5, 99-29, 1999 U.S. Briefs 5, \*2 (Nov. 12, 1999) (“Section 13981 does not undermine federalism . . .”); *id.* at \*15-16 (“The remedy that Congress chose is a necessary complement to the States' continuing efforts to redress gender-motivated violence, and also comports with the federal government's recognized role in protecting civil rights . . . . The States' own assessments of their legal responses to violence against women demonstrate that state protections remain inadequate . . . .”); Linda Greenhouse, *Justices Cool to Law Protecting Women*, N.Y. TIMES, Jan. 12, 2000, at A18 (noting that an additional state, Alabama, had filed a brief on the other side).

173. Some Justices have insisted that the states and the federal government cannot, by their agreement, render a law constitutional. At the same time, it is also true that the states, and their real assertions of interest, should not be ignored by a court aiming to protect federalism interests. To believe otherwise is to run the risk of enforcing federalism “against” the states. On this and the state support in the Supreme Court, see Nourse, *Vertical Separation*, *supra* note 37, at 780 & n.122.



they are relatively *less* sensitive to minorities. *The federalism analysis cannot stop at countermajoritarian effect; it has to consider, as well, whether there is a risk to state minorities.* In *Morrison*, the Court completely ignored the risk that states were particularly poorly situated to address the matters Congress sought to remedy—discrimination embedded in the states' own justice systems. If there was anything quite clear about the record that Congress compiled in *Morrison*, it was that gender discrimination was pervasive and deeply rooted in state systems (and thus likely to resist direct challenge as "intentional" discrimination by particular actors under either state or federal anti-discrimination law).<sup>174</sup> Moreover, Congress could rationally have concluded that this kind of discrimination was best uprooted and illuminated by the federal, unelected judiciary, rather than elected state judges who would have a relatively greater incentive to lean toward majority preference at the expense of minority protection. If this analysis of the federalism risks in *Morrison* is right, the decision was far from governed by *Lopez*; indeed, it presented precisely the *opposite* issue: Whether the federal government's relative advantage in enforcing the demands of equality provides a rational basis on which the federal government may intrude upon state majorities.

If this is right, this analysis should (in a perfect world) help—rather than hinder—the effort to respond to post-*Morrison* concerns about the continued constitutional status of the 1964 Civil Rights Act remedies. Although the Court has shown no interest in overturning *Katzenbach v. McClung*<sup>175</sup> and *Heart of Atlanta Motel*,<sup>176</sup> there are *Lopez*-based arguments that would seem to put them in jeopardy, at least to the extent the cases' overt rationales are grounded in the Commerce Clause. A vertical analysis of *Morrison* may point the way toward a more effective reconciliation of the cases and a firmer basis on which to rest future arguments in favor of the civil rights cases.

There is no question that protecting commerce from inequalities may intrude on localities, just as protecting commerce from unfair labor practices does. Darby's lumber yard and Ollie's barbecue are unmistakably "local" enterprises. A vertical analysis, however, cannot end with a risk to local majorities. It must also include the rival effect that a shift to localities increases the risk of individual or minority oppression. The answer to the civil rights cases is not to pit equality against commerce but to recognize that these rationales should reinforce the exercise of national power. *Where commerce and inequality converge, Congress' power in these cases should be greater, not lesser.* If the national government is to guarantee the equality of all citizens—as national citizens—it must be able to act even in the face of the opposition of state majorities.

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174. See *Morrison*, 529 U.S. at 629-30 (listing findings of state gender bias task forces).

175. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

176. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

*C. The Separation of Powers and Its "Implied" Federalism*

The skeptic will respond that, so far, a vertical incentive-based analysis has not resolved the "harder" federalism case; the critic will posit a statute regulating education or environment for which Congress has given a plausible rationale for the exertion of national power and suggested "effects" on commerce. If Congress, unlike in *Lopez*,<sup>177</sup> asserts a substantial reason for its innovation and there is no argument, as in *Morrison*, that the states are relatively poor decisionmakers because of state bias, we appear to have a harder case. Indeed, we must confront the "truth" of federalism that the Court so assiduously ignores. Just as with the separation of powers, where we know that the administrative state tends to resist neat functional divisions, we also know that, in a national, indeed globalized, economy, there is little (including family law and divorce) that does not have a "connection" to our commercial life. When the categories run out, we must look to constitutional structure, where that structure is understood not as a set of categorical labels but, instead, as a set of relationships to the people. Enter the separation of powers and its "implied federalism" dimension.

Let us assume that, in *Lopez*, Congress had set forth a plausible rationale for asserting the commerce power. Let us imagine, for example, that Congress put together a record showing increasing national gang activity—that the Crips and the Bloods had fanned out across the nation, posing a threat to school children and that one way in which these gangs obtained members was by enlisting them in a culture that proved one was "macho" by carrying a gun in school. Let us also posit that state authorities, and various state organizations, had testified in Congress that they needed federal help to stop the flow of guns to the Crips and the Bloods. Such a case is clearly harder than *Lopez* or *Morrison*. We cannot simply say that Congress has failed (as in *Lopez*) or that there is an obvious federal interest that the states cannot fulfill because of bias (as I have argued about *Morrison*).

In the more difficult case, our federalism question comes down to a question of the separation of powers. Presumably, if one cares about federalism, one should want doubts resolved by the national institution most likely to reflect the interests of the states (albeit at the federal level). And here, the answer seems straightforward. As a relative matter, and at the federal level, it is *more likely that Congress* (versus the Supreme Court) will be able to reflect, and thus protect, the majoritarian preferences of the people in the states

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177. It is one thing to decide, as in *Lopez*, that a Congress that fails to provide a constitutive claim for national authority must do better. In such a case, it seems to me perfectly appropriate for a court to identify the risk and demand that Congress provide some justification; at the very least, such a "clear statement" rule increases the political saliency of the issue and thus provides the opportunity for dissenters to vocalize their opposition.

and localities. And this is true, or at least relatively true, whether or not one believes that the national government adequately represents the states or their sovereignty in some absolute sense. There may be no perfect fit, but wise structural presumptions do not, by definition, always fit perfectly. It may be that, in any individual case, the Supreme Court will do a better job than Congress of reflecting the will of the states' citizenry. But as a prediction based on structural incentive, it seems fair to say that the least representative department—the judiciary—is least favorably positioned to reflect the majoritarian (or for that matter minoritarian) preferences of states and localities.

All of this suggests the propriety (at least in doubtful cases) of a strong rule of judicial deference to Congress' judgments about risks to state majorities. Such a rule, of course, has been the law for some time—or at least was the law until *Lopez*. Vertical analysis, however, offers a sounder reason for that rule of deference than arguments about whether there really “are” effects on commerce or whether these effects are “substantial” enough to satisfy the Supreme Court. Moreover, the reason for deference offered by vertical analysis comes from *federalism itself*—the implied federalism that, in part, generates the national government in three separate departments. Note that this is not the Wechslerian claim that the federal government protects state sovereignty. Instead, it is a claim based on the fact that the people's relation to their federal government is mediated by the people's relation to the states; it is in states, not in the nation, that the people vote for members of Congress and vote for a President and, through these, appoint Supreme Court Justices. One need not believe, as an empirical or legislative matter, that Congress or the President always protects the states or state sovereignty, in fact or in theory, to recognize that, as a matter of *relative relation* (with emphasis on the *relative*), the courts are less well situated than Congress or the President to assess the needs of the citizenry of states and localities.<sup>178</sup> And, as a result, the answer in our more complex case should turn on deference by the Supreme Court to the political departments.

One might argue that this move to the separation of powers is too quick because, if this is true, then all questions of judicial review are questions raising separation of powers issues. I recognize that many think that the separation of powers cases constitute a set of discrete, eccentric cases about structural innovation (in other words, about independent counsels and sentencing commissions and legislative vetoes), but I do not believe that this fits with the original understanding of our Constitution's structure or the doctrine of separated powers. Nor do I believe that the implications of a more generalized

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178. To some extent, this analysis explains the paradoxical position of *Lopez*. As the subject of scholarly discussion, *Lopez* has been written about extensively and many have found that it represents a significant statement of principle. But as a fact of real life, *Lopez* represents very little change in the standard operating procedures of federalism. See Pollak, *supra* note 161 (noting how easy it is for Congress to avoid *Lopez* by adding an interstate travel requirement in its criminal statutes).

view—that exercise of judicial power to overrule a federal statute raises separation of powers issues—is particularly controversial. Modern scholars have readily considered judicial review as a matter of the relation of judicial to legislative power.<sup>179</sup> If the countermajoritarian difficulty, and our obsession with it, means anything, it means that judicial review has been considered (albeit inadequately) as a reflection of structural concerns for some time now.<sup>180</sup>

But there is an important qualification to this point. There is a difference, and it was considered an important difference at the founding of the nation, between the Supreme Court overruling a federal statute and the Supreme Court overruling a state statute. In cases considered today as ones of federalism (for example, cases of congressional power under the Commerce Clause), it is often assumed that the principal structural issue is vertical (involving the federal government versus the states), and this is contrasted with the review of federal statutes (which is considered primarily a matter of horizontal relation, between the courts and Congress). I am arguing here, contrary to this convention, that review of state statutes also has important horizontal (separation of powers) implications.

A Supreme Court that routinely strikes down state laws (whether under the First, Fifth, or Fourteenth Amendment) asserts its power not only vis-à-vis the states but also vis-à-vis the other national departments as potential decisionmakers. By asserting that the courts' constitutive relations, their relations to the people (relatively distant ones), should govern federalism issues, the Court asserts its decisionmaking authority and its removal from the people as appropriate relative to that of Congress and the President. Whether this arises because the issue is dubbed one of Section Five power under the Fourteenth Amendment or because it is dubbed one of the "commerce power" is irrelevant to this assessment; both raise important questions about horizontal constitutional structure, or separation of powers.<sup>181</sup>

If this is right, then every time that the Court decides a federalism case it finds itself in a rather paradoxical position—it asserts the power of the national department *least likely to reflect the wishes of state citizens* in the name of states.<sup>182</sup> From this institutional difference, some have asserted absolutist

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179. See generally BICKEL, *supra* note 3, at 16 (describing the "root difficulty" of judicial review in institutional terms as a "counter-majoritarian force" in our system).

180. On the academic obsession with this issue, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

181. Post & Siegel, *supra* note 7, at 1945-50 (considering the separation of powers implications of the Section 5 power).

182. Lest this seem like an academic paradox, one need only refer to the actual litigation in *United States v. Morrison*, 529 U.S. 598 (2000), in which state attorney generals argued, in the Supreme Court, that the remedy struck down by the Supreme Court on federalism grounds was not in fact inconsistent with states' rights. For relevant background materials, see *supra* note 172.

rules—that the Supreme Court should never or should always decide federalism questions. But absolutism of this sort bears its own risks: Under the “no review” scenario, Congress is encouraged to believe that it can ignore the states; under the “review always” scenario, the Supreme Court is encouraged to believe that there are no limits to its power to assess the will of majorities. Both institutions may be wrong, and thus both must be encouraged to practice institutional humility, to recognize the limits of their own constitutive structure. Congress must understand that, in some cases, its need for action and results (the “constitutive virtues”)<sup>183</sup> may work to silence the claims of state citizens; the Court must understand that its lack of connection to the people will mean that it may actually harm state and national citizens in the name of an imagined legal geography.<sup>184</sup>

#### IV. IMPLICATIONS OF VERTICALITY

It is time, now, to situate this approach in a larger theoretical frame.. If a constitution is more than something for courts to interpret, as the popular constitutionalism literature suggests, then we must reconsider the judiciocentrism of conventional theories of constitutional structure. The theories of Ely, Bickel, and Choper<sup>185</sup> are no longer enough because the focus of the telescope has widened from a theory of judicial review to a theory of the *whole* Constitution and its application to all of the departments. Put in other words, we must consider the possibility that no theory of judicial review will suffice unless it begins with a theory of constitutional structure.

##### A. *The Question of Constitutional Ontology*

No one who looks candidly at the administrative state can say that our Constitution divides our government by function. We may still cling to this legal process ideal, but by now it is well-known that each of the departments performs each of the functions (executive, legislative, and judicial).<sup>186</sup> In such

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183. Nourse & Schacter, *supra* note 159, at 615-16 (discussing these constitutive virtues).

184. See, e.g., Nourse, *Vertical Separation*, *supra* note 37, at 801-02.

185. See BICKEL, *supra* note 3, at chs. 1 & 4 (arguing that the “root difficulty” for constitutional law was that “judicial review is a counter-majoritarian force,” and arguing for the passive virtues as an important response to the potential “deviance” and “activism” of the courts in constitutional controversies, *id.* at 128, of the court); CHOPER, *supra* note 3, at chs. 2-5 (arguing that the power of judicial review should extend only to the protection of individual rights rather than structural matters, such as federalism and separation of powers cases); ELY, *supra* note 3 (offering a representation-reinforcement theory as a means of legitimating judicial review).

186. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987) (“Virtually every part of the government Congress has created—the Department of Agriculture as well

a world, to assert a function-based view is simply wishful thinking and even a misreading of the text itself (which jumbles functional descriptions).<sup>187</sup> And, yet, the functional ideal remains pervasive. Virtually all the principal constitutional methodologies—from textualism to originalism to pragmatism—proceed upon this basis when trying to resolve structural problems. We have textualist theories of structure that depend upon function<sup>188</sup> and originalist theories of structure that depend upon function;<sup>189</sup> we have individual rights theories<sup>190</sup> and formalist theories,<sup>191</sup> and even game theories,<sup>192</sup> of structure that rely upon function. It is precisely because these methodologies rely upon this idea (that government amounts to a description of separate and discrete activities) that they have failed over and over again to illuminate how the Constitution actually governs.

So far, I have tried to show that it is possible and even attractive to construct a constitutional anatomy grounded in governing relations rather than in functional descriptions. I have also tried to show that, once function is understood as a proxy for risks to constituency, this helps moderate the apparent contradictions of a variety of categorical judgments and illuminates what was known at the founding of the nation: that federalism and the

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as the Securities and Exchange Commission—exercises *all three* of the governmental functions the Constitution so carefully allocates among Congress, President, and Court.”).

187. See *supra* notes 95-97 and accompanying text (arguing that the text may be read to give “executive” and “judicial” power to the Senate and “legislative” power to the President). This was, of course, a complaint of the Antifederalists and, as such, was well known to James Madison and others. See *supra* note 95.

188. See Calabresi & Rhodes, *supra* note 26, at 1175-76 (assuming that the vesting clauses of Articles II and III strongly support a functional division of powers that grants the executive all executive power); Redish & Cisar, *supra* note 16, at 455 (arguing for a traditional allocation of authority that depends upon the notion that “the exercise of each branch’s power is to be limited to the functions definitionally brought within those concepts”).

189. See Carter, *supra* note 24, at 765, 783 (arguing for an approach based on relatively determinate meanings of the “text and its historical background,” that, when applied, relies on the idea of function). Even those who are not originalists, but who take a historical approach, have tended to embrace the idea of function uncritically, despite good evidence of the difficulty of the very idea of governmental function in the founding period. See GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD I* (1997) (attributing a “functional” separation of powers to the founding); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732 (1996) (emphasizing the importance of a historical approach that assumes a functional ideal). But see Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1385 (1998) (questioning the projection of modern concepts of judicial function onto early American practice).

190. See Brown, *supra* note 27, at 1513-14 (urging that the separation of powers serves to protect individual rights and relying upon an assumption about functional division).

191. See Redish & Cisar, *supra* note 16, at 455 (assuming a functional division of powers in offering a pragmatic formalist approach).

192. See Eskridge & Ferejohn, *supra* note 92 (assuming a functional ideal in applying a game theoretic approach).

separation of powers are generatively intertwined.<sup>193</sup> There may well be something quite natural in the ideal of an “activities” constitution: It hails from the single most influential legal movement in the late twentieth century—the legal process movement with all its enthusiasm for institutional competences and purposes.<sup>194</sup> That a functionally driven constitutional ontology should be natural to legal process scholars should not mean, however, that it is inevitable or true or even illuminating.

The relations of governance have eluded us, at least in part, because constitutional scholars have, for the last generation, been obsessed with creating a methodology for judicial review.<sup>195</sup> Importantly, a vertical, incentive-based analysis does not proceed from that assumption. I have not asserted a textual model for deciding structural cases (although I think my argument does rely upon text—the text that creates the relations between the people and their government). I have not claimed, for example, that my approach commands respect because it allows the judiciary to choose the “right” values in a laundry list of potential values served by the separation of powers or federalism.<sup>196</sup> To be sure, I have placed the representative relation at the core of the analysis, but I have not, and this is very important to recognize, insisted that representation always succeeds or is always a positive value. Representation might fail entirely either in particular cases or more generally, and this theory might still be the best approach we can devise to understand the effects of innovation on constitutional *structure*. Similarly, I have resisted the notion that text or history—as methodologies associated with judicial review—should operate as interpretive trumps; indeed, I have rejected the classic textualist and originalist arguments and insisted upon the poverty of using vesting clause jurisprudence as a means to understand the whole Constitution.

I have managed to avoid this search for a judicial methodology because I have changed the question—from how a court should “review” structural cases to a question that I think should have priority: what the structure of the Constitution *is*, whether it is a set of legal descriptions or something more -- a set of governing relations and incentives. Much of the constitutional interpretation literature has tended to make an important assumption—that the structure of the Constitution is a set of words that describe and thus cabin the world of power, that constitutional structure is no different in this respect from the rest of the Constitution, it is simply “ordinary law.” And this seems to apply

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193. See *supra* Part I.B; *supra* notes 47-48 (discussing the role of state representational concerns in allocating power at the national level).

194. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 141-42 (1994) (discussing the importance of the legal process movement). Interestingly enough, one of the synonyms for “function” is “purpose,” an idea associated with the legal process school. Another meaning, however, is “gathering,” as in a cocktail party as a function.

195. See *supra* notes 3-4.

196. Cf. Sunstein, *supra* note 73, at 432-37 (listing a variety of “values” such as efficiency and accountability and rule of law served by the separation of powers).

whether one is a textualist or a pragmatist or an originalist. There is no open dispute among textualists or pragmatists or even originalists about how the structural text is law, only questions about how courts should interpret what seems, indisputably, to be law. The words are thought to constrain government by virtue of a binding edict of legal interpretation.

If anything I have said about structure illuminates, it does so precisely because I have departed from this assumption. I have tried to consider the whole Constitution prior to attempting to reach the question of judicial review. And I have treated the Constitution not only as ordinary law but as fundamental law, by which I mean a law that, first and foremost, creates a set of dynamic relations between the people and their government. It is important to remember that this "constitutive" understanding is as grounded in the text as is a more descriptive approach. I have simply focused on texts that are ignored in standard textualist approaches. The texts I have considered are ignored for a reason: They are not considered the appropriate kind of "constitutional law." And they are not considered the appropriate kind of "constitutional law" because they *are not the kind of texts that courts typically cast as capable of interpretation as "ordinary law."* They are not the proper kind of texts because they actually create the government rather than describe it.

Why should descriptive texts take priority in standard interpretive methodologies? They take priority, I believe, because they are consistent with a vision of constitutional law that is a projection of courts' own institutional mission. Courts proceed upon the theory that the Constitution constrains political power by judicial interpretation (for example, in defining executive or judicial or state power, it is thought that courts constrain political bodies). But, if I am right that the constitutive texts are crucial to understanding the structure of the Constitution, then there is more than an "ordinary law" approach to consider. The Constitution constrains not only by "ordinary law," but also by a fundamental, embedded law of constitutive relations to the people. Those relations work everyday, not simply the days on which the Supreme Court holds forth on federalism or the separation of powers. Indeed, if Larry Kramer is right, constitutionalists have failed to appreciate the ancient distinction between the constitution as "fundamental law" which governs political structure and the constitution as "ordinary law" binding in standard judiciocentric terms.<sup>197</sup>

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197. KRAMER, POPULAR CONSTITUTIONALISM, *supra* note 6, at 34 ("Constitutional or fundamental law subsisted as an independent modality, distinct from both politics and from the ordinary law interpreted and enforced by courts. It was a special category of law. It possessed critical attributes of ordinary law: Its obligations were meant to be binding, for example, and its content was not a matter of mere will or policy but reflected rules whose meaning was determined by argument based on precedent, analogy, and principle. Yet constitutional law also purported to govern the sovereign itself, thus generating controversies that were inherently matters for resolution in a political domain.") (citation to draft manuscript on file with author).



To be sure, this view of fundamental, performed law, of incentive and relation, is not complete; it does nothing to supplant the court's interpretive role when applying ordinary law. And yet the conventional view—that the ordinary law model is complete—should by now be seen as false. Put simply, the document does not only “say” or “report” what it is doing, but it creates and releases the public's political energies. Constituent relations *are* the Constitution's structure, or at least they have as great a claim to structural consideration as do the words that describe particular powers or departments. To see the relevant constitutional text as limited to those terms most hospitable to judicial “interpretation” is, in the end, to risk seeing constitutional structure as a means for judicial review; it is to risk a court that looks into the Constitution and sees only itself.

### B. *The Case of the Empty Constitution*

To understand the dangers of the judiciocentric view, let us begin with the most immediately compelling of constitutional methodologies, textualism (which for sake of clarity I will call “judicial textualism” because it takes as its starting point the judiciocentric position on the nature of the Constitution). Judicial textualism<sup>198</sup> gives us a vision of the separation of powers heavily dependent upon the precise terminology of certain parts of the Constitution, and most particularly, the vesting clauses, down to the “hereinafters,” “ands,” and “ors.”<sup>199</sup> From the position of a judicial textualist, the argument I have offered here is deeply flawed because it relies upon the wrong “text”—the words “legislative,” “executive,” and “states” are the “real” text, not the constitutive provisions creating the bodies that govern us.

But the judicial textualists' problem with this anatomy cannot be that the argument is not based on text. The constitutive texts are very important texts indeed. The real debate must be about something other than raw textuality. When we look to the constitutive texts, we do not reach for the dictionary to determine the “meaning” of voting or representation. We do not “translate” the term “representation” or search for an equivalent legal expression from the present or past. Instead, the meaning of these provisions resides in what they

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198. The principal feature of “judicial textualism,” as I am using that term here, is that it focuses on the words in the vesting clauses or other clauses in the Constitution that describe federal and state institutions and thus appear to demand that the analysis depend upon the meaning of such specific terms as “commerce” or “executive” or “state.”

199. See, e.g., Calabresi & Rhodes, *supra* note 26, at 1175-76 (relying upon precise differences in the vesting clauses to make inferences about constitutional structure: “The most obvious difference [between the three vesting clauses] is that the Article II and III vesting clauses omit the qualifying language ‘herein granted’ found in the vesting clause of Article I. What significance can be attributed to this omission? To begin with, it suggests that the President is to have *all* of the executive power and the Article III judiciary is to have *all* of the judicial power.”) (emphasis in original). But see U.S. CONST. art. I, § 7 (granting the President power to veto bills, in an article devoted to “legislative powers”).

*do*, in what they *create*, in their *performance*, in their *constitution*, in the *future*. Article I, Section 2 provides that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."200 Article II, as amended, provides that electors appointed by the states shall vote for a President and Vice-President.<sup>201</sup> These provisions create relations that then constitute government by people acting upon them. Thus, the importance of the constitutive provisions is not their meaning to *courts*, but their meaning to the Constitution of *real, political, life*—to those who are silenced and to those whose voices are amplified, to the people constituted in various political constituencies.

The real debate here, then, is *not* about textuality. Instead, the real debate is about what the text *is*. If one believes that constitutional structure is only about allocating a set of characteristic activities (or functions), then one is looking for the text to speak about activities (or functions).<sup>202</sup> And if one is asking such a question, then the vesting clauses are the places where the relevant language can be found. Notice, however, how this entire train of thought perpetuates its assumptions, how the original ontological assumption (that one is looking for an "activities" text to be translated by a court) finds itself repeated in the ultimate conclusion. We are now in a position to see the paradoxes created by a "judiciocentric position" toward constitutional structure.

Observe, first, how the textualist methodology has found the text rather than the text finding the methodology. Because the judicial interpreter is looking for a set of words *that a court might apply*, translate, or redefine, she seizes upon the vesting clauses. Once we know that there is more text to be considered (the constitutive provisions), this leads to the paradox that *judicial methodology has become more important than the text*—since, if one wanted to consider the *entire* text, one would have to take some account of the constitutive provisions. Moreover, there are significant effects to this privileging of textualist theory: Notice what has happened to the whole text, which literally has been "emptied" of governance. The vesting clauses present us with a mere picture of a government, a word painting that depicts organized "competencies" or "functions" or "purposes," but *provides no actual means for elections or representation or voting*. If the vesting clauses and associated texts

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200. U.S. CONST. art. I, § 2. The full provision goes on to further specify the relation between individuals and the House by providing for apportionment of representatives among the states.

201. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII (separating the votes for President and Vice-President).

202. To ask of constitutional structure whether an innovation is within the institution's competence is simply to ask the "function question"—that is, to ask whether a particular activity belongs within a department because of the department's characteristic activities. To ask the "legal process question" thus already assumes that courts, agencies, and Congress are what they do.

are all there is,<sup>203</sup> then we have quite literally elevated the needs of judicial review above those of governance.

Finally, and perhaps most importantly, notice how judicial textualism appears to elevate some of the least important provisions of the Constitution to a place where they become the most important in structural theory.<sup>204</sup> The vesting clauses can be eliminated with little effect on real governance.<sup>205</sup> And yet they have been the center of attention in constitutional theory and case law. They are, in other words, important in a world in which the Constitution is what courts and lawyers do; courts look to this kind of text because this is the kind of text that "can" be interpreted. But, in such a world, we risk our government being emptied of its content—the courts confidently standing by with an exquisitely ordered legal universe *inhabited by no one*.

Judicial textualism, as an interpretive methodology, is parasitic of the very idea that I am challenging—a constitutional ontology that celebrates, albeit without identification, the Constitution as the "sole province" of the judiciary. The "text" that courts see is, in this sense, a text of their own making. This self-referentiality, however, is not limited to textualist claims but applies to other constitutional methodologies as well. It is just as easy, for example, to find a textualist theory of the separation of powers that is built upon the search for a descriptive and legalistic essentialism (function as read into the text) as it is to find a historical theory built upon the same premise (function as read into history).<sup>206</sup> Originalists (despite the risks of presentism in the functional ideal) have enthusiastically embraced the notion of function, looking for functions in

203. This way of stating the argument owes much to conversations with Scott Shapiro.

204. The costs of this erasure may be quite significant in the real world—to *real* majorities and minorities. Consider the decision in *Morrison v. Olson* (the independent counsel case), a case that today is widely considered to have been wrongly decided. 487 U.S. 654 (1988). Standard accounts tell us that the decision was wrong because the Court's majority failed to apply textual analysis: All executive power did not remain in the executive. But this analysis, as I have argued elsewhere, emphasized the linguistic risks of a particular category ("executive") and ignored the real risks to the individual from Congress' prosecutorial actions and to majorities from the independent counsel's ties to the impeachment process. Nourse, *Vertical Separation*, *supra* note 37, at 768-72.

205. See *supra* notes 56-61 and accompanying text.

206. See Flaherty, *supra* note 189, at 1744 ("The other historicist school of separation of powers scholarship undermines the unitarian position. Here, the argument runs that the Founders themselves mainly possessed a functional approach . . ."). Professor Flaherty is here referring to "functionalism" as a school of thought, but it is also true that the "functionalists" about which he speaks, as well as his own article, relies upon the idea of function as uncontroversial. As Flaherty recognizes, the founders were quite confused about what the departments or the separation of powers would actually "do." See *id.* at 1776 ("American constitutionalists did not in fact advance a comprehensive conception of separation of powers . . ."). In my view, as I have written elsewhere, the founders were far more certain about what "relations" would govern the departments (precisely because those relations were at the heart of the debate at the constitutional convention and were, in fact, enumerated in the text), than they were of more modern ideas of the "purposes" of the doctrine. See Nourse, *Due Foundation*, *supra* note 46, at 459-63, 493-97.

the ratification debates or at the Convention, in the First Congress or in Madison's massive correspondence.<sup>207</sup> Each of these interpreters is looking for a rule for courts and finds such a rule by searching for texts that can be used by courts.<sup>208</sup>

This argument, if right, has important implications for standard views of constitutional methodology. To the extent that theories of structure based on text or history or precedent all search for an ideal that privileges judicial review, then these theories are "picking and choosing" relevant text or history—picking and choosing based on which text best matches what courts do. The textualist picks and chooses the vesting clauses as the "right text" and never looks, or even considers "as text," the constitutive provisions. The historical view takes its cue from this same notion, looking for historical divisions of executive, legislative, and judicial power, or perhaps something more generally purposive like balance or energy, and yet ignores history showing the importance the Founders attached to generative relations. Finally, precedential views, in their development of formal and functional models, tend to repeat this error, taking their cue as well from the essentialist ideas of state or federal, executive or legislative. If this is right, by privileging a narrowly "descriptivist" vision of the Constitution rather than a "constitutive" and more popular one, the standard constitutional methodologies tend to risk judicial self-referentiality. If the only evidence that an investigator uses is the evidence that

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207. See Flaherty, *supra* note 189, at 1801 ("Final confirmation for a functional understanding comes from the national debate over whether to ratify the Constitution, arguably the most important source of all . . ."). Again, this is referring to the modern doctrinal position of "functionalism," as contrasted with formal lines: Flaherty's own picture is more complex, preferring, as historians often do, the purposes/functions of accountability and energy and balance to the terms executive and legislative, but these ends, however more elegant and historically more accurate, partake of the intellectual structure of the standard inquiry. See, e.g., *id.* at 1832.

208. Interpretive theories based on representation do not avoid this problem. Professor Bickel's "passive virtues" theory, for example, is justified as a form of deference to legislative majorities. See BICKEL, *supra* note 3, at ch. 4. And, yet, this view is placed in the service of a theory, not of the entire Constitution, but of something higher and better—"judicial review." Similarly, Professor Ely's work is fully consistent with the view that the Constitution must protect against minoritarian biases but, again, his theory, like Bickel's, is a theory of "judicial review." See ELY, *supra* note 3, at ch. 4. Both theories privilege courts openly and develop a view of courts which depends on an oversimplified dichotomy between law and politics. Under Ely's view, one only cares about politics because of *legislatures' failures* and, under Bickel's view, one only cares about politics because of *courts' failures*. Neither view finds any reason to distinguish between the House and the Senate, the President and Congress; we might as well simply have one big institution we call the "political" one. The claimed deference of these theories to politics is really quite the opposite for both theories are, as Richard Parker has put it, "disdainful" of ordinary political energies, energies that are at the heart of a constitutive anatomy of constitutional structure. See RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 67-70 (1994) (arguing that the cliché of countermajoritarianism reflects an ironic disdain for politics). Politics, in what I take to be the Constitution's sense of it, must be more robustly defined than as simply "anything other than law."

works for his method or perspective, then his method has become more important than his results.

In the end, the Constitution's own text tells us that judicial textualism must be wrong as a structural theory. For if one is claiming that the argument is legitimate because it is textual, then one cannot be picking and choosing one's text. If the constitutive provisions of the Constitution count for anything—and they must—then judicial textualism has contradicted its own claims to legitimacy.

### *C. Political Economy, History, and Convergence*

Finally, it is time to answer the critic who argues that I have done just what I have complained that others have done, that is, I have focused on alternative explanations for Supreme Court cases and even, impliedly, set forth a theory of judicial review of structural matters. Yes, I have sought to show how the “constitutive provisions” in the Constitution might illuminate particular legal issues. (My aim here, at least in part, is not only to lay out abstract theory, but also to show how this might actually illuminate real political controversies.) And I believe that courts can apply such an analysis; indeed, in the guise of the amorphous notion of “accountability,” some Justices have already attempted to do just that.<sup>209</sup> And yet I have tried, as I show below, to avoid the pitfalls of self-referentiality that typically accompany the “judiciocentric position.” The text as descriptor, as constraint-by-court, should be respected and will work in easy cases to resolve structural controversies, but in harder cases, we must look deeper. The courts are, after all, charged with understanding the Constitution as a whole. And a “whole” understanding, in my view, must recognize that the Constitution constrains and regulates power not only by its words, but also by its very structure and relations.

I have started with a theory that seeks to better describe the Constitution as a whole, with all of its provisions: those that look like they are ripe for interpretation and those that generate governance. Having said that, whether or not this particular theory proves workable, the most important point here reduces to a simpler question of humility. It would be wise, in my view, if courts were to consider themselves among equals and if they were to embrace a view of the whole Constitution in which all departments are enjoined and entitled to consider constitutional questions—not because this would always yield correct results, but because it would give living meaning to the generative provisions of the Constitution as well as to the judicial ones. It would also be wise if Congress and the President were to take that view. But even if one were not to accept these recommendations in a strong form, one could nevertheless accept the need for greater self-consciousness by all institutions about their relative role in the polity.

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209. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 710 (1997) (Breyer, J., concurring).

Perhaps this is simply wishful thinking; perhaps institutional incentives are so strong that a court cannot do anything but see the constitutional world in its own judiciocentric image.<sup>210</sup> But there are reasons to worry about how far the Supreme Court has taken this view in recent years. There are real life consequences to structural controversies, and none of our governmental institutions—political or judicial—have been particularly good at predicting these consequences. We now know, for example, that the Supreme Court in *Clinton v. Jones* was spectacularly wrong to predict that its decision would have no effect on the presidency: that civil suit led to the impeachment of a sitting president.<sup>211</sup> We also know that the Court's decision in *Morrison v. Olson* deeply minimized the potential harm of independent prosecutions and completely ignored the risks of an independent counsel's recommendations for impeachment.<sup>212</sup>

This evidence suggests that there is far more at stake for the people, and for our government, than our present structural models predict. It also suggests why we have been unable to do better: because all of our attention has been focused in other directions, on painting an accurate linguistic portrait of power rather than on understanding how incentives and relations shape power. How, then, one might ask, are we to discover a more realistic account of structure and avoid the seemingly inevitable selection bias of contemporary constitutional methodologies?

My best answer, one that is embedded in the account given above (and purposely so), is that we must look outside judicial discourse. We must borrow techniques and concepts from other disciplines so that we avoid "cooking up" another "ism," a principle or doctrine applied to decide constitutional cases that reflects more about courts and legal demands than those of the people.<sup>213</sup> To avoid such a constitutional law, we must temper our legalistic blinders by testing our views against history and economics and political theory. That does not mean, and I emphasize this, that we must adopt a new "law and . . ." technique, rather than a law "in" approach.<sup>214</sup> We should not defer wholesale to theories built for other purposes, whether from economics or history or politics.

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210. See DOUGLAS, *supra* note 19.

211. For how judicial involvement changed the case for impeachment, see Nourse, *Vertical Separation*, *supra* note 37, at 770 ("It is the judicial proceeding that transforms public denials into claims of perjury . . .").

212. *Id.* at 772-777. These are only the most dramatic of cases. A similar gap exists, for example, between the Supreme Court's rationale in *Mistretta* and the real life effects of the sentencing commission. The Commission has had an enormous impact on prosecutorial practices, individual rights, and judicial behavior. These are well documented phenomena. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

213. See PARKER, *supra* note 208, at 66 (1994).

214. The original law "and" society movement was, in fact, a law "in" society movement. See William N. Eskridge, Jr., *In Memoriam: Willard Hurst, Master of the Legal Process*, 1997 WISC. L. REV 1181, 1183.

Instead, we need to seek *convergence and independent confirmation*. We must assert hypotheses based upon the whole text and its history and then test our theories against the findings of others.<sup>215</sup> And, in that effort, we must import concepts and understandings that give us a richer and more realistic sense of what is at stake, in structural theory—for the people.

The principal way in which I have tried to close this gap and, at the same time, control against judiciocentric bias, is to start with assumptions supported by a convergence of law, history, and political economy. For example, I have focused on the Constitution (the whole Constitution) as constructing a set of relations (between the people and their governors). This assumption minimizes the extent to which we begin from a judiciocentric position. Not only have I tried to avoid privileging courts, but I have also used the idea of a “relation,” purposely trying to minimize the offstage moralizations that often come with more concrete descriptions such as “representation.” This approach has the benefit of making the initial stance toward a structural question more self-conscious, first defining a baseline and then focusing on changes in structural configurations.

This focus on relations and incentives resonates not only with history and text, but also with a rich literature on political economy. Indeed, one might say that the study of incentives sits at the core of the modern political economy literature.<sup>216</sup> At the same time, this notion is not simply presentist—one can find it in the ratification debates and scattered throughout the constitutional convention. Like modern political economists, the Framers wanted to make predictions—even crude predictions—about what the Constitution’s structure would accomplish.<sup>217</sup> As both legal scholars and political scientists have noted, the founders’ view of political relations and incentives resonates with a variety of work in modern political science.<sup>218</sup> And, finally, of course, this focus on incentives finds a home in the text—in the generative texts that create such incentives, whether they be provisions about election or appointment or removal.

If incentives form a key piece to this puzzle, so does a more careful focus

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215. In future work, I aim to measure this claim, about shifting incentives and relations, against historical accounts of actual structural conflicts.

216. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990) (emphasizing how all institutions “structure incentives in human exchange, whether political, social, or economic”); see also ARNOLD, *supra* note 68, at 6-8 (analyzing the ways in which electoral incentives and potential policy preferences of voters constrain congressional action).

217. See, e.g., X THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION BY THE STATES: VIRGINIA, *supra* note 45, at 1371 (statement of Mr. Monroe, June 18, 1788) (“The President ought to act under the strongest impulses of rewards and punishments, which are the strongest incentives to human actions.”).

218. See Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2269 (1998) (“[T]he Framers wedded an understanding of likely incentive effects to the basic topic of institutional design . . .”).

on analyzing shifting incentive structures. Lawyers consistently engage in labeling exercises; the meaning of words is their trade and so they tend to think in definitional terms. In the context of structural theory, however, this kind of "linguistic affinity" standard can simply perpetuate selection bias. Thus, for example, if one begins by asking about function, and one is looking for a term that "means function," then one will simply extend the judiciocentric bias to a new linguistic situation. One of the ways a generative anatomy aims to avoid the dangers of this kind of "matching game" is to make explicit the nature of the inquiry. One sets forth the baseline condition of the relation one assumes to be correct (based on an acceptance of the relations enumerated in the Constitution) and then asks how those relations change and what incentives the new relation is likely to bring to bear on the structural innovation. This helps in terms of candor (it is always possible that one's baseline assumptions are incorrect); and also helps in forcing the analysis to focus on the *change* in structure (the difference between a state of affairs with one set of incentives as against another). This focus on comparison, or alternatives, is again characteristic of work in political economy as well as debates that the founders themselves had about "alternative" forms of governance. A brief look, for example, at Madison's defense of constitutional structure in *The Federalist* makes clear that his views were largely formed in the crucible of political experience and comparison to the best available institutional analogues (the state constitutions).<sup>219</sup>

Ultimately, the key principle I take from the political economy literature is simply that there are significant costs to individual decisionmaking and that these costs are likely to have an effect on the formation of groups, majorities and minorities alike. For example, decisionmaking at small numbers is likely to be very easy but at large numbers may be far more costly. This emphasis on the transaction costs of decisionmaking is shared by a variety of scholars of political economy, from James M. Buchanan and Gordon Tullock,<sup>220</sup> to Oliver Williamson and Douglass North.<sup>221</sup> Notice, however, that in borrowing this concept, I have not limited it to particular political theories but, in deference to my reading of the Founding, have combined what are sometimes considered antithetical political risks. I do not assume, here, for example, that government always malfunctions or small interest groups always win (a staple of some

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219. THE FEDERALIST NO. 47, at 327-31 (James Madison) (Jacob Cooke ed., 1961) (examining state constitutional experience); THE FEDERALIST NO. 48, at 334-38 (James Madison) (Jacob Cooke ed., 1961) (examining the experience of the state constitutions on the separation of powers).

220. See, e.g., BUCHANAN & TULLOCK, *supra* note 80, at 112 ("The expected costs of organizing decision, *under any given rule*, will be less in the smaller unit than in the larger, assuming that the populations of each are roughly comparable.") (emphasis in original).

221. NORTH, *supra* note 216, at ch. 4 (emphasizing the role of institutions in reducing transaction costs); Williamson, *supra* note 148 (arguing that there are diminishing returns to scale in all organizations due to organizational transaction costs).



modern public choice theory); nor do I accept the rosy picture that majorities are always capable of having their way (a staple of the older pluralist literature). Instead, I consider both possibilities, as ones that institutional designers must consider. As I said earlier, the key here is to aim for convergence and that requires not only that the economic or political concept might “work,” but that there is some basis in the traditional legal canon that recommends “fit” with the problem. The problem posed by the constitutive provisions of the Constitution is to determine how one is to know the effects of a shift in decisionmakers (or a shift from one aggregation of citizens to another). Institutional economics and positive political theory provide us with rough presumptions based on the size of the group. At the same time, this notion that “numbers matter” and that the costs of decisionmaking matter fits with very traditional constitutional law, law that reaches back to the Founders. Reread a variety of literature from the founding period, and you will find precisely this kind of assumption—that numbers and size matter in politics and constitution-making, and in predicting the risks of constitutional design.<sup>222</sup>

Finally, I have insisted upon “relative” judgments or, to put it more accurately, judgments based on the available alternatives.<sup>223</sup> One of the grave and repeated misunderstandings of any theory of constitutional structure is that it must assume that “democracy works” all the time or never. I have no illusions; indeed, unlike many of my interlocutors, I have personal experience of the pitfalls of governance. Yes, it is the worst government except all the others. The important point to see here, though, is that adopting a constitutive theory does not commit one to a view that representation works, works well, or even works most of the time. One may think that government in America is troubled and that representation is a fraud. One would still want, in my view, to ensure that the fraud was distributed lest it be compounded. The separation of powers is about distributing power, where power means aggregation of citizens. Representation, for good or ill, and for all the agency problems it possesses, is a problem distinct from the separation of a given set of agency relations. I do not assert here that representation works, but only that a shift in constituencies may make *relative* changes in constitutional structure with real effects on the

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222. *The Federalist* No. 51 is the canonical citation for this proposition as it opines that the “ambition” (otherwise, the incentives) of the departments must be made to counteract each other). *THE FEDERALIST* NO. 51 (James Madison) (Jacob Cooke ed., 1961); *see also supra* note 45 (discussing the importance of the concepts of the “few” and the “many” among other numerical judgments during the constitutional convention); *supra* note 46 (discussing notions of “dependence” and “independence,” which were proxies at the time for judgments about the future behavior of government actors and how relationships between governmental actors would produce certain kinds of incentives; a judgment that one actor was “too” dependent on another, for example, was a claim that he would have too great an incentive to act as the other).

223. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 16-17 (2003) (arguing that “relative claims can be a good bit more revealing than absolute ones”).

representative relation distinct from the standard agency problems.

#### D. Popular Constitutionalism: A Coda

In a wonderfully imaginative book published in 1994, Richard Parker identified what I believe to be the great pathology of late twentieth-century constitutionalism: “[W]e constitutional lawyers,” he argued, “have fed on disdain for the political energy of ordinary people.”<sup>224</sup> During the past forty years, structural theory has become a debate largely about lawyers and courts, and their relation to the administrative state. Many have noted that all that “formalism” and “functionalism” seem to describe, as constitutional theories, is a mood, an intuition, or a result.<sup>225</sup> Indeed, one might go so far as to say that there is only one real difference between these two views: If one approves of the New Deal, one finds oneself in the functionalist camp (because one must find *some* rationale for the administrative state); otherwise, one tries to find a way to accommodate the formalist cases in a nonformal world.

This is not even an excuse for a theory of a whole constitution. And, lest one think that the theories that we teach have no influence on law, one need only look to the output of the Supreme Court in the past few years. Recall the great political cases involving different presidents, but the same judiciocentric self-regard. Think of *Clinton v. Jones* and read about the man who “just happened to be President.”<sup>226</sup> Or think of *Bush v. Gore* and read nary a mention of the Constitution’s remission of electoral contests to Congress, rather than the courts.<sup>227</sup> These are deeply self-referential decisions, decisions that reveal enduring misunderstandings about the political provisions of the Constitution. If there is anything that a vertical approach helps us to see it is that: Regardless of what we think about the state of modern government, if we erase politics from the Constitution, we risk erasing the people. As Bruce Ackerman has so richly warned us, over and over again, history tells a story in which the people have—for over two hundred years—found ways to change a system that refuses to recognize their sovereignty. And the “ways” that they have found have been through what we conventionally call the “separation of powers.”<sup>228</sup>

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224. PARKER, *supra* note 208, at 66.

225. See, e.g., Tushnet, *Bowls and Plateaus*, *supra* note 37, at 581-85 (questioning the real differences between formal and functional approaches and considering them largely rhetorical).

226. For a discussion of *Clinton v. Jones* in greater depth, see Nourse, *Vertical Separation*, *supra* note 37, at 768-72.

227. It is widely held, even by scholars who tend toward support of strong executive power, that the Constitution and federal law remit disputed electoral contests to Congress. See, e.g., Steven G. Calabresi, *A Political Question*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 134, 138-39 (Bruce Ackerman ed., 2002). According to Calabresi, “The failure . . . to consider Congress’s constructive role was a mistake.” *Id.* at 135.

228. See, e.g., ACKERMAN, *supra* note 14, at 21-25.

A constitution constitutes, it creates, it unleashes power in ways that live. My point here is not the traditional one about the “lived” constitution—that the Constitution must “keep up” with the times. In fact, as a matter of structure, that is deeply wrong. On structural matters, I am decidedly conservative: I am deeply reverent of the Founders’ pragmatic vision, and I believe strongly that if there is any place caution is merited in constitutional law, it is in the structure of the document. Change our representational structure and you change our form of government; Madison knew this, and he knew that the form of government resided, in the end, in the hands of the people.<sup>229</sup> A generative anatomy thus describes something that must continue to happen, that is in a sense *absent* from the text because it resides in the *future* and thus lives. It is thus dynamic and must be so.<sup>230</sup>

It is precisely because the Constitution gives life to government that it must change even if its texts stay the same. To ignore this force, to see the document as only constraint, is to risk seeing the Constitution as empty of the people it constitutes.<sup>231</sup> If the new wave of scholarship on popular constitutionalism is to prevail over older modes, it should not be seen as a new constitutional methodology, but instead as a new constitutional humility, as courts and scholars begin to understand their place in the constitutional order. May this structural anatomy assist us in making such a vision appear not only important, but possible. May it lead us to rethink our obsession with judicial review and consider that the first question must be one of constitutional structure, as a whole.

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229. As James Madison wrote in *The Federalist* No. 46:

The adversaries of the Constitution seem to have lost sight of the people altogether in their reasoning on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . . .

THE FEDERALIST NO. 46, at 315 (James Madison) (Jacob Cooke ed., 1961).

230. See, e.g., DEWEY, *supra* note 1, at 14. According to Dewey, “A thinking being can, accordingly, act on the basis of the absent and the future.” *Id.*

231. See ARENDT, *supra* note 13, at 155-56.