

2016

# The Constitutional Law of Agenda Control

Aziz Huq

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## Recommended Citation

Aziz Huq, "The Constitutional Law of Agenda Control" (University of Chicago Public Law & Legal Theory Working Paper No. 556, 2016).

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## The Constitutional Law of Agenda Control

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

Forthcoming, 104 *California Law Review* – (December 2016)

### Abstract

*Constitutional scholarship is preoccupied with questions of how state power should be constrained. The Constitution, however, not only sets bounds to state action, it also structures the range of policy options and the rules for making legally effective choices. This Article analyzes the ensuing constitutional law of agenda control, focusing on the distribution of such powers between the three federal branches. This analysis generates two central claims. First, the Framers incorporated an array of heterogeneous agenda control devices across the three branches in order to calibrate intragovernmental relations. These make up a hitherto ignored constitutional law of agenda control. Second, a surprising number of these constitutional agenda-setting rules have been ignored or even circumvented. Political actors have tended to negotiate alternate distributions of agenda control power at odds with the original constitutional design. While the ensuing transformation of the constitutional processes for governance has ambiguous distributive consequences, there is reason to treat the historical transformation of constitutional agenda control as on balance a desirable development.*

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## The Constitutional Law of Agenda Control

### Introduction

The ordinary diet of constitutional adjudication is dominated by questions about state actors' *powers*. Can Congress, the Justices ask, regulate certain private conduct<sup>1</sup> or direct the president's diplomatic decisions?<sup>2</sup> What sort of cases must Article III forums decide?<sup>3</sup> When can the president make recess appointments<sup>4</sup> or preempt state-law procedural rules in the national interest?<sup>5</sup> The resulting jurisprudence maps *limits* to government's ability to act. Constitutional law, to judge by the case reporters, involves the mapping of institutional limits.

This story is incomplete. There is more to constitutional design than jealous titration of state power via prohibitory injunctions. This Article investigates a hitherto unexplored domain of constitutional design—*the constitutional law of agenda control*.<sup>6</sup> Its central premise is that constitutional rules do not merely prohibit state action, but also shape how decisions are made. For example, the Court's judgment in *Zivotofsky ex rel. Zivotofsky v. Kerry* is superficially a decision about whether the president or Congress determines what gets printed in U.S. passports.<sup>7</sup> More profoundly, it is a dispute about which branch sets the foreign policy agenda. Similarly, *NLRB v. Noel Canning* directly concerns the president's recess appointment authority, but also allocates power both initiate or block regulatory agendas between the branches.<sup>8</sup> Agenda control in the federal courts is also a matter of explicit disagreement. The dissenters in *Obergefell v. Hodges* perceived an improper effort by "five unelected Justices" to

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<sup>1</sup> Nat'l Fed'n of Indep. Business v. Sebelius, 132 S. Ct. 2566 (2012). For a more recent reaffirmation of the principle of limited enumerated powers principle, see *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1603 (2015) (Thomas, J., concurring) ("[T]o be 'made in Pursuance' of the Constitution, a law must fall within one of Congress' enumerated powers and be promulgated in accordance with the lawmaking procedures set forth in that document.").

<sup>2</sup> See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (invalidating congressional regulation of U.S. passports' content as inconsistent with a presidential "recognition power").

<sup>3</sup> *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015) (allowing consent-based adjudication of certain state-law claims in bankruptcy court); see also *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (holding that Article III limits non-Article III delegations).

<sup>4</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

<sup>5</sup> *Medellin v. Texas*, 552 U.S. 491, 522–23 (2008) (holding that the President lacks authority to delay Texas executions based on an International Court of Justice judgment).

<sup>6</sup> I use the terms agenda control and agenda setting interchangeably in this Article.

<sup>7</sup> 135 S. Ct. 2076, 2084 (2015).

<sup>8</sup> *Noel Canning*, 134 S. Ct. at 2550

foist “their personal vision of liberty upon the American people.”<sup>9</sup> In contemporaneous cases, though, those same Justices invited litigants to raise previously dormant constitutional challenges—in effect seeking to shape the Court’s agenda themselves.<sup>10</sup>

I advance two main claims about agenda-control rules. *First*, one of the Constitution’s original functions was to structure how state actors selected among issues and picked among potential policy responses. The ensuing rules for agenda control are distinct from more familiar constitutional limitations on state action, yet still aim to shape the epistemic and strategic environment of democratic governance. *Second*, the Framers’ original allocation of agenda setting power has not fared well (perhaps explaining its relative neglect by scholars). Interbranch negotiation and bargaining has led to some agenda control rules being ignored, even as others are circumvented. As a result, the distribution of agenda-control powers has drifted far from the arrangement envisaged in 1787.

Let me unpack each of these points in turn. My first task, given the scant academic attention hitherto paid to agenda control rules,<sup>11</sup> is descriptive and

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<sup>9</sup> 135 S. Ct. 2584, 2640 (2015) (Alito, J., dissenting); *id.* at 2629 (Scalia, J., dissenting) (accusing the *Obergefell* majority of staking “a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government”).

<sup>10</sup> In particular, Justice Thomas issued a series of striking concurrences in the 2014 Term that flagged previously dormant constitutional issues in ways that de facto invite litigants to file future challenges. *See* *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1603 (2015) (noting “doubts about the legitimacy of this Court’s precedents concerning the pre-emptive scope of the Natural Gas Act,” and in effect flagging the issue for future challenge); *Dep’t of Transp’n v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1240-41 (2015) (calling into question the permissible scope of legislative guidance and purporting to “identify principles relevant to today’s dispute, with an eye to offering guidance to the lower courts on remand”); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment) (calling into question “the legitimacy of our precedents requiring deference to administrative interpretations of regulations,” including *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

<sup>11</sup> A few legal scholars have identified piecemeal some of the agenda setting mechanisms discussed here. For example, Saul Levmore has offered an influential account of bicameralism as a solution to incoherence in collective choice and an important analysis of the interaction between interest-group activity and agenda-setting mechanisms. *See* Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259, 260-61 (1999) (identifying a “link between instability and [interest group] activity” such that interest groups “will then invest in order to influence . . . procedural rules or, what is sometimes the same thing, the agenda setter”). William Eskridge and John Ferejohn have drawn attention to the way in which lawmaking is “dynamic interaction between the preferences of the House and Senate (bicameralism) and the President (presentment).” William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528 (1992). In subsequently work, Eskridge has extended the analysis to congressional committees. William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-48 (2008) (describing opportunities for House or Senate members to derail proposed legislation at “veto-gates,” i.e. necessary stages in the legislative process where one group or another has the ability to derail a bill). They build on a political-science literature on “veto-gates”—a kind of concurrence power, in my argot—upon the available range of policy outcomes. *See* George

conceptual. Constitutional scholars need a vocabulary to discuss the large domain of agenda control rules. To that end, I map out the agenda control rules found in the constitutional text. I then identify three margins along which agenda-setting rules in the Constitution vary. First, rules can regulate either the *starting point* of a decision-making process or, alternatively, require a subsequent *concurrence* by a given institution. Second, agenda-setting rules can be *intramural*—in the sense of assigning power over a decision to the same entity with ultimate authority to act—or *external*, in the sense of splitting the power to decide what subject government will address from the power to decide that government will, in fact, act. Finally, and related to the endogenous/exogenous divide, control of the government’s agenda can be assigned to a *state* actor or to a *private*, non-state actor.

To taxonomize the constitutional law of agenda setting in this fashion, I draw upon two bodies of political science scholarship. The first focuses empirically on the ebb and flow of attention to different policy issues, exploring the incentives for officials and interest groups to compete strategically for influence,<sup>12</sup> and the instruments they use to do so.<sup>13</sup> The second, labeled the study of social choice,<sup>14</sup> begins with a pathmarking 1950 article by Kenneth Arrow.<sup>15</sup>

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Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 293 (1995). The Eskridge-Ferejohn analysis usefully draws attention to how the strategic invocation of sequential veto-gates shapes the selection of proposals initially introduced into the lawmaking process, an insight I extend here. See, e.g., Eskridge & Ferejohn, *supra*, at 532 (noting that “the threat of a veto significantly affects the location of statutory policy”). Finally, there is a small literature on the Origination Clause of Article I, Section 7. Rebecca M. Kysar, *The “Shell Bill” Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659 (2014) [hereinafter “Kysar, *Shell Bill*”] (offering normative proposals to revive the efficacy of the Origination Clause); Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT’L L. 1 (2013) (criticizing tax treaties on Origination Clause grounds); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 424-25 (2004) (analyzing effect of the Origination Clause). This article draws on all these previous analyses, but its aim is more synoptic than these precursors. Rather than exploring one retail element of the Constitution’s mechanisms for framing decision-making, it develops a comprehensive approach to the identification and evaluation of the Constitution’s agenda-setting rules.

<sup>12</sup> JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2011) (exploring how issues become part of the public agenda); BRIAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION* (2d ed. 2005) (examining how policymakers obtain and use information to legislative agenda).

<sup>13</sup> See, e.g., ROBERT W. BENNETT, *TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY* 37 (2003) (developing the concept of “conversational entrepreneurs,” who seed demand among political elites for policy change); see also Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103 (2007) (providing an overview of such framing effects).

<sup>14</sup> My focus here is social choice literature catalyzed by Arrow’s work on the transformation of individual preferences into collective choices. For useful summaries of the key technical results in this literature, see AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970) [hereinafter “SEN, *COLLECTIVE CHOICE*”], and Amartya Sen, *Social Choice Theory: A Re-Examination*, 45 *ECONOMETRICA* 53 (1977). This literature is distinct from the public choice scholarship, which

Arrow developed a “general possibility theorem” that, in rough paraphrase, demonstrates that any process for choosing between three or more individual preferences over “alternative social states” will either produce incoherent results or, alternatively, violate “reasonable-looking” conditions for democratic choice.<sup>16</sup> In the influential gloss offered by political scientist William Riker, Arrow’s theorem shows that “so long as a society preserves democratic institutions, its members can expect that some of their social choices will be unordered or inconsistent.”<sup>17</sup> Instead, those in power can manipulate the agenda—or the inclination of participants to vote strategically—to determine the outputs of a collective-choice mechanism.<sup>18</sup> Legal scholars have been cognizant of social choice theory for decades now, but have focused on its negative implications for the coherence of legislative and judicial outputs.<sup>19</sup> This Article exploits a different insight from social-choice theory: that there are many different ways of managing

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centers on the formation and behavior of various interest groups in the face of collective action costs. MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GOODS 2* (1965). Social choice and public choice analyses are sometimes concatenated to generate mutually reinforcing justifications for normative reform proposals. *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 410 (1989) (invoking social choice theory to support “the findings of public choice theory [that] would treat statutes as lacking coherent normative underpinnings”) [hereinafter “Sunstein, *Interpreting Statutes*”]; William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 284 (1988) (invoking Arrow’s theorem to similar ends).

<sup>14</sup> OLSEN, *supra* note 13, at 2.

<sup>15</sup> Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950); *see also* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

<sup>16</sup> ERIC MASKIN & AMARTYA SEN, *THE ARROW IMPOSSIBILITY THEOREM* 33-36, 38 (2014).

<sup>17</sup> WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 136 (1982) [hereinafter “Riker, *Liberalism against Populism*”].

<sup>18</sup> *Id.*; accord DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 39-40 (1958).

<sup>19</sup> Judge Frank Easterbrook, for example, famously complained that it is “difficult, sometimes impossible, to aggregate [legislators’ preferences] into a coherent collective choice.” Frank H. Easterbrook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533, 547-48 (1983); accord Frank H. Easterbrook, *The Supreme Court, 1983 Term—Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 51 (1984) (making the analog point that interest-group bargaining for legislative outcomes may suffer from an empty core problem); *see also* Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L. J. 1787, 1822 (1992) (using Arrow’s theorem to argue for more robust judicial review). To the extent this literature counsels for more searching judicial review based on inferences about legislative incoherence, it suffers from a pervasive nirvana problem because it fails to account for instability in multimember courts. For a penetrating critique along these lines, *see* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1225-26 n.18 & 1229-30 (1994) [hereinafter “Stearns, *Misguided Renaissance*”]. Similar criticisms were lodged against the decisions of multi-member courts. Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 563 (1977) (“Decision making by multi-judge appellate courts ... [and other collective decision makers] display[s] features that may make them vulnerable to similar theoretical criticism [based on social choice].”); *see also* Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J. L. ECON. & ORG. 441 (1992) (identifying aggregation difficulties as a central problem in the analysis of multimember courts); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986) (same).

instability in collective choice, such that wholesale skepticism is an unnecessary response.<sup>20</sup>

Having demonstrated the utility of an agenda-control lens, I then ask how successful the Framers' initial distribution of agenda-setting authorities has been. The original dispensation of agenda control powers, I argue, has not proved durable. Rather, agenda-setting powers have diffused across branch boundaries or from within government to non-state actors. A central change has been a large shift of decisional authority from Congress to both the executive and (less often remarked) the judiciary. Building on earlier work about the *negotiated* character of interbranch arrangements,<sup>21</sup> I contend that derogations from the constitutional law of agenda control are best explained by the fact that political actors and branches have traded their original agenda-control authorities. The Constitution, in effect, has provided a framework for bargaining, not a Procrustean network of constraints. The ensuing negotiated redistribution of agenda control powers is an overlooked element of the history of shifting interbranch relations over the past century. As such, it illuminates the dynamics of constitutional change around the separation of powers.<sup>22</sup>

The argument proceeds in three parts. Part I sets the stage by explaining why agenda control is a consequential margin of constitutional design by mining on the aforementioned two bodies of political science research. Part II adumbrates the heterogeneous solutions to the problem of agenda setting found in the original Constitution, focusing on the separation of powers. It develops a taxonomical framework for classifying and evaluating agenda control mechanisms. The final Part then evaluates how the Framers' choices fared. It demonstrates that branches have traded agenda-control entitlements in ways that have critically shaped the

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<sup>20</sup> Another line of legal scholarship attacks the assumptions and definitions of Arrow's theorem, and in particular its definition of rationality. See, e.g., Richard H. Pildes & Elizabeth S. Anderson, *Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2146-58, 2192 (1990); see also Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949 (1990) (arguing that formal assumptions of Arrow's Theorem's rarely hold). For an comprehensive response to such criticisms, see JOHN W. PATTY & ELIZABETH MAGGIE PENN, SOCIAL CHOICE AND LEGITIMACY: THE POSSIBILITIES OF IMPOSSIBILITY 32-33 (2015).

<sup>21</sup> See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014) [hereinafter "Huq, *Negotiated Structural Constitution*"].

<sup>22</sup> This is true in both the separation-of-powers context, see, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243 (1994) (pointing to "the demise of the nondelegation doctrine" and the "death of the Unitary Executive" as motors of change in the constitutional dispensation); see also Kathryn A. Watts, *Rulemaking As Legislating*, 103 GEO. L.J. 1003, 1016 (2015) (characterizing extant constraints on legislative delegation as "toothless"), and the federalism context, see David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL'Y 267, 304 (2015) ("Today, however, the enumerated-powers principle hardly restrains Congress's substantive power.").

historical trajectory of institutional development. It further addresses the normative question how the ensuing changes should be evaluated.

## I. Agenda Control as an Object of Constitutional Design

Theorists of constitutional design as early as Rousseau have recognized the importance of agenda control.<sup>23</sup> Drawing on that literature, this Part unearths two general reasons for attending to the question. The first draws on an empirical literature about the formation of national policy agendas. The second mines social choice scholarship to show why agenda control is inevitably a part of constitutional design

### A. The Circumstances of Democratic Choice

Constitutional adjudication is intensely focused on prohibitory effects. Constitutional design, though, is not solely a matter of constraining the state. Before constraint, constitutions must articulate basic forms of the state as a framework for ongoing governance.<sup>24</sup> The American iteration is also a “blueprint for *democratic* governance.”<sup>25</sup> To further this end, the Constitution must account for how democratic contestation unfurls. In three ways, the quotidian circumstances of democratic politics create a need for constitutional agenda-control mechanisms.

First, governments are typically confronted with “a great number of real, tangible issues” at any one moment, but “can attend to them only one at a time.”<sup>26</sup> The first step of democratic choice, therefore, is sorting a subclass of issues to

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<sup>23</sup> See John T. Scott, *Rousseau’s Anti-Agenda-Setting Agenda and Contemporary Democratic Theory*, 99 AM. POL. SCI. REV. 137, 140-41 (2005) (discussing how Rousseau in *The Social Contract* envisaged the allocation of power to initiate policy-making to the legislative branch). Scott’s analysis is a persuasive response to an earlier suggestion that Rousseau allocated agenda-setting authority to experts in the government. Ethan Putterman, *Rousseau on Agenda-Setting and Majority-Rule*, 97 AM. POL. SCI. REV. 459, 461 (2003) (reading Rousseau as envisaging “expert agenda setters [who] would advance and enhance citizen participation”).

<sup>24</sup> The enabling function of constitutional design is stressed by STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS: THE THEORY OF LIBERAL DEMOCRACY* 163 (1995) (comparing constitutional rules to grammatical rules, which “do not merely retrain a speaker” but also “allow interlocutors to do many things they would not otherwise have been able to do or even have thought of doing”).

<sup>25</sup> Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1995 (2003) (emphasis added). Not all constitutions, of course, strive aim toward democratic government. Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1, 4-5 (Tom Ginsburg & Tamir Moustafa eds., 2008) (explaining the function of constitutions in authoritarian regimes).

<sup>26</sup> BAUMGARTNER & JONES, *supra* note 12, at 10.

consider seriously.<sup>27</sup> This entails creation of a “list of subjects or problems to which governmental officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time.”<sup>28</sup> Such lists are not defined by exogenous shocks alone. Even casual acquaintance with the rhythms of national politics should reveal that the mere fact that an issue makes headlines—be it drought in the western states, a looming federal deficit, crime, or immigration surges—does not all suffice to elicit new legislation or regulation. It requires conscious mobilization, typically by political elites, to mold crisis into an occasion for state action.<sup>29</sup>

Second, once an issue advances onto the government’s radar, there are almost always non-binary choices between paths of state action. For example, there are often civil and criminal regulatory options. Proposals to criminalize implicate decisions about how to calibrate a continuous variable of sentence severity. Noncriminal regulation require choices over forms of regulation (e.g., command-and-control vs. market mechanisms), the mix of public and private enforcement, and the range of legal and equitable remedies. In many domains, officials face plural, incompatible regulatory approaches. In the healthcare context, for example, Congress recently had to elect between (among other options) a Canadian-style single payer system, expansion of employer-based coverage, or an individual-mandate approach to market correction.<sup>30</sup> This need for agenda-setting *between* policy options persists through the decision-making process.

Third, the government’s agenda is typically an object of interest-group contestation that requires channeling and resolution. Interest groups mobilize to elevate novel issues onto the government’s agenda and then to frame issues so as to maximize their comparative advantage,<sup>31</sup> and to engage in “negative blocking” of disfavored issues.<sup>32</sup> Interest groups also shape the range of policy options considered by officials. As the national economy has expanded in complexity,

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<sup>27</sup> See David A. Rochefort & Robert W. Cobb, *Problem Definition, Agenda Access, and Policy Choice*, 21 POL’Y STUD. J. 56, 56 (1993).

<sup>28</sup> KINGDON, *supra* note 12, at 3.

<sup>29</sup> See, e.g., BENNETT, *supra* note 13, at 3. For a brilliant demonstration of this point in the crime policy context, see Vesla Weaver, *Frontlash: Race and the Development of Punitive Criminal Policy*, 21 STUD. AM. POL. DEV. 230, 234-36 (2007).

<sup>30</sup> Congress was familiar with this range of options. Matthew P. Harrington, *Health Care Crimes: Avoiding Overenforcement*, 26 RUTGERS L.J. 111, 111-12 (1994) (describing considerations of these options during President Clinton’s effort to obtain a new healthcare law during the 103rd Congress).

<sup>31</sup> Olsen’s canonical work on public choice suggests that the efficacy of an interest group is inversely correlated to its transaction cost of mobilization. OLSEN, *supra* note 13, at 2.

<sup>32</sup> KINGDON, *supra* note 12, at 46, 48-49 (finding that “interest groups loom very large indeed” in agenda-setting efforts).

interest groups have grown in “number and diversity.”<sup>33</sup> They increasingly supply a “legislative subsidy”<sup>34</sup> in the form of policy information, political intelligence, and legislative labor to strategically selected legislators. This epistemic role situates interest groups to shape both how issues are defined<sup>35</sup> and remedied.<sup>36</sup> An important role of the constitution is channeling and harnessing such activity into productive legislative form.

## **B. Agenda Control as an Equilibrating Mechanism in Collective-Choice Mechanisms**

Social choice theory illuminates a second important justification for agenda-setting mechanisms in constitutional design. This literature identifies irreconcilable tensions between demands for coherence and for minimal democratic credentials in collective-choice mechanisms. It teaches that instability (or cycling) is imminently possible in all normatively plausible mechanisms for aggregating inputs from more than two decision-makers over more than two options, and that an inexorable specter of instability haunts democratic constitutional design. A constitution’s framers face difficult trade-offs between the risks of instability in collective outcomes, of strategic voting, and of the abuse of agenda-control power.

To unpack these basic points, this section briefly sets forth some core results of social choice theory. First, key technical results—most importantly, Arrow’s original theorem—are summarized in nontechnical terms. Second, I elaborate *institutional* implications of those results, focusing on the role of agenda control and strategic voting in suppressing instability. Finally, the extent of federal government action implicating the potential for cycling is mapped.

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<sup>33</sup> BAUMGARTNER & JONES, *supra* note 12, at 177.

<sup>34</sup> Richard Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69-70 (2008). Access to legislators to provide information, however, appears to be a function of campaign contributions. See Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, -- AM. J. POL. SCI. – (forthcoming 2015) (reporting results of a randomized experiment to the effect that campaign contributions to congressional staff offered access four times more often when contributions were made than when no contributions were made).

<sup>35</sup> See DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION-MAKING 309 (1997) (“Political debates on policy issues are often portrayed as a conflict over competing definitions of a social condition.”). Questions of causation provide an especially fruitful object of interest-group contestation. Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281, 283 (1989).

<sup>36</sup> Cf. BAUMGARTNER & JONES, *supra* note 12, at 29 (“[M]uch of the policy process is determined by the artful connection of solutions to problems.”).

1. *Instability and Incoherence in Collective Choice*

Consider three individuals (1, 2, and 3) with three options (A, B, and C) and the following distribution of preferences (where “ $\succ$ ” stands for “is preferred to”):

**Table 1: The Condorcet Cycle**

| Person | Order of Preferences  |
|--------|-----------------------|
| 1      | A $\succ$ B $\succ$ C |
| 2      | B $\succ$ C $\succ$ A |
| 3      | C $\succ$ A $\succ$ B |

The three individuals use majority-rule to decide between pairs of options in turn. In seriatim votes, A beats B, B beats C, and then C beats A. Application of a majority rule to these options, therefore, generates a series of intransitive outcomes, or what is termed a Condorcet cycle.<sup>37</sup> In this and many other collective choice situations, there is also no Condorcet winner: an option that beats all others in pairwise voting.<sup>38</sup> An examination of Table 1 demonstrates that any outcome, A, B, or C, can be destabilized by a new majority-rule vote, and that there will always be someone who stands to gain from seeking that vote. For example, once C is selected, 1 will request a vote on C versus B. For this reasons, the results in Table 1 exemplify *instability* or *cycling*. Further, the results can also be labeled *incoherent* insofar as there seems to be no singular way of translating underlying individual preferences into a single ‘right’ outcome that represents a single collective choice.<sup>39</sup>

Arrow’s theorem implies that “many minimally democratic systems will in some situation produce an intransitive ordering ... similar to [a Condorcet cycle].”<sup>40</sup> As updated in 1963,<sup>41</sup> Arrow’s theorem identifies four criteria that a reasonable mechanism for aggregating individual preferences into a collective choice should meet. According to Arrow, a reasonable aggregation rule should meet the following criteria: (1) It should be *Pareto efficient*, insofar as if every

<sup>37</sup> PATTY & PENN, *supra* note 20, at 13.

<sup>38</sup> *Id.*

<sup>39</sup> Riker identifies a “populist interpretation of voting” to the effect that “the opinion of the people must be right and *must* be respected because the will of the people is the liberty of the people.” RIKER, LIBERALISM AGAINST POPULISM, *supra* note 17, at 14. But, it is hardly clear any theorist endorses such a view. Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26, 27-28 (1986) (discussing Rousseau’s and Bentham’s views).

<sup>40</sup> PATTY & PENN, *supra* note 20, at 14.

<sup>41</sup> The following account draws on the elegant account in Sen and Maskin, *supra* note 16, at 33-38, and the more extended and technical treatment in PATTY & PENN, *supra* note 20, at 20-69 (explaining theorem and offered extended defenses of each condition). The version of the theorem set forth here was first developed in ARROW, SOCIAL CHOICE, *supra* note 15, at 22-33.

individual prefers A to B, A should prevail. (2) It should satisfy the *independence of irrelevant alternatives* condition: when ranking two alternatives, A and B, preferences over C should not influence the result of the aggregation mechanism.<sup>42</sup> (3) It should be *transitive*, i.e., it should produce an unambiguous winner or collection of winners.<sup>43</sup> (4) It should be *non-dictatorial*, in that it responds to the preferences of more than one person. The nub of Arrow's result is that there is *no* aggregation rule—not majority rule, supermajority rules, plurality vote rules, Borda count, and not the market<sup>44</sup>—that consistently satisfies all these conditions. To generate coherent outputs across all cases, the Arrow theorem holds, the mechanism must give way along one of these four margins.

Subsequent theoretical work extends and refines this basic result. For example, later studies examined the possibility of cycling under majority rule.<sup>45</sup> Building on Arrow's initial result, Plott and others demonstrated that a majority vote rule will generate transitive outputs in only a limited set of cases.<sup>46</sup> Another vein of theoretical work, developed by Gibbard and Satterthwaite, examined the tendency of preference aggregation mechanisms to elicit strategic or insincere behavior. They demonstrated that every nontrivial preference mechanism (except for a dictator) *can* elicit strategic voting from participants.<sup>47</sup> Finally, McKelvey demonstrated that when a preference aggregation mechanism engenders potential voting cycles, there is always an agenda that, once chosen, will lead to the choice of *any* possible policy alternative within the space of options under

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<sup>42</sup> Lest this sound arcane, consider the use of plurality vote rule in presidential elections, where the choice between two main party candidates A and B can be altered by the presence of a 'spoiler' third candidate C. "The independence axiom serves to rule out spoilers." SEN AND MASKIN, *supra* note 16, at 48.

<sup>43</sup> In Sen and Maskin, the third criterion is "unrestricted domain," which requires that "[f]or any logically possible set of preferences, there is a social ordering *R*." *Id.* at 34. This emphasizes the fact that the aggregation rule cannot ex ante rule out by fiat a subset of alternative options as a way of generating intransitivity.

<sup>44</sup> See Saul Levmore, *Public Choice Defended*, 72 U. CHI. L. REV. 777, 781 n.17 (2005).

<sup>45</sup> There are plenty of reasons for endorsing majority rule as a desirable aggregation rule. Kenneth O. May, *A Set of Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952).

<sup>46</sup> A majority vote rule generates stable outputs when there is only one issue to decide, where preferences or interests are similar or nearly unanimous, and where preferences are delicately balanced against each other. William H. Riker & Barry Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 382 (1988); see also Charles Plott, *A Notion of Equilibrium and Its Possibility Under Majority Rule*, 57 AM. ECON. REV. 787 (1967).

<sup>47</sup> Allen Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 ECONOMETRICA 587, 587 (1973) (asserting that any nondictatorial voting scheme with at least three possible outcomes is subject to individual manipulation); Mark A. Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 10 J. ECON. THEORY 187, 193, 192-202 (1975).

consideration.<sup>48</sup> In later work, McKelvey identified distributions of preferences and voting rules for which the possibility of cycling (and, hence, of manipulation by agenda control) is relatively low.<sup>49</sup> These results illustrate that allocations of agenda-control power dramatically change the stability, coherence, and substances of outputs from collective choice mechanisms.

Neither Arrow's theorem nor its extensions are empirical in nature. They do not predict the frequency of instability under any given decision rule.<sup>50</sup> There is vigorous, ongoing debate about how often either Condorcetian cycling or other forms of instability are observed in the real-world political institutions.<sup>51</sup> There is also disagreement as to whether the formal possibility of strategic voting under a given aggregation mechanism will necessarily imply the observed fact of strategic voting.<sup>52</sup> Nevertheless, an observed absence of instability (in the form of Condorcet cycles) or strategic action (whether by an agenda setter or voters) does not mean an aggregation rule is invulnerable to incoherence or instability critiques. In part, this is because instability might not arise due to the exercise of a strategic agenda control (as McKelvey shows) strategic voting (as Gibbard and Satterthwaite predict).

From the perspective of the constitutional framer, social-choice theoretical results have bite regardless of instability's empirical frequency. Typically, those who design a constitution strive to create an enduring document, not one good for

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<sup>48</sup> Richard D. McKelvey, *Intransitivities in Multi-Dimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976) (demonstrating that "where all voters evaluate policy in terms of Euclidean metric, if there is no equilibrium outcome ... it is theoretically possible to design voting procedures which, starting from any given point, will end up at any other point in the space of alternatives"); RIKER, *LIBERALISM AGAINST POPULISM*, *supra* note 17, at 187 (providing a summary of McKelvey's result).

<sup>49</sup> Richard D. McKelvey, *Covering, Dominance, and Institution-Free Properties of Social Choice*, 18 AM. J. POL. SCI. 283, 283 (1986); *see also* Norman Schofield et al., *The Core and the Stability of Group Choice in Spatial Voting Games*, 82 AM. POL. SCI. REV. 195, 207-08 (1988).

<sup>50</sup> Riker & Weingast, *supra* note 48, at 382 ("Arrow's Theorem is a possibility theorem. It says only that an event can occur, not that it will occur or has often occurred.")

<sup>51</sup> *Compare id.* at 388-93 (providing examples from congressional debates); *with* GERRY MACKIE, *DEMOCRACY DEFENDED* (2003) (rejecting examples).

<sup>52</sup> SEN, *COLLECTIVE CHOICE*, *supra* note 14, at 195 (arguing that in many democratic choice situations, people are "guided not so much by maximization of expected utility, but something much simpler, viz, just a desire to record one's true preference"). Elsewhere, Sen develops the concept of a commitment, defined "in terms of a person choosing an act that he believes will yield a lower level of personal welfare to him than an alternative that is available to him," as an explanation for the refusal to engage in strategic voting. Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 327 (1977). For another skeptical view of the relevance of the Gibbard-Satterthwaite and McKelvey results, see Bernard Grofman, *Public Choice, Civil Republicanism, and American Politics: Perspectives of A "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541, 1554 (1993).

a single ride.<sup>53</sup> This requires a collective choice mechanism that works with many different permutations of popular preferences. The constitutional designer thus cannot assume that the distribution of preferences will be such that instability and incoherence will not be concerns.

## 2. *Institutional Responses to Instability in Collective Choice: Agenda Control and Strategic Voting*

A central implication of Arrow's theorem for constitutional design is that that task must begin by "identifying which assumption(s) is relaxed for each institution" and then to proceed by "comparing the ability of a given institution to which collective decision-making responsibility has been assigned under the Constitution to issue a rational collective design."<sup>54</sup> That *any* method of collective choice will fall short of meeting all four of Arrow's conditions means that *comparative* judgments are in practice inevitable.

There are, roughly speaking, three general categories of responses to instability in collective-choice mechanisms. I set these out, but must stress at the outset that this Article is focused on the third response. *First*, a designer might tolerate a certain degree of instability within a preference aggregation system. This might be justified on pluralist grounds as "provid[ing] a way to avoid rejecting some fundamental values in situations when not all can be satisfied at once."<sup>55</sup> *Second*, certain collective choice mechanisms do not allow cycling because they stipulate a fixed number of 'rounds' of voting. Such mechanisms do, however, invite strategic voting. The plurality voting rule used in presidential elections, for example, will often mean that "supporters of third parties vote for their second choice in order to defeat the major party candidate they like the least."<sup>56</sup> The Gibbard-Satterthwaite result suggests that the institutional design question is less whether to allow strategic voting—its possibility is endemic—but, rather, whether to adopt measures to dampen, if not eliminate, it.

The *third* possibility—which most concerns me here—is that a designer will arrange a collective choice mechanism to allocate agenda control among institutional players in some stable and regular way. Institutional designers, as Shepsle and Weingast observe, can strive for "structure-induced equilibrium" by

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<sup>53</sup> But perhaps this is a mistake: The average duration of a constitution, however, is only seventeen years. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 120 (2009). The U.S. Constitution is an outlier. *Id.* at 101.

<sup>54</sup> Stearns, *Misguided Renaissance*, *supra* note 19, at 1232; *see also* Saul Levmore, *From Cynicism to Positive Theory in Public Choice*, 87 CORNELL L. REV. 375, 375 (2002) (noting that the takeaway of aggregation paradoxes for legal theorists need not be skepticism, but rather conduce to "the study of how we do the best we can in the face of difficulties").

<sup>55</sup> Pildes & Anderson, *supra* note 20, at 2171-72.

<sup>56</sup> RIKER, *LIBERALISM AGAINST POPULISM*, *supra* note 17, at 145-51.

carefully channeling “the sometimes subtle influence provided by control over structure and procedure.”<sup>57</sup> Conscious allocation of agenda control power to one or another institution justified because it should elicit regularity and stability in state action.<sup>58</sup>

What does it mean to assign agenda control to a given actor? The social-choice literature suggests this term has a capacious meaning. At a minimum, it captures a class of cases in which collective choice is required to begin or end with certain steps, and where the structure of a multi-stage aggregation rule determines outcomes.<sup>59</sup> But it sweeps more broadly than this. Riker commented on the “significance, variety and pervasiveness” of agenda-setting devices.<sup>60</sup> They include powers to initiate policy-making, to veto proposals, to identify policymakers, to resolve ambiguities in extant policies, and to determine who may offer proposals. Consistent with this view, I develop in Part II.A a capacious account of agenda-control devices within the Constitution.

In sum, I draw a rather different lesson for institutional design from the social choice literature choice from earlier scholars. The finding of Arrowian instability has transfixed legal scholars, motivating coruscating critiques of both legislative and multimember courts’ decisions. Skepticism, though, is not a necessary inference from social choice theory.<sup>61</sup> Although its core results cast

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<sup>57</sup> Kenneth A. Shepsle, *Studying Institutions: Some Lessons from the Rational Choice Approach*, 1 J. THEORETICAL POL. 131, 136-37 (1989) (“[A] structure induced equilibrium may be defined as an alternative ... that is invulnerable in the sense that no other alternative, allowed by the rules of procedure, is preferred by all individuals, structural units, and coalitions that possess distinctive veto or voting power”); Kenneth A. Shepsle & Barry R. Weingast, *Structure-induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 507-14 (1981) (analyzing a series of equilibrium-inducing institutional design options).

<sup>58</sup> Accord William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 443 ((1980); see also Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J. L. ECON. & ORG. 213, 216 (1990) (“Politics is stable because of the distinctive role that institutions play,” in particular in determining ex ante “what alternatives get considered, in what order, and by whom.”).

<sup>59</sup> See ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 43-46 (2000) (describing the process in which agenda setting chooses outcomes); accord Grant M. Hayden, Note, *Some Implications of Arrow's Theorem for Voting Rights*, 47 STAN. L. REV. 295, 299 (1995) (suggesting that intransitivity leads to dictatorial power being exercised in a social choice function by agenda setters).

<sup>60</sup> RIKER, *LIBERALISM AGAINST POPULISM*, *supra* note --, at 169.

<sup>61</sup> In a much cited piece, Richard Pildes and Elizabeth Anderson treat Arrow’s theorem as a threat to the normative force of democracy, but respond that “because the values people care about in individual choice and democratic politics are plural and often incommensurable, those values cannot be expressed adequately through consistent preference rankings over outcomes described in the sparse terms available to social choice theory.” Pildes & Anderson, *supra* note 20, at 2142; *id.* at 2160-61 (giving an example of inconsistent individual preferences); see also *id.* at 2186 (identifying as their target “the claim that social choice theory ‘proves’ that democratic systems cannot be rationally responsive to citizens’ desires, values, and interests”). Aggregation, on this

doubt on the possibility of identifying in all cases a *single* outcome as the unique product of collective choice, Arrow’s theorem hardly implies that democratic institutional design is a fool’s errand. There is no need to assume that a unique collective choice, as opposed to a “set of acceptable outcomes,” exists, and Arrow’s theorem suggests that an aggregation mechanism that can provide at least some evidence of individuals’ summed judgments is of passable utility.<sup>62</sup> With this weaker ambition in hand, one of many aggregation rules that operate as “pretty good truth tracker[s]” may suffice.<sup>63</sup>

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This Part has identified two reasons why a constitution must address agenda control. First, the circumstances of democratic politics in an extended, heterogeneous republic present state actors with many more potential objects of regulation than can feasibly be tacked at a single time. Exogenous shocks alone do not establish priorities, and capacity constraints mean there is a need to

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account, is an incomplete method for realizing democratic choice. *Id.* This is a “narrow” view of social choice theory’s implications. PATTY & PENN, *supra* note 20, at 32-33 (faulting Pildes and Anderson for insisting on the need for social norms and institutional rules, while simultaneously “miss[ing] the crucial point: [Arrow’s and subsequent] results ... indicate why ... norms, rules, and practices are required to produce meaningful and coherent democratic outcomes”). Of note here, Pildes and Anderson do not categorically deny the need for some form of aggregation mechanism in a democratic polity. To the contrary, they recognize that social choice theory can help isolate some of the trade-offs implicit in democratic institutional design. Pildes & Anderson, *supra* note 20, at 2196-97 (recognizing that sometimes “agenda-setting elites” exist, and the relevant normative question “whether the [agenda control] power is managed, distributed, or contained in ways that over time further democratic values”). They do not, however, pursue in detail the range of institutional responses resolving trade-offs generated in the design of collective choice mechanisms.

<sup>62</sup> Jules Coleman & John Ferejohn, *Democracy and Social Choice*, 97 ETHICS 6, 15-17 (1986) (developing, in response to Riker, a series of defenses of the meaningfulness of collective choice given Arrow’s theorem); *see also* Pildes & Anderson, *supra* note 20, at 2187 (rejecting consistency as a criteria of rationality).

<sup>63</sup> Gerry Mackie, *The reception of social choice theory by democratic theory*, in MAJORITY DECISIONS: PRINCIPLES AND PRACTICES 77, 89 (Stéphanie Novak & Jon Elster eds. 2014). A more recent effort to define a nonempty class of legitimate choice procedures, developed by John Patty and Elizabeth Penn, focuses on internal consistency and stability of that mechanism. On their view, internal stability requires (1) sensibility of outcome—i.e. “no alternative in the sequence of considered alternatives is strictly superior to the final choice”; and (2) sequence coherence—that the “order of decision-making not contradict the presumption that reasoning was guided by the underlying principle”; and (3) stability, which “implies that inclusion of any alternative in the decision sequence would either introduce a policy that is incomparable to the final policy choice or violate internal consistency.” PATTY & PENN, *supra* note 20, at 91-103. They demonstrate that “the set of legitimate choices is always well defined and non empty.” *Id.* at 119. Although I do not apply their notion of legitimate choice here—which does not plainly fit any constitutional mechanism—Patty and Penn’s work demonstrates how social choice theory can accommodate normative theories that distinguish desirable from undesirable decision rules.

integrate some kind of agenda-setting mechanism into the fabric of national policy-making institutions.

Second, even once an issue has been identified as appropriate for regulation, any collective state actor confronts a cluster of difficulties in reaching decisions. The social choice literature points toward a need for constitutional structures that induce equilibrium. It demonstrates that the design of collective choice mechanisms necessitates a trade-off between different goals, in particular the nondictatorship and unrestricted domain conditions. Agenda control mechanisms, moreover, come in different flavors. Different circumstances may warrant different solutions. A fair implication of the social choice literature, therefore, is that a constitutional designer must exercise a measure of judgment over which agenda control mechanisms to use.

## II. Agenda Control Mechanisms in Constitutional Law

This Part develops an account of agenda control mechanisms originally to be found in the Constitution. I begin by offering a working definition of ‘agenda control’ tailored to constitutional analysis. I then identify agenda-setting rules in the original constitutional text. My focus here is on interbranch relations, where problems of agenda control loom large and where the Framers’ design choices can be picked out with greatest perspicuity. That is not to say that agenda control does not emerge as a design choice elsewhere in constitutional law; it is simply that the separation of powers context is one in which problem of agenda control loom prominently.<sup>64</sup>

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<sup>64</sup> Consider, for example, federalism. On the one hand, collective state action via treaty is prohibited. U.S. CONST. art. 1, §10, cl. 1. This means that states do not need a mechanism to resolve agenda control problems in the mine run of things. Nevertheless, states have developed a suite of subconstitutional organizations, such as associations, to engage in collective action. *See Aziz Z. Huq, Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 288-92 (2014) (documenting informal solutions to facilitate states’ collective action). Article V, moreover, anticipates two forms of supermajoritarian state action to propose and ratify amendments. It is possible to imagine cycles emerging in the ratification process if states were able to first ratify and then rescind their acquiescence to an amendment. States’ power to rescind is unclear. On the one hand, judicial precedent sparked by Kansas’s attempted rescission of the child labor amendment suggests withdrawal is impermissible. *See Coleman v. Miller*, 146 Kan. 390, 400-03, 71 P.2d 518, 524-26 (1937), *aff’d on other grounds*, 307 U.S. 433 (1939). On the other hand, the 1924 Wadsworth-Garrett proposal to amend Article V would have provided that “until three-fourths of the States have ratified or more than one-fourth of the States have rejected or defeated a proposed amendment, any State may change its vote.” 65 Cong. Rec. 4492-93 (1924); 66 Cong. Rec. 2159 (1925). A rule against rescission of a ratification might be justified as a solution to Arrovian instability, at the cost of making amendments harder to enact. Given the difficulty of changing the constitutional text at present, the latter’s marginal cost may though be minimal. *Cf. Aziz Z. Huq, The Function of Article V*, 162 U. PA. L. REV. 1165 (2014). A discussion of agenda choice mechanisms in the federalism context, in short, would not want for richness.

## A. A Definition of Agenda Control

The term ‘agenda control’ is widely used in both the policy-making literature and the social choice literature. Nevertheless, it does not have a clear definition upon which all converge. Instead, a working definition for constitutional analysis must be stitched together from hints, allusions, and theories across both the political science and the legal scholarship.

To begin, scholars working in the empirical political science literature on continuity and change in national policy-making treat policy agendas as the product of plural social forces, including interest groups, media, as well as official actors.<sup>65</sup> This literature is not focused on questions of institutional design or legal rules, and hence has no need for precise identification of the institutional forms of agenda control. In contrast, the social choice literature is centrally concerned with the design of aggregation mechanisms such as elections, legislative processes, or adjudication. Nevertheless, a clear definition of agenda control does not emerge from the social choice literature either. Although Riker points to examples such as legislative leadership’s ability to “select alternatives among with decisions will be made, and ... procedures for coming to a choice,”<sup>66</sup> he does not provide a comprehensive definition.

More usefully, Patty and Penn define “the agenda” as the act of “constructing the decision sequence [of options and expressions of preferences through voting or otherwise].”<sup>67</sup> They further observe that “a common thread among political institution” is that powers of “proposing, shepherding, and defending potential policy choices [are] generally explicitly assigned to one or more individuals.”<sup>68</sup> Their analysis suggests that the notion of agenda control encompasses control not just of a starting point for deliberation, but also the length, structure and composition of its sequence.<sup>69</sup> Consistent with this approach, Levine and Plott posit that an agenda has two functions: “it limits the information

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<sup>65</sup> See KINGDON, *supra* note 12, at 20 (including interest groups, legislative coalitions, the administration, and the “national mood” as causal forces in agenda creation); BAUMGARTNER & JONES, *supra* note 12, at 59-82, 175-92 (documenting the roles of a similarly variegated set of actors and social forces).

<sup>66</sup> RIKER, LIBERALISM AGAINST POPULISM, *supra* note 17, at 169; *id.* at 173-4 (supplying the example of Pliny the Younger’s control of the structure of voting in the Roman Senate).

<sup>67</sup> PATTY & PENN, *supra* note 20, at 93; *see also* Pildes & Anderson, *supra* note 20, at 2195 n.187 (refraining from giving a definition of agenda control, but intimating that it includes “establishing sequences of decisions”). For other discussions of agenda control that focus on sequence alone, *see* Levine & Plott, *supra* note 19, at 564;

<sup>68</sup> PATTY & PENN, *supra* note 20, at 125.

<sup>69</sup> This is consistent with Banks’s definition of an agenda as “a means of facilitating the decision problem of voters when faced with a set of alternatives ... an ordering of alternatives from which pairwise comparisons may be made.” J.S. Banks, *Sophisticated Voting Outcomes and Agenda Control*, 1 SOC. CHOICE 295, 295 (1985).

available to individual decision-makers” and “determines the set of strategies available.”<sup>70</sup> Similarly, Stearns observes that agenda-setting powers include timing-related powers to set “[d]eadlines and limitations on reconsideration.”<sup>71</sup>

Consistent with these approaches, the following definition of agenda control power provides a starting point for the analysis of constitutional rules. A constitutional agenda-setting rule is one (1) *found in constitutional text or jurisprudence* that (2) *vests an office, person, or organization, explicitly or implicitly, with authority to define the persons involved in, or the substantive scope, timing, voting rule, or sequencing of a decision-making process that can generate a legal rule or other outcome with the force and effect of law*. More informally, agenda-setting rules concern the *who* and the *how* of state power, not questions of *what* may be done.

Because it does not include boundary-setting rules on the reach of state power, this definition of agenda-setting rules marks out a species of constitutional question distinct and separate from the modal puzzles of constitutional law.<sup>72</sup> It also distinguishes the constitutional law of agenda-setting from a related, but non-constitutional, body of congressional procedures for organizing the internal legislative process. Legislative procedures, which are endogenously produced by each chamber,<sup>73</sup> assign agenda-setting authority among various members of Congress to important effect. Although the Constitution licenses such rules—

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<sup>70</sup> Levine & Plott, *supra* note 19, at 564-65.

<sup>71</sup> Stearns, *Misguided Renaissance*, *supra* note 19, at 1273; *see also* Mattias K. Polborn & Gerald Willman, *Optimal Agenda-setter timing*, 42 CANADIAN J. ECON. 1527, 1536 (2009) (modeling agenda-setting in a committee context, and demonstrating that part of the value of agenda-setting is the power to alter the timing a decision in ways that increase or decrease the option value of learning more about a policy on the part of other participants).

<sup>72</sup> I also exclude a wide range of other kinds of rules found in the Constitution. These include, for example the selection of officials, *see, e.g.*, U.S. CONST., Art I, §§2 & 5 (selection rules for representatives and senators), the punishment of officials, Art I, § 2, cl. 4 & § 3, cl. 6 (impeachment), or textual amendment of the Constitution, Art. V, among other matters. Agenda control questions do, nevertheless, arise in respect to these provisions. Consider, for example the sequence of action envisaged by the impeachment clauses, with the House first voting articles of impeachment, and then the Senate trying those articles alone. In the mine run of things, this likely means the Senate’s preferences operate as a constraint on the House, for a House focused on impeachment will necessarily anticipate the likely preferences of the Senate in crafting impeachment articles. On the other hand, however, the House’s power to determine the scope of articles allows it to craft grounds for impeachment that either place the Senate under great political pressure to convict, or that render it difficult to convict but politically costly to acquit. The House, in this way, has the power to create tensions between legal and political imperatives for the Senate. The agenda-setting regime over impeachment, in order words, has complex distributive effects as between the two chambers of Congress.

<sup>73</sup> The Constitution requires as much. U.S. CONST. art I, § 5, cl 2 (“Each House may determine the Rules of its Proceedings ...”).

allocating their authorship to distinct chambers—I keep the specific content of those rules largely outside this analysis so as to keep my project tractable.<sup>74</sup>

## **B. The Agenda Control Powers of Congress**

This section identifies a series of mechanisms in Article I and beyond that stabilize legislative outcomes, and in doing so, parcel out authority to select some issues rather than others for governmental attention. Solving Congress’s social-choice problem, that is, simultaneously determines which governmental actors have power to set the public policy agenda.

The Constitution disperses lawmaking power between two houses of Congress and the president by assigning different agenda control powers to different institutional actors. One example of an agenda-setting power, found in the Origination Clause of Article I, Section 7, Clause 1, is the House’s authority to initiate the legislative process on fiscal matters.<sup>75</sup> Another is embodied in the subsequent clause, which describes a sequence of lawmaking involving two-house passage, presidential consideration and potential White House veto, and finally, a super-majoritarian override procedure.<sup>76</sup> While neither the second house nor the president directly determine the metes and bounds of a legislative proposal, their exercise of a “veto power”<sup>77</sup> necessarily shapes the contents of threshold bill proposals: the proposing chamber seeking to enact a bill into law will rationally anticipate and shape a measure in conformity to the expected preferences of subsequent veto players.<sup>78</sup> Divergences in the preferences of the pivotal institutional actors impede enactment of any new law,<sup>79</sup> narrowing the space of enactable legislative proposals.

This basic structure of legislative choice in the federal government embodies a complex, Burkian solution to social choice problems. Three design choices are worth isolating and analyzing as forms of agenda-setting embedded

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<sup>74</sup> Cf. Vermeule, *supra* note 11, at 362 (“Methodologically, it is impossible to talk fruitfully about the design of constitutional rules if everything is up for grabs all at once ...”). For an analysis of congressional procedures through a social choice theory lens, see Saul Levmore, *Parliamentary Law, Majority Decision Making, and the Voting Paradox*, 75 VA. L. REV. 971 (1989) [hereinafter “Levmore, *Parliamentary Law*”].

<sup>75</sup> U.S. CONST. art. 1, § 7, cl. 1 (“All Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”)

<sup>76</sup> U.S. CONST. art. 1, § 7, cl. 2.

<sup>77</sup> CHARLES CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER 46 (2000).

<sup>78</sup> Eskridge & Ferejohn, *supra* note 11, at 529-33 (modeling bicameralism and presentment as a sequential game with perfect information). For a similar model under a different label of “pivotal politics,” see KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF LAWMAKING 21-28 (1998).

<sup>79</sup> Eskridge & Ferejohn, *supra* note 11, at 532 (“The Framers expected the House, Senate, and President to have widely dispersed preferences about the status quo, and therefore the no-statute game (Case 2) was most likely in the short term.”).

within constitutional text and jurisprudence. Attention to the agenda-setting function of these elements of the Constitution, I endeavor to show, surfaces consequences and internal conflicts that would otherwise go unobserved.

### 1. *Bicameralism and Presentment*

It is useful to begin with the most facially prominent agenda-setting element of Article I: the requirement that the House, the Senate, and the President (almost always) all *concur* in a bill before it becomes law. By requiring concurrence from several veto players across both Houses and the presidency, bicameralism and presentment dramatically narrows the domain of plausible legislative proposals.<sup>80</sup> That space, in expectation, will be smaller than the space of enactable policy preferences turning on either a pair's or a single actor's preferences.

This choice-constraining effect of the concurrence demands of bicameralism and presentment is a first agenda-shaping solution to Arrovian instability. In an influential treatment of structure-induced equilibrium, Shepsle and Weingast observed that “institutional restrictions on the domain of exchange [can] induce stability,” albeit at the cost of violating Arrow's unrestricted domain condition.<sup>81</sup> The resulting set of options is also likely to be “value-restricted” (i.e. there is some option never ranked as either best, worst, or medium by any veto player) and thus coherent.<sup>82</sup> The structure of veto-gates in the legislative process, in short, mitigates the risk of uncertainty by easing one of the four Arrovian criteria (unrestricted domain). It does so, moreover, without making the House, the Senate, or the President a ‘dictator’ in the sense of having unfettered, or largely unfettered, control over the shape of legislative outputs. To the contrary, bicameralism may diffuse agenda-setting power since “one chamber's agenda setter will be at the mercy of the order of consideration in the other chamber.”<sup>83</sup> The bicameralism element of Article I, in short, combines with presentment to solve a social choice problem, but at the same time to advance another central

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<sup>80</sup> This is prior, indeed, to the introduction of congressional committees and judicial review into the model—new features that reduce the domain of plausible enactments even further. Eskridge & Ferejohn, *supra* note 11, at 539, 548-551. For the sake of expositional clarity, moreover, I omit the further complication that discussion of the House or Senate as a unitary actor is misleading: Given the procedural rules of each chamber, and the power exercised by party leaders, the preferences of the median legislator will not necessarily be pivotal to that body's endorsement.

<sup>81</sup> Shepsle & Weingast, *supra* note 57, at 507 (emphasis omitted).

<sup>82</sup> SEN, COLLECTIVE CHOICE, *supra* note 14, at 166-86.

<sup>83</sup> Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 147 (1992) [hereinafter “Levmore, *Bicameralism*”].

goal of the Constitution’s separation of powers—the diffusion of political power between different elected bodies.<sup>84</sup>

Design solutions often have costs. The concurrence demands of bicameralism and presentment are no exception. It is by now familiar observation that plural veto-gates “often” yield gridlock.<sup>85</sup> Gridlock, in turn, constitutes a heavy thumb on the scale in favor of the status quo.<sup>86</sup> This is normatively attractive if new lawmaking is presumptively suspicious, and the status quo ante to law-making always desirable. For example, if the background to federal legislation were a just prepolitical distribution of property rights at risk of inequitable corruption by meddling legislative majorities,<sup>87</sup> a structure-induced equilibrium that favored the status quo might be normative desirable. Such a presumption about the baseline distribution of property entitlements, however imaginable at the time of the Founding, is plainly implausible now.<sup>88</sup> The status quo that contemporary legislative coalitions stand to displace is not well described as a *tabula rasa*. It is rather a complex accumulation of previous legislation, agency interpretations, presidential unilateralism, and unexpected interactions between the multiplicity of regulatory regimes found in the U.S. Code and state statute books.<sup>89</sup> Thus, the status quo that bicameralism and presentment shields might embody background distributions of individual entitlements, the outcomes

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<sup>84</sup> For a typical statement to this effect, see, e.g., Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 252 (positing that “the central end of a system of separation of powers [is] the diffusion of power to ‘protect the liberty and security of the governed.’” (citation omitted)).

<sup>85</sup> KREHBIEL, *supra* note 78, at 38-39 (developing the prediction that gridlock “occurs, and occurs often” under a pivotal politics model)

<sup>86</sup> Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2077 (2013) (“Gridlock is simply the perpetuation of the status quo; it is inertial.”).

<sup>87</sup> For a defense of Article I, § 7 that seems to rest on these grounds, see David G. Savage, *Justice Scalia: Americans “Should Learn to Love Gridlock,”* L.A. TIMES (Oct. 5, 2011) (“Americans should learn to love gridlock . . . The framers (of the Constitution) would say, yes, ‘That’s exactly the way we set it up. We wanted power contradicting power (to prevent) an excess of legislation.’” (quoting Justice Scalia)); see also William Mayton, *The Possibilities of Collective Choice: Arrow’s Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L. J. 948, 958 (“Article I does not regard a private ordering of society as inviolate. It does, however, require that defects in this ordering, and a remedy for them, be carefully identified before government upsets it.”).

<sup>88</sup> The Founding-era push for constraints on governmental power, particularly in relation to taxation and spending, however, was rooted in a desire to protect slavery. ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 117-58 (2008). That resistance may be defensible on independent grounds, but it is hardly clear that we can rely on the Framers’ preferences on the size of government as obviously normatively salient.

<sup>89</sup> The effect is complicated by Congress’s use of sunset provisions, which can lead to changes in the status quo absent congressional action. See Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 FORDHAM L. REV. 1777, 1832-34 (2013) (canvassing use of sunset provisions). In one case, the Constitution itself imposes a sunset rule in respect to military expenditures. See U.S. CONST. art. I, § 8, cl. 12 (two-year limit on military appropriations).

of long and unintended policy drift, or even executive branch adventurism.<sup>90</sup> A bias in favor of such a baseline has only a thin intrinsic normative justification.<sup>91</sup>

This agenda-setting structure has motivated legal disputes when Congress has tried to require the concurrence of additional actors. The Court, however, has resisted some deviations from the “finely wrought” pathway of Article I, Section 7.<sup>92</sup> In the mid-1980s and 1990s, the Court invalidated three different legislative efforts to supplement Article I, Section 7 with, a legislative veto exercised by a subset of Congress<sup>93</sup>; a budgetary mechanism designed to mechanically trim deficit spending via automatic fiscal ‘haircuts,’<sup>94</sup> and a presidential line-item veto again designed to keep budgets in check.<sup>95</sup> In each of these cases, the Court read the text of the Constitution to establish “a single, finely wrought and exhaustively considered, procedure.”<sup>96</sup> The Court’s text-based argument in favor of the exclusivity in these cases, however, is unpersuasive. To begin with, notice that in many other instances the Court has declined to read the Constitution’s text as exhaustive in a similar fashion. The application of the First Amendment to executive as well as legislative action, the efflorescence of state sovereign immunity doctrines—these are merely the immediately obvious examples. Further, the “perception of [textual] clarity or ambiguity is itself often affected by interpretive considerations that are commonly thought to be extra-textual [and] is partly constructed in American interpretive practice.”<sup>97</sup> To conclude that a legal text should be read as exclusive or exemplary, one needs some other evidence, whether gleaned from structure, history, or a prior understandings of the text’s purpose. The Court’s precedent treating Article I, Section 7 as exclusive begs the question whether the normative justifications for bicameralism and presentment justify that result—a question I return to in Part III.

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<sup>90</sup> See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2220 (2013) (describing the baseline preserved by gridlock as “arbitrary”).

<sup>91</sup> There is also a rather pessimistic theoretical literature that suggests bicameralism will generate results not originally manifested in either chamber, that are not Condorcet choices, and that may not be Pareto optimal, see Donald R. Gross, *Bicameralism and the Theory of Voting*, 35 WEST. POL. Q. 511, 512 (1982), as well as producing complex patterns of strategic voting, see Simon Hug, *Strategic Voting in a Bicameral Setting*, 16 STUD. PUB. CHOICE 231, 231-32 (2010).

<sup>92</sup> *INS v. Chadha*, 462 U.S. 919, 941 (1983). It is important to note that the Court has not uniformly resisted such deviations

<sup>93</sup> *Id.*

<sup>94</sup> *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986).

<sup>95</sup> *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998).

<sup>96</sup> *Id.* (citing *Chadha*, 462 U.S. at 941); see also *Bowsher*, 478 U.S. at 734.

<sup>97</sup> Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1238 (2015).

## 2. *Bespoke Starting Rules for Legislation*

A second sort of solution to social choice dynamics concerns the power to *start* certain kinds of legislative process as opposed to the series of required concurrence from various actors. There are three elements of Article 1, Section 7 bearing this function.

*First*, Article 1, Section 7 regimes makes the House the first mover on “[a]ll Bills for raising revenue”<sup>98</sup> as a means of vesting the power of the purse with the more popular branch of the legislature.<sup>99</sup> That clause also preserves the Senate’s power “to propose or concur with Amendments as on other Bills.”<sup>100</sup> The primary method of enforcing the Origination Clause is the House’s “blue slip” procedure for returning Senate-passed revenue bills to the other house.<sup>101</sup> Judicial enforcement is available, but rarely invoked.<sup>102</sup> The Court has permitted the Senate to exercise an expansive amendment power by suggesting that the judiciary lacks power “to determine whether the amendment was or was not outside the purposes of the original bill.”<sup>103</sup> This construction of the Senate’s authority is consonant with debates at the Philadelphia Convention, during which delegates considered and rejected the longstanding English rule that would have rendered a lower house’s fiscal proposals amendment-proof.<sup>104</sup>

*Second*, in contrast to the Origination Clause, the starting power for treaties resides outside Congress in the President.<sup>105</sup> Only the president can negotiate with another sovereign nation; indeed, only the president can formally communicate with another nation for the purpose of entering into a treaty.<sup>106</sup>

*Third*, and perhaps less noticed, the veto override provision in Article 1, Section 7, Clause 2, also contains a starting rule. It requires that “the House in

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<sup>98</sup> U.S. CONST. art I, § 7, cl. 1.

<sup>99</sup> See Kysar, *Shell Bill*, *supra* note 11, at 666 (“Delegates . . . used democratic principles to justify the Origination Clause, which gave control over initiating revenue matters to the directly elected House of Representatives, rather than the Senate whose members were elected by state legislatures.”).

<sup>100</sup> U.S. CONST. art I, § 7, cl. 1

<sup>101</sup> House Rule IX, cl. 2(a)(1) (setting forth blue slip procedure).

<sup>102</sup> The leading case is *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990), but it has produced little progeny. Earlier cases established that a bill is not covered by the Origination Clause unless the resulting funds were deposited in the general Treasury fund. See, e.g., *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906).

<sup>103</sup> *Rainey v. United States*, 232 U.S. 310, 317 (1914); *accord Flint v. Stone Tracey Co.*, 220 U.S. 107, 143 (1911).

<sup>104</sup> Kysar, *Shell Bill*, *supra* note 11, at 665-71.

<sup>105</sup> U.S. CONST. art. II, §2, cl. 2.

<sup>106</sup> Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 207 (2009) [hereinafter “Hathaway, *Presidential Power*”] (“The President possesses unilateral power to negotiate an agreement with a foreign party.”).

which [a bill] shall have originated” vote *first* on a veto override.<sup>107</sup> This role has entered constitutional law only obliquely as a means of glossing a separate constitutional rule. In the Supreme Court’s 1929 Pocket Veto Cases, the Court relied on the fact that “the House in which the bill originated is not in session” in the case at hand to construe the President’s pocket veto authority in relatively capacious terms.<sup>108</sup>

At least at first blush, these three starting rules seem to allocate significant agenda-setting authority. Without the consent of a relevant gatekeeper, it would seem, no proposal can even embark on its legislative voyage let alone reach safe anchor in the U.S. Code. Whether these provisions have indeed had such a decisive effect is a question I take up in Part III.

### 3. *The Equilibrating Role of Political Parties*

A final source of structure-induced equilibrium in legislative outcomes can be rooted in constitutional jurisprudence, but not constitutional text. At least formally, Article I neither restricts the range of proposals that can be introduced within the congressional process nor elicits any particular pattern of voting.<sup>109</sup> Nevertheless, congressional preferences are distributed in a monotonic (i.e. a single-peaked) pattern. Empirical studies of the second half of the twentieth century find that a single dimension of ideological difference explains more than eighty-five percent of congressional voting.<sup>110</sup> Polarization along this axis has increased since 2000.<sup>111</sup> Monotonicity in Congress reduces the likelihood of cycling, although it does not eliminate it entirely.<sup>112</sup>

The existence of monotonic congressional preferences suggests that the search for legislative stability can be usefully extended before the proposal of a

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<sup>107</sup> U.S. CONST. art. 1, § 7, cl. 2.

<sup>108</sup> 279 U.S. 655, 683 (1929). Petitioners in that case argued for a narrow reading of adjournment that encompassed only “the final adjournment of the Congress.” *Id.* at 674. The Court seemed to be influenced by the specificity of the sequencing rule in reading “Adjournment” broadly. *Id.* at 683-84. The same result logically, though, might have obtained without a reference to specific house that had to act first in a veto override.

<sup>109</sup> In the antebellum period, Congress did use its power to set internal rules of procedure to limit the domain of policy questions—imposing a “gag” rule on abolitionist proposals—in order to preclude instability both in the Arrovian and also the more colloquial sense. DON E. FEHRENBACHER, *SLAVERY, LAW, & POLITICS* 58 (1981).

<sup>110</sup> Keith T. Poole & R. Steven Daniels, *Ideology, Party, and Voting in the U.S. Congress, 1959-1980*, 79 AM. POL. SCI. REV. 373, 397 (1985); Keith T. Poole & Howard Rosenthal, *A Spatial Model for Legislative Roll Call Analysis*, 29 AM. J. POL. SCI. 357, 368 (1985).

<sup>111</sup> NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 15-70 (2006).

<sup>112</sup> Elizabeth Maggie Penn, John W. Patty and Sean Gailmard, *Manipulation and Single-Peakedness: A General Result*, 55 AM. J. POL. SCI. 436, 436-37 (2011).

bill in the House or Senate.<sup>113</sup> One plausible source of monotonicity in *congressional* preferences (as distinct from the general public’s preferences) is the binary structure of the national party system.<sup>114</sup> A two-party system tends to produce policy debates with a binary structure. The existence of only two parties, rather than the more crowded party systems observed in other democracies, flows in turn from two elements of the constitutional dispensation. First, it is a function of a single-district electoral framework since the Founding. Famously, Duverger’s law predicts that a simple-majority single-ballot electoral system is very likely to produce a binary party system.<sup>115</sup> This framework, though, is only partially a constitutional choice. At the federal level, it is necessitated solely in the post-Seventeenth Amendment Senate.<sup>116</sup> Notwithstanding its longstanding use, it is not required for the House of Representatives, which—except in states with only one congressional district—can be elected via multi-member districts.<sup>117</sup>

Second, notwithstanding the flexibility embedded in constitutional districting rules, the Court has identified the preservation of a two-party system as a state interest that licenses harsh restrictions on third parties’ access to the ballot.<sup>118</sup> The Court’s logic relied here (in a markedly circular fashion) on a worry about “party-splintering and excessive factionalism,”<sup>119</sup> and has been subject to much criticism as a result.<sup>120</sup> The Court, however, missed a chance to justify its protection of the national two-party systems by invoking the party duopoly’s

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<sup>113</sup> Parties are not the sole nonstate actors salient to national agenda creation. The national broadcast and news media—who, like political parties, are central objects of First Amendment solicitude—are pivotal actors in calibrating the national agenda. Unlike parties, though, they are “a major source of instability,” whose contributions conduce to “surges” and “lurch[es]” in policy focus. BAUMGARTNER & JONES, *supra* note 12, at 103, 125.

<sup>114</sup> See Levmore, *Parliamentary Law*, *supra* note 74, at 980; Grofman, *supra* note 52, at 1554 (“A two-party system creates a largely single-dimensional competition within the legislature.”). It is worth stressing that what requires explanation here is the distribution of congressional preferences, not popular preferences. That is, the public may or may not have monotonic preferences. Provided the constitutional system of representation translate those views into a monotonic array of legislative preferences, cycling will be dampened.

<sup>115</sup> MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 216-28 (Barbara & Robert North trans., Methuen 1954) (1951) (proposing that a simple majority electoral system strongly favors a two-party status quo).

<sup>116</sup> U.S. CONST. amd XVII.

<sup>117</sup> For judicial consideration of multimember congressional districts, *see, e.g.*, *White v. Regester*, 412 U.S. 755, 765 (1973) (multimember districts not necessarily unconstitutional); *accord* *Whitcomb v. Chavis*, 403 U.S. 124, 159-60 (1971).

<sup>118</sup> *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (“[T]he States’ interest [in political stability] permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system.”).

<sup>119</sup> *Id.* at 367

<sup>120</sup> *See, e.g.*, Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 342-44 (1997).

tendency to induce monotonic legislative preferences.<sup>121</sup> Stability of a social choice flavor, therefore, might be invoked to underwrite constitutional solicitude for the two-party system. That stability, moreover, may not emerge if alternative modalities of political choice were adopted in lieu of a two-party duopoly. In response, the critics of the party duopoly's constitutional status might point to the interaction between the party system and bicameralism. During periods of interparty polarization, where the gap between the median member of each party is large, it will be much more difficult to locate legislation that can survive every veto-gate created by Article I, Section 7. Over the past three decades, legislative inaction has increased in lockstep with increasing party polarization.<sup>122</sup> Stalemate, that is, flows from the interaction of two stability-inducing structures: our two-party duopoly characterized by ideologically distinct options and the thicket of concurrence rules populating Article I, Section 7. These interactions, which conduce to a supernumerary degree of stability, may justify loosening either one of the two design margins.

Although my focus here is the separation of powers, it is worth noting in passing that the choice between party-based and popular agenda-setting instruments also arises at the state level, in part because institutional experimentation is more readily feasible than at the federal level. Among the states, the popular initiative process has been used as a workaround of an entrenched party system.<sup>123</sup> Whether this workaround has provided successful is the object of debate.<sup>124</sup> Most recently, the choice between party-based and popular agenda control was starkly at issue in *Arizona State Legislature v. Arizona Independent Redistricting Commission* ["ARIC"], which formally concerned Arizona's allocation of redistricting authority to an independent commission.<sup>125</sup> That commission was formed to "en[d] the practice of gerrymandering and

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<sup>121</sup> Duopolies, notwithstanding the criticism to which they have been subject, are perhaps preferable to other instruments for limiting the domain of expressed political preferences. *See, e.g.*, David Levi, *The Statistical Basis of Athenian-American Constitutional Theory*, 18 J. LEG. STUD. 79, 887-89 (1989) (positing the classical Athenian practice of ostracism as a method of restricting domain).

<sup>122</sup> Sarah Binder, *Polarized we Govern?* 10, fig.3 (May 2014), <http://www.brookings.edu/~media/research/files/papers/2014/05/27%20polarized%20we%20govern%20binder/brookingscepmpolarized.pdf>; *see also* Sarah A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* 41 (2003) (reporting an earlier round of findings on stalemates).

<sup>123</sup> THOMAS CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 2-6* (1989).

<sup>124</sup> Because access to the initiative process depends largely on fiscal resources needed to organize the necessary signature campaigns, it is thus quite possible to imagine strategic agenda manipulation and cycling among proponents of different initiatives. Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1850-51 & 1862 (1999) (exploring signature thresholds and other fiscal barriers to entry in the initiative process).

<sup>125</sup> 135 S. Ct. 2652, 2658-59 (2015) (holding that Article I, § 4, clause 1 does not bar congressional redistricting by independent commission).

improving voter and candidate participation in elections” by moving the starting power in redistricting matters out of legislative hands into putatively more independent hands.<sup>126</sup> *ARIC* illustrates how agenda setting can emerge in the federalism as well as the separation of powers context because of elements the federal constitutional order that seem to distinguish between different institutions within a state.

### C. Agenda Control within the Executive Branch

This section first explores two ways in which the Constitution parcels out agenda-control power between Article I and II, in regard first to policy-making and then to appointments. As a way of showing the analytic traction obtained by the agenda-control lens, I further analyze internal executive-branch organization, especially the creation of multimember agencies, in terms of agenda-setting problematics.

#### 1. *Starting Rules and the Executive*

In most domains where the Constitution divides authority between the executive and Congress, Congress has the “exclusive” starting power as a matter of course.<sup>127</sup> As Justice Black stated in his *Youngstown* plurality opinion, “[i]n 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.”<sup>128</sup> The necessity for and temporal “primacy of the Article I lawmaking process”<sup>129</sup> over executive action is implicit in Article II’s command that the president “take Care that the Laws be faithfully executed.”<sup>130</sup> The *Youngstown* case itself, which is a bedrock of contemporary separation of powers jurisprudence, is often taken to stand for the proposition that “the President not only cannot act *contra legem*, he or she must point to affirmative legislative authorization when so acting.”<sup>131</sup>

Congressional starting power is underscored and reinforced in three different ways in the Constitution’s text and case-law. First, specific elements of

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<sup>126</sup> *Id.* at 2662 (noting that the independent commission was created to “en[d] the practice of gerrymandering and improving voter and candidate participation in elections” (citation and quotation marks omitted)).

<sup>127</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (Black, J., plurality op.); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319 (2001) (“Basic separation of powers doctrine maintains that Congress must authorize presidential exercises of essentially lawmaking functions.”). The creation of treaties, noted above, is an exception.

<sup>128</sup> *Youngstown*, 343 U.S. at 588-89 (noting “exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution”).

<sup>129</sup> Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2134 (2008)

<sup>130</sup> U.S. CONST. art II, § 3.

<sup>131</sup> Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10 (1993).

the Constitution's text reiterate the primacy of congressional action. The Declare War Clause,<sup>132</sup> for example, appears to repose in Congress the power to initiate armed hostilities and then to regulate comprehensively their execution,<sup>133</sup> although it is generally believed that the Framers intended the presidency to have power to “repel sudden attacks” on its own initiative.<sup>134</sup> Notwithstanding this exception, there is “no mistaking ... the Constitution's broad textual commitment to Congress's key role in the war-making system.”<sup>135</sup>

Second, the Court has developed lines of jurisprudence to preserve, to greater or lesser extents, legislative primacy in determining the content of federal policy. The more successful judicial intervention—perhaps so successful that it has now been largely forgotten—concerns the criminal law. Article I does not mention a specific congressional power to criminalize quotidian matters.<sup>136</sup> Nevertheless, it seems obvious that the federal government has the power to impose criminal punishment, and yet that the executive has no power to initiate a criminal prosecution in the absence of a legislative authority. At the time of the Founding, however, a federal prosecutor or judge could rely on a common law of crimes.<sup>137</sup> The executive's ability to rely on a repository of common law offenses invested it with a sort of starting power in respect to the criminal law. It was only in 1812 that the Supreme Court rejected that inheritance of common-law criminal offenses from colonial practice.<sup>138</sup> Extinguishing the federal common law of

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<sup>132</sup> U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power to ... declare War ....”).

<sup>133</sup> Although there is some controversy on this point, the best historical accounts stress the pervasive extent of congressional authority. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb - A Constitutional History*, 121 HARV. L. REV. 941, 947 (2008) (“Congress has been an active participant in setting the terms of battle (and the conduct and organization of the armed forces and militia more generally”); Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1340 (2015) (making a “case for expansive congressional power “ in respect to “domestic wars”).

<sup>134</sup> See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 475-77 (Norton 1966) (1840); see also Raoul Berger, *War-Making By the President*, 121 U. PA. L. REV. 29, 40-43 (1972) (analyzing those debates).

<sup>135</sup> Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 453 (2011).

<sup>136</sup> Indeed, a committed textualist ought to infer the opposite result. The Constitution assigns Congress power to “define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.” U.S. CONST. art I, § 8, cl. 10. Reading Article I as exclusive—as the Court has done in *Chadha*, *Bowsher*, and like jurisprudence—leads to the conclusion that the federal government has no power to criminalize.

<sup>137</sup> That common law of crime was recognized in eight federal circuits in the 1790s. see Gary D. Rowe, *The Sound of Silence: United States v Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 920 n.8 (1992) (collecting cases); see also Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 263 (1986) (mapping debates about the federal common law of crime).

<sup>138</sup> *United States v Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812).

substantive crimes in effect restored starting power to Congress, depriving the executive of the power to take the initiative.

Finally, robust protection of congressional first-mover prerogatives in the domestic policy domain implies careful policing of the boundary between enforcing an enacted statute and using that statute as a springboard for independent policymaking. An “intelligible principle” from Congress was, and technically still is, required to guide any exercise of executive branch discretion.<sup>139</sup> The extent of congressional agenda-setting power is measured in inverse proportion to the enforcement—or, as explored further below, non-enforcement<sup>140</sup>—of that specification demand. Among its other effects, failure to enforce a non-delegation rule in an era of broad agency rulemaking authority would mean that the status quo sheltered by bicameralism and presentment<sup>141</sup> is more likely to be comprised of Article II-calibrated norms.

Even when the Court recognizes a domain of threshold executive-branch authority, it also stresses residual pathways for congressional control. For example, describing the exclusive presidential power to recognize foreign sovereigns in *Zivotofsky ex rel. Zivotofsky v. Kerry*—in effect, an allocation of starting power to the president rather than Congress—the Court cautioned that it did “not question the substantial powers of Congress over foreign affairs in general or passports in particular.”<sup>142</sup> Hence, it would seem that the Constitution would generally require the legislative branch of Article I to be the first mover.<sup>143</sup>

## 2. *Appointments as a Form of Agenda Setting*

Once regulatory statutes are enacted, the manner in which they are enforced often turns on decisions made by federal agencies’ leadership. The mechanism for appointing senior officials to those agencies, therefore, acts as a

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<sup>139</sup> *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For a contemporary application, see *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001) (rejecting a nondelegation challenge under the intelligible principle rule).

<sup>140</sup> See *infra* text accompanying notes 203 to 206.

<sup>141</sup> See *supra* text accompanying notes 80 to 91.

<sup>142</sup> 135 S. Ct. 2076, 2096 (2015); see also *id.* at 2090 (“For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation’s course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.”).

<sup>143</sup> An exception is *Dames & Moore v. Regan*, in which the Court could point to no law that authorized its dismissal of private contract claims pending in U.S. courts against Iran. 452 U.S. 654, 686 (1981). Professors Manning and Goldsmith argue more generally that the President has “a discretion that is neither dictated nor meaningfully channeled by legislative command.” Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2308 (2006). Most of their examples—rulemaking, the executive of prosecutorial discrimination in the criminal context, deference to agency interpretations of regulatory statutes—arise within the four corners of a legislative authorization, and so are strained and inapposite of the claimed completion power.

subsequent moment for influencing the federal policy agenda. By alternating either zealous or reluctant agencies heads, political leaders can recalibrate agency enforcement efforts. Appointments to federal agencies, therefore, provide a second agenda-setting mechanism in the regulatory domain after the enactment of a statute.<sup>144</sup>

The constitutional scheme for appointments of both officials and federal judges is “a mirror image” of default rule in other settings. “Whereas Article I empowers the Congress to set the legislative agenda, the Appointments Clause grants agenda-setting power to the president on appointments matters.”<sup>145</sup> Indeed, Article II of the Constitution vests presidents with infeasible control over the selection of “principal officers” subject to possible rejection by the Senate.<sup>146</sup> Article II further grants the president power to make “recess” appointments without a Senate vote.<sup>147</sup> One study of appointments to twelve agencies between 1945 and 2000 found that 12 percent were made without Senate advice and consent, with presidents Eisenhower, Truman, and Reagan using the tactic most frequently.<sup>148</sup> In its recent decision in *NLRB v. Noel Canning*, the Court defined the president’s power to extend to all breaks in legislative proceedings more than three days in length, without regard to when the vacancy first arose.<sup>149</sup> Although some commentators have characterized *Noel Canning* as a “broad” construction of presidential power,<sup>150</sup> the ultimate effect of the opinion likely hinges on the Senate’s willingness to recess in ways that triggers presidential appointive power. Nevertheless, it is plausible to generalize to the effect that the president has starting power in respect to most important federal appointments.

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<sup>144</sup> The appointments power is only one of a series of instruments possessed by the President for influencing regulatory outcomes. Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 25-33 (2013) (canvassing those instruments). It is, however, the only one that is identified in the Constitution’s text.

<sup>145</sup> Michael J. Gerhardt, *Toward A Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL’Y 467, 481 (1998).

<sup>146</sup> U.S. CONST. art II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 133–37 (1976) (*per curiam*) (describing effect of Appointments Clause and holding that Congress cannot appoint officers).

<sup>147</sup> U.S. CONST. art. II, § 2, cl. 3.

<sup>148</sup> Pamela C. Corley, *Avoiding Advice and Consent: Recess Appointments and Presidential Power*, 36 PRES. STUD. Q. 670, 676 (2006).

<sup>149</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2558-73 (2014) (describing a relatively broad account of the Recess Appointment power).

<sup>150</sup> Michael B. Rappaport, *Why Non-Originalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL’Y 889, 892 (2015) (“When combined with the broad view as to when a vacancy happens, this interpretation allows the President to make a recess appointment for any vacant office during the six to ten legislative breaks of ten days or more that typically occur each year.”).

### 3. *The Design of Federal Agencies*

Arrow's theorem and its successors might seem to suggest that instability will be limited to the plural branches—Congress and the federal judiciary—while the “unitary executive”<sup>151</sup> will evade its perils. If allocating decisions to the executive obviated the trade-offs identified in social choice theory, then this might provide a powerful reason for allocating larger authority to Article II rather than to Article I or Article III. Indeed, it is certainly true that the hierarchical structure of an executive branch peaked with a singular head provides at least one putatively instability-proof channel for policy choice.<sup>152</sup> But not all decision-making in the executive branch is channeled through a singular vessel. Article II provides no safe harbor from instability.

There are two reasons to believe instability is a more substantial possibility in executive branch decision-making than is commonly realized. *First*, the Constitution does not assume that the president will shoulder the task of translating law into policy on its own. The opinions clause of Article II, to the contrary, assumes a multiplicity of “departments” in a hierarchical relationship with the president.<sup>153</sup> Many important decisions taken by the executive branch implicate several different agencies and are reached through either formal or “informal and relatively invisible.”<sup>154</sup> Some statutes contain what Jody Freeman and Jim Rossi call “concurrence requirements” that make interagency agreement a

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<sup>151</sup> The unitary executive theory of Article II of the Constitution holds that the President must have “the power to supervise and control all subordinate executive officials exercising executive power conferred explicitly by either the Constitution or a valid statute.” Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1177 n.119 (1992). Were the unitary executive theory to hold in practice (which even its proponents do not claim), it might stifle some, but not all, the institutional features that conduce to instability in decision-making within the executive. *Cf.* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 581-82 (1994) (setting forth implications of the theory for independent agencies).

<sup>152</sup> Quantitative studies of presidential control of regulatory agencies, however, have identified plurality even in White House influences. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) (“Presidential control is a ‘they,’ not an ‘it.’” (citation omitted)).

<sup>153</sup> *See* U.S. CONST. art. II, § 2 (empowering the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices”)

<sup>154</sup> J.R. DeShazo & Jody Freeman, *Public Agencies As Lobbyists*, 105 COLUM. L. REV. 2217, 2232 (2005) (claiming that “[a] great deal of interagency communication occurs in the administrative state”). A weaker form of collective choice has been identified in the adjudicative context. *See* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 813 (2015) (“Resolving administrative claims often involves interagency coordination throughout the process. Agencies coordinate throughout their investigations and claim development by sharing both facts and legal analyses with one another.”).

prerequisite of regulatory intervention,<sup>155</sup> much as Article I requires the concurrence of several elected bodies before a proposal becomes law. Even absent a formal interagency process, the regulatory process creates opportunities for instability to enter executive decision-making. Part of the Office of Information and Regulatory Affairs (OIRA's) function, for instance, is to manage "a genuinely interagency process."<sup>156</sup> Whenever this entails more than two agencies debating over more than two possible policy choices, there is an act of collective choice that must be reached through some decision rule—a decision rule that risks instability and incoherence.

*Second*, the design of post-New Deal regulatory agencies has often been motivated by a concern that the agency will succumb to the influence of "well-financed and politically influential special interest groups."<sup>157</sup> One of the agency design choices thought to hinder capture is multiplicity. There are by one recent count forty-three federal agencies captained by multimember boards.<sup>158</sup> The plural structure of these agencies' leadership means their decisions are vulnerable to the incoherence and instability dynamics identified in the social choice literature. It is also worth noting that about half of these multimember boards are statutorily required to show "partisan balance" in their composition.<sup>159</sup> This means that these boards tend to have more heterogeneous preferences than might otherwise be anticipated,<sup>160</sup> which means they have a less restricted domain of choices; as a result, they will tend to be more vulnerable to instability.<sup>161</sup> The choice between such multimember boards and single-headed agencies, therefore, implicates a trade-off between the risk of capture and the risk of instability or paralysis.

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<sup>155</sup> Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1160-61 (2012).

<sup>156</sup> Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1841 (2013).

<sup>157</sup> Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17 (2010); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1285 (2006) ("[More recent explanations of agency capture] look to how agencies cooperate with interest groups in order to procure needed information, political support, and guidance; the more one-sided that information, support, and guidance, the more likely that agencies will act favorably toward the dominant interest group.").

<sup>158</sup> Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 792 (2013).

<sup>159</sup> *Id.* at 797-99; see also Ronald J. Krotoszynski, Jr. et. al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 962-72 (2015) (tracing the historical usage of partisan balance requirements back to the 1862 Utah Commission).

<sup>160</sup> For a celebration of this characteristic that fails to note the effect of decisional stability, see Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000) ("An independent agency that is all Democratic, or all Republican, might polarize toward an extreme position .... A requirement of bipartisan membership can operate as a check against movements of this kind.").

<sup>161</sup> To the best I can tell, the only scholar to apply social choice theory in this context is Mayton, *supra* note 87, at 961-62.

In summary, problems of agenda control are endemic across the federal government. Article II supplies no escape route from the trade-offs presented by social choice theory by dint of the unitary nature of its textual design.

#### **D. Agenda Control and the Judiciary**

A multimember national judiciary, like a plural legislature, faces both the problem of selecting questions to address from a large background population of potential disputes, and then the difficulty of overcoming Arrowian instability in decision-making processes. The Constitution contains two agenda-setting mechanisms for judicial action: first, the congressional power to calibrate the scope of federal-court jurisdiction and second, the reticulated doctrine of standing inferred from the text of Article III.

##### *1. Jurisdictional Calibration as Agenda Control*

Like the domain of potential objects of government regulation, the universe of potential disputes amenable to federal-court resolution is too large to be compassed by the federal judiciary. Scarcity of adjudicative resources has implications both for the settlement function of the U.S. Supreme Court and also the more retail dispute-resolution service offered in district courts.

The Supreme Court is not centrally concerned with the resolution of individuals' disputes. It rather endeavors to resolve legal questions of wide-ranging importance.<sup>162</sup> At the same time, the Court lacks the resources, and perhaps the political support,<sup>163</sup> to decide *all* constitutional questions of large national significance. In contrast, federal district courts are engaged in a distinct kind of routinized resolution of granular individual disputes, the vast majority of which lack national resonance. Yet like the Supreme Court, federal district courts cannot possibly handle all potentially justiciable disputes.<sup>164</sup> Even in the limited domain of constitutional disputes, the volume of routine government actions that

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<sup>162</sup> Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1385 (1997) (emphasizing Supreme Court's role "as the authoritative settler of constitutional meaning").

<sup>163</sup> The leading empirical studies of the Court's "diffuse" support find a reservoir of public support that the Court can draw upon. See James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 355 (2003) (documenting (providing data on support of the Supreme Court from 1973 to 2000); see also Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1220-23 (1986) (charting changes in confidence in Court from the late 1960s to the early 1980s).

<sup>164</sup> For an example of judicial awareness of this point, see *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) ("Courts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case.") (internal quotation marks omitted).

might be characterized as violations of due process or equal protection norms means that lower courts need docket management tools to staunch a potentially overwhelming flow of litigation.<sup>165</sup>

In the first instance, the Constitution reposes the power to shape the judicial agenda in Congress's hand.<sup>166</sup> Congress not only has threshold authority to determine whether lower courts exist at all,<sup>167</sup> but also can carve "Exceptions, and . . . Regulations" to the appellate jurisdiction of the Supreme Court.<sup>168</sup> Since its founding, Congress has modulated both the extent of lower court jurisdiction and also Supreme Court settlement authority in response to changing social, political, and ideological demands.<sup>169</sup> Since the antebellum period, the Court has recognized broad congressional power over lower-court jurisdiction.<sup>170</sup> Regulation of the high court's appellate jurisdiction triggers more heated controversy.<sup>171</sup> Today, the Supreme Court exercises almost complete discretionary authority over the exercise of that appellate jurisdiction via the use of the certiorari system—but it is easy to forget that certiorari was a *congressional*

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<sup>165</sup> The Supreme Court has recognized this volume problem most explicitly in the context of constitutional tort litigation. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986) (holding that "random and unauthorized" actions cannot violate the Due Process Clause); *Hudson v. Palmer*, 468 U.S. 517 (1984) (extending *Parratt*'s exhaustion principle to intentional torts). It is arguable that anxieties about docket management have shaped the landscape of constitutional remedies more generally. *See Aziz Z Huq, Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L. J. 1 (2015) [hereinafter "Huq, *Judicial Independence*"].

<sup>166</sup> Extrapolating from discussions of the power of downstream veto-gates to influence earlier participants' strategic choices in a multistage decisional process, it might be posited that Congress also influences the judiciary's distribution of adjudicative resources via the threat of a legislative override. Recent research concern patterns of the Supreme Court certiorari grants between 1953 and 1993, however, obtains a null result for that kind of anticipatory effect. Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412, 419-24 (2010). Hence, Congress's influence appears to be purely *ex ante* in operation.

<sup>167</sup> James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 715-18 (1998) (describing how "the Madisonian Compromise, letting Congress decide whether to appoint inferior tribunals" emerged at the Philadelphia convention).

<sup>168</sup> U.S. CONST. art. III, § 2, cl. 2. The Court's original jurisdiction is sufficiently exiguous to be of little practical significance.

<sup>169</sup> For a detailed history of jurisdictional development in both the lower courts and the apex tribunal, see JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012).

<sup>170</sup> *See, e.g.*, *Sheldon v. Sill*, 49 U.S. 441, 448-49 (1850) (upholding the power of Congress to restrict the scope of diversity jurisdiction). With a handful of exceptions, there is also an academic consensus that "Congress has very broad power to limit the jurisdiction of the lower federal courts, as long as the Supreme Court retains appellate jurisdiction over constitutional claims initially litigated in state court." Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1093 (2010).

<sup>171</sup> Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895-97 (1984) (documenting that history).

choice, one that can be presumptively unraveled by legislative hands.<sup>172</sup> The fact that Constitution reposes agenda control power for the judiciary in the elected branches has engendered much anxiety and hand-wringing among scholars.<sup>173</sup> Nevertheless, in the absence of a definitive statement to the contrary from the Court, the text of the Article III would seem to vest the legislature with tolerably broad authority to determine which constitutional questions of national import end up on the judiciary's agenda.<sup>174</sup>

## 2. *Justiciability Doctrine as Agenda Control*

A second species of agenda control power lies with the courts rather than Congress. The Justices have authority to develop doctrine that selects between litigants in ways that shape the flow of issues presented in subsequent periods. I use the example of standing doctrine here, but a parallel point might be made with many other doctrines, including ripeness, mootness, and the elaborate judge-made structures of state sovereign immunity. The Supreme Court has read the words “case” and “controversy” in Article III to limit the class of cognizable disputes. One element of the ensuing body of justiciability doctrine concerns the standing of plaintiffs to seek judicial redress.<sup>175</sup> It is typically said that standing's central function is “ensure that the people most directly concerned are able to litigate the questions at issue.”<sup>176</sup> But in a pair of insightful articles, Maxwell Stearns has adduced another, quite ingenious explanation for standing doctrine: these rules constitute a judicially fashioned source of structure-induced equilibrium.<sup>177</sup> A further inference from Stearns logic is the use of stare decisis to limit the emergence of cycling by making a first resolution of an issue presumptively

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<sup>172</sup> Congress first reposed significant discretionary authority in the Court's own hands over the content of its appellate docket in the Evarts Act, Act of Mar. 3, 1891, ch. 517, §6, 26 Stat. 826, 828, a discretion expanded in later statutes, *see, e.g.*, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

<sup>173</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953).

<sup>174</sup> For a textual argument to this effect, see John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204 (1997).

<sup>175</sup> *Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009) (framing the “critical question [in standing analysis as] whether at least one petitioner has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.” (internal quotation marks and emphasis omitted)).

<sup>176</sup> William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988). The black-letter law of standing is now calcified in the three-part test of injury-in-fact, causation, and redressibility enunciated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992); *see also* *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009) (describing the tripartite *Lujan* test as a “hard floor”).

<sup>177</sup> Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) [hereinafter “Stearns, *Historical Evidence*”]; Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) [hereinafter Stearns, *Justiciability*].

conclusive, even when a majority might exist to overturn it, provides another guarantor of stability in judicial outcomes.

The potential for Arrowian instability arises whenever a multimember must select among more than two alternative rules: Arrow's theorem holds that a majority votes sequentially and pairwise for A over B, B over C, and A over C.<sup>178</sup> Absent some constraint on the reconsideration of A, a Court facing these alternatives can "continue to cycle indefinitely, leading to a stalemate."<sup>179</sup> Alternatively, if previously defeated options are eliminated from consideration by the doctrine of stare decisis, "the power to set the agenda, meaning the power to determine the order in which options are presented for voting" will be outcome dispositive.<sup>180</sup> Courts are vulnerable to a second kind of instability called the doctrinal paradox. This arises when a collective entity forms a judgment on a single matter based on numerous sub-issues, but different ultimate results are obtained by a single all-or-nothing vote versus seriatim issue-by-issue voting over sub-issues.<sup>181</sup> The Third Circuit Court of Appeals recently confronted a dispute in which outcome-voting and issue-voting in an antitrust case would have resulted in different results because of three judges' views on an antitrust standing and an antitrust merits question.<sup>182</sup> (That case is unusual, perhaps, because of the judges recognized the doctrinal paradox, and provided cogent discussions of how it should be resolved). In at least one case, moreover, it is arguably that a Justice (perhaps strategically) decided to switch from outcome-based voting to issue-voting for the purpose of influencing the outcome of a case.<sup>183</sup>

Standing rules, Stearns ingeniously argues, do not entirely extinguish instability in multimember courts. Rather, standing rules tether access to the federal courthouse to a set of facts—*injury-in-fact*—largely outside the control of individual litigants.<sup>184</sup> Stearns thus characterizes the *injury-in-fact* element of standing doctrine as "likely beyond" the power of even powerful interest groups

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<sup>178</sup> For examples, see Stearns, *Historical Evidence*, *supra* note 177, at 1335-39 (providing an example from standing doctrine).

<sup>179</sup> Stearns, *Historical Evidence*, *supra* note 177, at 1339.

<sup>180</sup> *Id.* at 1340, 1347; *see also id.* at 1353 (describing the stabilizing role of stare decisis); Stearns, *Justiciability*, *supra* note 177, at 1314-15 (same); Saul Levmore, *Public Choice and Law's Either/or Inclination*, 79 U. CHI. L. REV. 1663, 1663-64 (2012) (noting that "judicial results might depend on the order in which cases are considered").

<sup>181</sup> *See* Christian List, *The Probability of Inconsistencies in Complex Collective Decisions*, 24 SOC. CHOICE & WELFARE 3, 4-5 (2005) (detailing doctrinal paradox); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 11-12 (1993) (applying it legal doctrine).

<sup>182</sup> *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 189 (3d Cir. 2015) (Ambro, J., concurring).

<sup>183</sup> Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 84 (2003) (discussing Justice Kennedy's vote in *Arizona v. Fulminante*, 499 U.S. 279 (1991)).

<sup>184</sup> Stearns, *Historical Evidence*, *supra* note 177, at 1551.

seeking judicial ratification of a non-Condorcet-winner rule.<sup>185</sup> Standing doctrine’s injury-on-fact rule, in Stearns’ view, therefore prevents interest groups from engaging in “advertent or ideological path manipulation.”<sup>186</sup> It thus shifts agenda control power away from litigants, whose privilege to litigate depends on judges’ willingness to recognize a given injury. On this account, standing does not supply a guarantee that a Condorcet winner (if one exists) will emerge from a sequence of litigated cases or that the particular order in which issues arises does not influence the final equilibrium reached by the Court. Nor will it prevent Justices from exploiting the doctrinal paradox.<sup>187</sup>

In sum, the institutional responses to Arroviaian instability in the judiciary are a blend of interbranch and precedential tools. Congressional regulation of lower court jurisdiction—the bounds of which have constantly shifted over time as Congress has hemmed in or let out the judicial role in response to fluctuating social demands—determines the range of issues that federal courts can confront from among the heterogeneous world of potential legal questions. Standing and stare decisis doctrines, in contrast, might be explained as efforts to prevent certain forms of strategic action and induce a minimum of stability. Notably, neither form of agenda-control device precludes strategic flipping between outcome-voting and issue-voting, strategic decisions to grant or deny certiorari review,<sup>188</sup> or other retail *judicial* efforts to shape the law by leveraging agenda control power.

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<sup>185</sup> *Id.* at 1362 (“Standing promotes adherence to the majoritarian norm by preventing, at least presumptively, non-Condorcet minority from forcing its preferences into law through the judiciary.”); see also Stearns, *Justiciability*, *supra* note 177, at 1395-96 (asserting that the injury-in-fact rule “properly understood, is not really about injury at all. Instead, the term “injury” is a metaphor. The relevant inquiry in comparing these cases is whether the facts alleged are sufficient to overcome the burden of congressional inertia”). Where the judiciary’s preferences diverge from those of the general public, however, standing might not have that democracy promoting effect that Stearns envisages. Instead, standing may prevent Condorcet majorities in the general population from manipulating the order in which issues are presented to a Court in order to ensure that the popular median preference, not the judicial median preference, becomes law.

<sup>186</sup> Stearns, *Justiciability*, *supra* note 177, at 1400-01. The Supreme Court’s discretion in respect to whether to grant review via a petition for certiorari, Stearns notes, is subject to potential manipulation by the Justices, and cannot prevent the manipulation of jurisprudential paths in the federal appellate courts. *Id.* at 1350-53.

<sup>187</sup> Nash argues that “courts do not adhere to a strict outcome-based voting regime but rather follow a modified outcome-based voting protocol,” and that this regime, coupled with restraints on interlocutory appeals, increases the frequency with which the doctrinal paradox can arise. Nash, *supra* note 183, at 84-89. As a result, the doctrinal instability can emerge in and across cases.

<sup>188</sup> For evidence that the voting on certiorari petitions is informed by strategic, policy-focused considerations, see Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1072 (2009) (finding based on a study of a random sample of 358 noncapital petitions, that “Justices grant review when they believe that the policy outcome of their merits decision will be better ideologically for them than the status quo”).

## E. A Taxonomy of the Constitution's Agenda Control Mechanisms

This Part has demonstrated that the Constitution contains a wide array of agenda-setting rules within the separation of powers domain alone. These devices respond either to capacity constraints and the need to select only a slice of issues for government intervention and also to the immanent specter of instability in collective choice mechanisms. Agenda control instruments in the Constitution also work in diverse ways, assigning power to a range of actors inside and outside the Constitution. In the aggregate, they comprise a central element of our Constitution's design.

The heterogeneity of agenda control devices found in the Constitution, however, should not deflect analysis. Despite their diversity, it is possible to organize those diverse instruments of institutional design into a tolerable, simple taxonomical framework—one that should enable further analysis. The agenda control instruments adumbrated above can be usefully organized according to three parameters: (1) starting powers v. concurrence powers; (2) intramural v. external powers; and (3) state v. nonstate actors. Institutional designers can advance different goals, I suggest, by toggling between these various options. This section sets forth those different design choices, as illuminated in the Constitution's text. It further sets forth variations within some of those large categories.

The first margin concerns the timing of an agenda setter's power, in particular whether that power entails the ability to *start* a decisional process, or whether it is a subsequent power to *concur* that is conditional on another actor's decision to set in motion a process. *Starting powers* are constitutional endowments to select an issue from the array of possible objects of government regulation and to initiate policy-making on that topic. Moreover, the starting powers in the Constitution come in two flavors: they can be either *complete* or *contingent*. A *contingent* starting power entails the ability to offer a proposal subject to rejection or amendment by another actor. The House's origination authority and the President's appointment have this aspect. In both instances, the starting power does not exhaust the preconditions for legal efficacy. On the other hand, a *complete* starting power entails a power to not just make a proposal, but also to preclude any stalling or veto. The presidential "recognition power" described in *Zivotofsky ex rel. Zivotofsky v. Kerry*,<sup>189</sup> for example, allows the executive to present the other branches with a *fait accompli* with immediate legal and diplomatic consequences.<sup>190</sup> Similarly, the recess appointment power is a

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<sup>189</sup> 135 S. Ct. 2076, 2084-85 (2015).

<sup>190</sup> *Id.* (recognizing "[l]egal consequences," including the recognized sovereign's right to sue, to claim sovereign immunity, act-of-state immunity, and noting that recognition is "a precondition of regular diplomatic relations").

complete, if temporally bounded, power to invest a person with the legal powers and perquisites of a federal office.<sup>191</sup>

*Concurrence* powers are conditional on another institution's power to initiate state action. At least formally, the Constitutional text seems to assign concurrence powers to the president (who can veto legislation), the Senate (which can resist treaties) and the judiciary (which must shape the mandate engrafted into jurisdictional legislation). Concurrence powers might further be dichotomized as either *plenary* or *partial*. A *plenary* concurrence power allows an office-holder not merely to stop a proposal, but also to alter it. The Senate's role under the Origination Clause has this aspect, as does the Court's discretionary control of its own appellate jurisdiction.<sup>192</sup> In other cases, a concurrence power is *partial* insofar as it only permits approval or disapproval of the first mover's proposal without substitution of an alternative. The Senate's role in the appointments process has this character. These terms, plenary and partial, are useful heuristics describing end-points of a range, not precise descriptions. To see this, consider how Congress's lawmaking power should be characterized. On the one hand, Congress's super-majoritarian power to enact laws over a presidential veto might be seen as an effectively complete power. Where Congress eliminates a criminal penalty or authorizes private behavior, in particular, the executive can do little to resist. But when Congress's intended policy change depends on executive-branch action, legislative power looks more partial.

The second design decision focuses upon the choice between *intramural* versus *external* assignment of agenda control. An intramural agenda control power is one that assigns to a single entity the power to select among potential policy pathways, and also the power to act upon that choice. For example, the President's recess appointment power is intramural insofar as it allows the executive branch to exercise control at a key veto-gate over regulatory policy.<sup>193</sup> Similarly, the new-minted recognition power of *Zivotofsky* is also an intramural instrument of agenda control: it dictates which of several potential diplomatic stances the United States will adopt toward diverse international counterparties.<sup>194</sup>

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<sup>191</sup> A recess appointment "shall expire at the end of their next session." U.S. CONST. art. II, § 2, cl. 3. What of the power to appoint inferior officers?

<sup>192</sup> The Court reserves the authority to reframe the questions presented by a given petition, EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 459-61 (9th ed. 2007), a power that it uses with increasing frequency, Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 689 (2012) (criticizing the practice).

<sup>193</sup> It is precisely the ensuing institutional amalgam of agenda control and power to act, indeed, that generates suspicion among many commentators. Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523, 1555 (2013) (worrying, in the recess appointment context, that "concentrated power often results in the loss of liberty").

<sup>194</sup> A weak form of endogenous agenda control device, which falls at the boundary of this paper's scope, is each house's power to set its own rules. U.S. CONST. art I, § 5, cl 2. Those rules

And it is possible to see standing doctrine as a kind of intramural agenda-control device. In one prominent account, standing doctrine is a fabrication of liberal Justices during the New Deal seeking to insulate regulatory initiatives from judicial unsettling.<sup>195</sup> That is, standing is an invention of the federal courts grounded in an ingenuous reading of isolate text fragments from the Constitution—an autochthonic mechanism for self-regulating the order of cases presented for judicial resolution.

By contrast, an external agenda control power is one that divides between entities (a) the power to *propose or vote* on a matter, and (b) the power to *act* upon that matter. It is perhaps unsurprising that a Constitution that consciously positions institutional powers to check and balance each other<sup>196</sup> would frequently split the power to propose from the power to act. Across Congress and the executive, it is the executive that is empowered to act, but Congress alone that can propose a policy. Examples of external powers include the president’s power to nominate Article III judges, the Senate’s point to block principal officer appointments, and Congress’s authority to enact jurisdictional statutes.

The third and final distinction to draw is between the exercise of agenda-setting power by a state actor, as opposed to a person plainly outside the state apparatus but operating under a constitutional license. The lion’s share of examples supplied in Part II, of course, concerns allocations of power *within* the three federal branches. In descriptive legislative agenda-setting, I identified political parties as central stabilizing forces. To this one might add the role of the media as an agenda-setting, although one more prone to dis-equilibrating effects than stability.<sup>197</sup>

Table 2 summarizes the resulting taxonomy of agenda control devices found in the Constitution. Examples are provided for each taxonomical cell for which they are available (with italics used to indicate those institutional design possibilities that have been struck down by the Court on constitutional grounds).

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determine who in Congress has power to block proposed legislation, and thus has important outcome-related consequences.

<sup>195</sup> Compare Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436-38 (1988) (advancing the thesis of standing as an invention of liberal Justices), with Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 695-967 (2010) (finding that “the insulation thesis does not fully explain the conception or invention of the modern standing doctrine”).

<sup>196</sup> For a canonical statement of this position, see *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) (*per curiam*).

<sup>197</sup> See *supra* note 113.

**Table 2. A Taxonomy of Agenda Control Mechanisms**

|                          | State Actors   |  | Nonstate Actor   |
|--------------------------|--|--|--|
|                          | Intramural   | External   |  |
| <b>Starting Power</b>    | The President's recess appointment power<br>The President's treaty powers<br>The proposing chamber in veto override votes<br>Standing doctrine | Congress's power to enact bills<br>Congress's control of federal-court jurisdiction<br>The House's Origination Power | Political parties<br><br>Initiative mechanisms in the states |
| <b>Concurrence Power</b> | The President's veto<br>Line-item veto   | The Senate's role in fiscal legislation<br>The Senate's role in appointments and treaties<br>Legislative veto        |  |

As diverse as the options arrayed on Table 2 are, the variety of agenda-setting rules in the U.S. context hardly exhausts the field. To the contrary, there are many devices for agenda control that do not appear in this enumeration. Consider, for example, the mechanism for setting the legislative agenda in fifth century B.C. Athens, in the wake of Cleisthenes' democratic reforms. Athenian legislative power was partitioned between an Assembly, open to all who chose to attend on a give day, and a Council of 500, whose paid members were chosen by lot and limited to two years' service.<sup>198</sup> The Council had the power to set the Assembly's agenda, in the sense of defining the issues under consideration.<sup>199</sup> The effect of this system was to split the power to establish the threshold set of questions under deliberation from final decisional authority. Moreover, the randomization rule for selecting Council members, in tandem with a term limit, can be understood as a means to rein in strategic use of the power to set threshold agendas.<sup>200</sup> Today, "random processes are virtually never found in parliamentary law," even though order-mandating rules are in effect "often ... a randomizing element."<sup>201</sup> This suggests that there are plausible and tractable design opinions

<sup>198</sup> JOSIAH OBER, *THE ATHENIAN REVOLUTION: ESSAYS ON ANCIENT GREEK DEMOCRACY AND POLITICAL THEORY* 25 (1996).

<sup>199</sup> *Id.*; see also JOSIAH OBER, *DEMOCRACY AND KNOWLEDGE: INNOVATION, INNOVATION AND LEARNING IN CLASSICAL ATHENS* 142-51 (2008) (describing the geographical roots and structure of the Council, and noting the effect of term limits on preventing "a self-serving identity or corporate culture").

<sup>200</sup> Once a question had been proposed, the assembly did not count votes, but instead employed *cheriotonia* (a rough hand count) or even *thorubus* (acclamation by shouts). Melissa Schwartzberg, *Shouts, Murmurs and Votes: Acclamation and Aggregation in Ancient Greece*, 18 J. POL. PHIL. 448, 464 (2010). Probabilistic modes of aggregation of this kind obscured cycles, likely making the Council's agenda-setting role even more significant.

<sup>201</sup> Levmore, *Parliamentary Law*, *supra* note 74, at 990 n.57. Adam Samaha identifies the military draft, randomized experiments in welfare policy in the 1960s, and federal land-grant lotteries, as

that have yet to be explored in the American context.<sup>202</sup> The diversity of observed agenda control modalities in contemporary constitutional law, in short, should not preclude experimentation with novel instruments for clarifying the focus on government action and resolving instability when government acts.

### III. The Transformation of Constitutional Agenda Control

The Framers' inclusion of a mechanism in the original constitutional text is no guarantee of persistence. This Part revisits the allocation of agenda-control powers between the three branches to consider how well the Framers' constitutional allocation of agenda-control powers has fared. In brief, the careful distribution of agenda-control powers described in Part II has not fared well: Starting and concurrence powers have diffused across branch boundaries and from within to outside government. By examining the taxonomy of agenda control mechanisms developed in Part II.E, moreover, a logic of success and failure emerges. Generally speaking, *endogenous starting* powers work all too well, whereas external starting powers founder. Concurrence rules, whether endogenous or external, have mixed success. Moreover, starting authority has migrated away from the House of Representatives and from Congress more generally toward the executive. On the other hand, the federal courts in general—and the Supreme Court in particular—have wrestled away a large measure of starting authority in relation to the range of issues to be settled through judicial review on either constitutional or statutory grounds. While hardly powerless, therefore, Congress no longer occupies the axial position the Framers envisaged.

This Part documents those changes and evaluates their consequences. I identify two movements of agenda-control authority, the first from Congress to the executive and the second from Congress to the federal courts (and the Supreme Court in particular). These transfers of agenda-control authority, I suggest, are better understood as evidence of salutary institutional adaption in the teeth of continuing challenges than as infidelities to an original institutional dispensation. Although each shift of agenda setting power has subtle distributional consequences, none wants for rational justification.

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three recent instances of randomization in government. Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 25-27 (2009). None of these examples concern agenda-setting problems.

<sup>202</sup> The role of the European Commission in setting the agenda for Europe-wide law-making is another example. See George Tsebelis, *The Power of the European Parliament as a Conditional Agenda Setter*, 88 AM. POL. SCI. REV. 128 (1994).

## A. The Struggle for Agenda Control Between Congress and the Executive

The trajectory of Congress-executive branch relations can be reframed as an erosion of the original constitutional allocation of agenda-control authority across several domains, including regulatory matters, fiscal decisions, and veto overrides. Judicial efforts to prevent this shift have been erratic and ineffectual in promoting any coherent vision of legislative process.

### 1. Congress and the Nation's Regulatory Agenda

Congress no longer has a monopoly on the nation's regulatory agenda. It is common knowledge that the nondelegation doctrine lies in desuetude both in the courts and practical political life.<sup>203</sup> Its demise is exemplified by administrative agencies' recent efforts to deploy old statutes "deliberately and strategically" to address policy problems that did not exist at the moment the statute was initially enacted,<sup>204</sup> a capacity aided by courts' deference to agency expertise as a means "to soften statutory rigidities or to adapt their terms to unanticipated conditions."<sup>205</sup> In effect, these practices blunt legislators' ability to determine which social problems warrant political attention, and which do not. Symptomatic of the erosion of congressional agenda control in the regulatory sphere is the reflex, increasingly evinced both by courts and commentators, of justifying exercises of regulatory power as democratic by dint of the *president's*, rather than *Congress's*, democratic imprimatur.<sup>206</sup> That is, independent law-making by the executive is now vindicated with a normative theory of democracy at variance with the theory implied in Article I.

Outside the ordinary regulatory sphere, Congress's other regulatory powers have similarly withered on the vine. Consider the powers to make war, create international obligations, and define crimes. In each domain, Congress has largely ceded agenda-setting authority to the executive. First, to near universal

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<sup>203</sup> Lawson, *supra* note 22, at 1243 (stating that the failure of the nondelegation rule faces "no serious real-world legal or political challenges").

<sup>204</sup> Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 19 (2014) (giving as examples EPA's deployment of the CAA to address climate change and FERC's use of the FPA to modernize electricity policy).

<sup>205</sup> Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2102-03 (1990).

<sup>206</sup> For judicial deployment of a presidential accountability trope in administrative law, see, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010); *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring). For the leading scholarly treatment, see Kagan, *supra* note 127, at 2332-33 (arguing that "[p]residential administration promotes accountability" by "enabling the public to comprehend more accurately the sources and nature of bureaucratic power" and "establish[ing] an electoral link between the public and the bureaucracy").

obloquy,<sup>207</sup> legislators have largely renounced their power to declare war, while also abjuring the use of fiscal powers to discipline overseas military adventures.<sup>208</sup> Presidential initiation of armed hostilities has become the rule, with or without a sudden attack, while the Declare War clause has fallen into desuetude.<sup>209</sup> Symptomatic of this trend, the Declare War Clause has been invoked only five times in American history.<sup>210</sup> War-making, in important ways, is a prerogative of the executive branch.<sup>211</sup> Second, in the international domain, it is increasingly common for the president to enter into so-called executive agreements, lacking any congressional imprimatur, in lieu of treaties.<sup>212</sup> One commentator has observed that between 1980 and 2000, the United States made 2744 congressional-executive agreements and only 375 treaties.<sup>213</sup> The president can also, by signing a treaty, encumber the United States with international obligations even if the prospect of Senate ratification is dim.<sup>214</sup> Finally, although formally the first-mover in the definition of federal criminal law, in practice, Congress is better viewed as responsive to executive-branch needs. Congress is heavily and asymmetrically lobbied by the Department of Justice.<sup>215</sup> It has enacted a network of federal criminal laws that delegate effectual policymaking authority to prosecutors via “laws with punishments greater than the facts of the offense would demand,” that “allow prosecutors to use the excessive punishments as bargaining chips.”<sup>216</sup> The perhaps ironic resemblance between the freewheeling

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<sup>207</sup> The original, and still, the best critique is JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 47-54 (1993).

<sup>208</sup> Ackerman & Hathaway, *supra* note 135, at 476.

<sup>209</sup> This has long been recognized. *See* Berger, *supra* note 134, at 58-59.

<sup>210</sup> Jennifer K. Elsea & Richard F. Grimmett, Cong. Research Serv., RL 31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* 4-5 (2007) (listing the War of 1812, the Mexican War of 1846, the Spanish American War of 1898, World War I declared in 1917, and World War II).

<sup>211</sup> At the time of this writing, this dynamic was playing out in respect to the conflict against the Islamic State in Syria. *See* Manu Raju & Burgess Everett, *War Authorization in Trouble on Hill*, POLITICO, March 5, 2015, <http://www.politico.com/story/2015/03/no-clear-way-forward-isil-war-authorization-115773.html>.

<sup>212</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 217 (2d ed. 1996) (describing such agreements as a “complete alternative” to treaties). Henkin here understates the degree of longstanding resistance of congressional-executive agreements. *See, e.g.*, Edwin Borchard, *Treaties and Executive Agreements--A Reply*, 54 *YALE L.J.* 616, 616 (1945).

<sup>213</sup> Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1258-60 (2008).

<sup>214</sup> David H. Moore, *The President's Unconstitutional Treaty-making*, 59 *UCLA L. REV.* 598, 604-13 (2012) (explaining why, under Article 18 of the Vienna Convention on the Law of Treaties, signature of treaties incurs significant consequences even absent ratification).

<sup>215</sup> Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. REV.* 575, 587-88 (2002) (describing the Justice Department as the only “regular player” lobbying congressional staff on criminal justice policy); *accord* Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 728 (2005) (“No other group comes close to prosecutorial lobbying efforts on crime issues.”).

<sup>216</sup> Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 880 (2009).

days of the federal common law of crime<sup>217</sup> and today's open-ended statutory delegations of criminalization only underscores the failure of Congress's notional starting power.

Ironically, even as Congress has otherwise ceded regulatory agenda-setting power, the dykes to legislative action erected by the concurrence rules of bicameralism and presentment have proved remarkably effective at precluding formal legislative action.<sup>218</sup> The high transaction costs of legislative action render the low transaction costs of executive branch action all the more salient and alluring.<sup>219</sup> This has led presidents to refine their constitutional instruments of policymaking. The appointments power, for example, effectively vests presidents with continuing influence over the policy agenda.<sup>220</sup> There is some empirical uncertainty about the magnitude of this effect.<sup>221</sup> A threshold reason for this uncertainty is the observed historical variance in senatorial resistance to presidential nominations.<sup>222</sup> There is also some theoretical reason to suspect that the effect of presidential appointive authority will be weaker than might appear at first blush. To be sure, presidents have unfettered authority to pick candidates to advance to the Senate, and can deploy their recess appointment power in the teeth of senatorial opposition.<sup>223</sup> (Executive branch lawyers, moreover, had crafted a "broad construction" of the recess appointment power as early as the 1840s,<sup>224</sup>

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<sup>217</sup> See *supra* text accompanying note 137.

<sup>218</sup> See *supra* text accompanying notes 85 to 91.

<sup>219</sup> Freeman & Spence, *supra* note 204, at 8-17.

<sup>220</sup> Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1606 (2015) [hereinafter "Mendelsohn, *Uncertain Effects*"] (assuming presidential incentives to make appointments in order to influence the content of substantive policies); accord Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 250. But see David E. Lewis, *The Personnel Process in the Modern Presidency*, 42 PRES. STUD. Q. 577, 584 (2012) (discussing the administration's incentive to "reward campaign personnel, surrogates, and donors with jobs"). Similar considerations may infuse notionally merit-based civil service hiring to which Article II does not apply. David E. Lewis & Richard W. Waterman, *The Invisible Presidential Appointments: An Examination of Appointments to the Department of Labor, 2001-11*, 43 PRES. STUD. Q. 35, 51 (2013) (presenting evidence of presidential influence on agency staff level--noncareer SES or what are known as Schedule C appointees); accord Nina Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 610-11 (2003).

<sup>221</sup> For an optimistic view of that power's scope, focusing on the Reagan presidency, see Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 235, 235 (John E. Chubb & Paul E. Peterson eds., 1989).

<sup>222</sup> Resistance often takes the form of delay. See Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122, 1136-41 (1999) (quantifying delays over time).

<sup>223</sup> Indeed, Corley finds that presidents are most likely to invoke the recess appointment power when they face large opposition in the Senate, and when they have a reserve of political capital. Corley, *supra* note 148, at 677.

<sup>224</sup> Michael J. Gerhardt, *Constitutional Construction and Departmentalism: A Case Study of the Demise of the Whig Presidency*, 12 U. PA. J. CONST. L. 425, 441 (2010).

albeit one that received judicial blessing only in 2014.<sup>225</sup>). The Senate, however, has been increasingly demurring to move appointees forward, leading to a growing catalog of vacancies.<sup>226</sup> That is, just as in other sequential, multi-stage decisional processes, the advantage that accrues to the possessor of exclusive proposal power is cabined when subsequent veto players are willing to pay the political price of blocking action. Further, recent research identifies a relatively short tenure of most Senate-confirmed officials, which implies that they are unlikely to initiate, or see to completion, major policy initiatives.<sup>227</sup> On the other hand, the number of administrative positions subject to Senate confirmation has seen a recent “staggering” uptick.<sup>228</sup>

The net effect of these cross-cutting trends on the magnitude of presidential post-enactment control via the appointments power is hard to quantify. Adding to the complexity of the analysis, any evaluation of ex post presidential control over regulatory policy would also have to account for non-constitutional instruments of regulatory control, such as centralized White House regulatory review, as well as potentially severe epistemic constraints upon congressional oversight.<sup>229</sup> Nevertheless, it remains safe to say that the president’s appointment power—just like bicameralism and the veto—still operates as a potent downstream device for agenda control. The magnitude of its effect—although uncertain—directly determines presidential authority over regulatory agendas. The larger such power, the less important is the threshold specification of regulatory policy by Congress via the exercise of bicameralism and presentment.

## 2. *Congress and the Fiscal Agenda*

At first blush, it would seem that constitutional starting rules are especially significant allocations of decisional authority between constitutional actors in respect to fiscal matters. The Origination Clause seems to imply that if the House

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<sup>225</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

<sup>226</sup> Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1677 (2015) (documenting recent increases in the duration of vacancies).

<sup>227</sup> Mendelsohn, *Uncertain Effects*, *supra* note 220, at 1595-96 (arguing that “political supervision of significant regulatory activity is mainly reactive, not proactive. Midlevel Senate-confirmed political officials may not be responsible for many significant new affirmative agenda items”). The mean term of office of a Senate confirmed official is less than three years. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 919 n.23 (2009).

<sup>228</sup> Joel D. Aberbach & Bert A. Rockman, *The Appointments Process and the Administrative Presidency*, 39 PRES. STUD. Q. 38, 41, 48-49 (2009).

<sup>229</sup> For example, congressional efforts to oversee administrative agencies are limited by legislators’ limited epistemic competence, and the relative expertise of agency officials. Terry M. Moe, *Political Control and the Power of the Agent*, 22 J.L. ECON. & ORG. 1, 3 (2006). If epistemic constraints are large, an ineffectual appointments power may be somewhat irrelevant.

wishes to resist the Senate’s initiatives, it can simply refuse to propose a fiscal measure in the first instance. The power to hold-up the legislative process by refusing to start the ball rolling would seem to imply a disproportionate power on the House side. Consistent with this view, Adrian Vermeule has argued that the Origination Clause vests the House with “an intangible but real form of first-mover advantage from its ability to set the policy agenda in ways that structure both legislative and political debate.”<sup>230</sup> The leading empirical study of the effect of origination clauses in state constitutions suggests that this design choice produces outcomes closer to the preferences of the median legislator in the originating chamber (which may or may not be evidence that chamber’s influence, as opposed to a stabilizing effect).<sup>231</sup>

For several reasons, however, it is not clear that the federal Origination Clause has had, or even could have, the biasing effect in favor of the House that the Framers anticipated. First, as a matter of theory, it is not the case that the first option presented to a group of decision-makers engaged in serial votes over a matter will be advantaged because of the possibility of strategic voting to defeat the earlier proposal.<sup>232</sup> An agenda setter might instead seek to leverage the epistemic effects of timing with a later proposal: because the latter allow for less time for participants to learn about the proposal’s consequences, opponents of the measure may have less time to develop empirical or theoretical counterarguments. The asymmetric distribution of opportunities for learning, in short, can be used to advantage a later option.<sup>233</sup>

A second reason for doubting the efficacy of the Origination Clause turns on the longstanding practice among designers of procedural rules for collective bodies of disfavoring earlier slots in a decisional process, which tend to be allocated to less popular proposals. One example is found in the standard rules of legislative procedure. Discussing the process of filling blanks in legislative schemes,<sup>234</sup> *Roberts’ Rules of Order* states not only that “members have an opportunity to weigh all choices before voting” but that entries be arranged such

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<sup>230</sup> Vermeule, *supra* note 11, at 424; *id.* at 425 (arguing “the House’s ability to demand a payment for the renunciation of its origination privilege with respect to particular bills will skew the distribution of political benefits between the House and the Senate in the House’s favor”). For a formal model that predicts that bicameral chambers will endogenously sequence themselves to take advantage of comparative epistemic advantages, see James R. Rogers, *Bicameral Sequence: Theory and State Legislative Evidence*, 42 AM. J. POL. SCI. 1025, 1025 (1998).

<sup>231</sup> James R. Rogers, *Empirical Determinants of Bicameral Sequence in State Legislatures*, 30 LEG. STUD. Q. 29, 39 (2005) [hereinafter “Rogers, *Empirical Determinants*”] (reporting a statistically significant effect in the 40 percent of states that have an origination clause).

<sup>232</sup> See Levmore, *Bicameralism*, *supra* note 83, at 147. Claims about the House’s agenda-setting power also fail to account for the now-prevalent Conference Committee process. *Id.* at 149.

<sup>233</sup> Of course, there is also less time to learn of a later proposal’s benefits. But an agenda setter can prepare offset this by gathering information before introducing the proposal.

<sup>234</sup> For instance, by assigning appropriated amounts to different tasks envisaged by a law.

that “the one *least* likely to be acceptable will be voted on first.”<sup>235</sup> This concern resonates in congressional practice. Exemplifying the weakness of the House’s power under the Origination Clause, the Senate has developed a practice of striking the text of a House bill entirely and then replacing it with a wholly new revenue-raising text.<sup>236</sup> A recent scholarly treatment of the Origination Clause observes that this maneuver was anticipated amongst the drafters of the Constitution at Philadelphia.<sup>237</sup> In short, from the Constitution’s inception, it may well have been anticipated that the inter-cameral distributive effect of the Origination Clause would be weak to non-existent.<sup>238</sup> To the extent that the voting public uses the Clause as a guide to facilitate retrospective voting on fiscal matters, therefore, the Clause may well mislead more than it informs.

Finally, empirical evidence that the Origination Clause’s allocation of starting power has empowered the more numerous chamber is also elusive. Rather, congressional budgeting reforms enacted in the wake of the early 1970s impoundment crisis<sup>239</sup> have instead empowered the leadership of the two political parties. The latter exercise effectual agenda-setting power by selecting and then maintaining tight control over the membership of congressional committees responsible for setting the concurrent budgetary resolution.<sup>240</sup> Budgetary agenda setting, in short, is not only external, but in the hands of a nonstate actor.

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<sup>235</sup> H. ROBERTS, ROBERTS’S RULES OF ORDER NEWLY REVISED 136-28 (1970).

<sup>236</sup> Kysar, *Shell Bill*, *supra* note 11, at 661 & n.6 (listing examples).

<sup>237</sup> *Id.* at 691.

<sup>238</sup> It is not clear whether the finding that state-level origination clause lead to outcomes closer to the median preferences of the proposing chamber are to be the contrary. *See* Rogers, *Empirical Determinants*, *supra* note 231, at 39. If that finding extends to the federal level—which is doubtful—it would show the Origination Clause shifts power between appropriation committees in the House and the median floor voter in the House. That is, absent origination, it would be expected that committees, which play a gatekeeping role, would have a disproportionate influence on the shape of legislative proposals. Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 758 (2005) [hereinafter “Garrett, *Framework Legislation*”] (discussing the role of “gatekeeping” appropriations committees on fiscal matters). With origination, those committees lose power—which is consistent with the intuition that a starting power is less important than first seems. *See supra* Part III.B.

<sup>239</sup> *See* Congressional Budget Act of 1974, Pub. L. No. 93-344, § 310(c), 88 Stat. 297, 315 (1974). The preeminent statutory budgetary framework before 1974 directed the president to submit an annual budget. *See* 67 Pub. L. No. 13, 42 Stat. 20 (1921); *see also* Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1559-64 (2007) (summarizing history of federal budgeting process).

<sup>240</sup> Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702, 714-16 (2000). Garrett further notes that “negotiations concerning the concurrent budget resolutions have actually occurred between party leaders outside the forum of the committees.” *Id.* at 718.

### 3. *The Presidential Veto Override*

The substantive effects of concurrence rules in the veto-override context are more difficult to discern, in part because of an absence of empirical work on the topic.<sup>241</sup> Unlike the Origination context, the first mover in a veto override has no framing power: a bill's contents are identical during final passage and veto override votes.<sup>242</sup> In addition, it is the “rare” case in which a veto occurs (in two percent of cases), and the even scarcer case that Congress decides to override that veto (about forty-five percent after a non-pocket veto).<sup>243</sup> As a result, the embedded starting rule and concurrent requirement within the veto override are unlikely to be anticipated by participations in the regular enactment process.

At the same time, overrides are no mere formalism. They rather appear to be surprisingly contested votes, with about 1 in 10 legislators who voted on the final version of an enrolled bill switching sides either for or against the president.<sup>244</sup> Patterns of vote switching seem to be explained by ideological affinity with (or distance from) the president as well as a member's length of service on Capitol Hill.<sup>245</sup> Neither of these factors cast light on the effect of the override regime. To the contrary, they suggest that there is no informational justification for the starting rule, since members already have the information necessary to make a judgment about ideological affinities and tenure in Congress.<sup>246</sup> Perhaps the best that can be said in defense of the starting rule is that it might be weakly justified as a means of clarifying political accountability. In those rare cases that Congress decided to reject the President's considered veto decision—an action perhaps founded on constitutional objections to legislation—the Framers may have believed it was important to pick out in the constitutional text which of the two Houses took the lead. Of course, given the need for both Houses' consent to an override (i.e., an embedded concurrence rule), and the possibility that voters are more attentive to the news-engendering second and final

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<sup>241</sup> David Bridge, *Presidential Power Denied: A New Model of Veto Overrides Using Political Times*, 41 CONGRESS & THE PRESIDENCY 149, 150 (2014) (“[T]he literature is almost silent about the factors influencing the override of presidential vetoes.”).

<sup>242</sup> Patrick T. Hickey, *Beyond Pivotal Politics: Constituencies, Electoral Imperatives, and Veto Override Attempts in the House*, 44 PRES. STUD. Q. 577, 577 (2014).

<sup>243</sup> CAMERON, *supra* note 77, at 46 (finding that 2.3% of bills passed by both Houses between 1945 and 1992 were vetoed).

<sup>244</sup> KREHBIEL, *supra* note 78, at 123 (Table 6.2, row 3); Hickey, *supra* note 242, at 581 (finding that 11.3 percent of House members switched votes from final passage to override). To the best that I can tell, there is no empirical study of veto overrides that distinguishes vote switching in the first and the second chambers to cast votes.

<sup>245</sup> See Hickey, *supra* note 242, at 591-93 (reporting results from a study of veto overrides between 1973 and 2011); see also Richard S. Conley & Amie Kreppel, *Toward a New Typology of Vetoes and Overrides*, 54 POL. RES. Q. 831, 833 (2001) (analyzing the composition of three different kinds of override coalitions).

<sup>246</sup> For a similar point, see Conley & Kreppel, *supra* note 245, at 832 (characterizing override votes as a rare “complete information” environment in Congress).

vote, it is quite possible that this accountability justification is frail in practice. If that is so, the lesson of the veto override provision may be that the Framers occasionally deployed agenda control instruments for no clear purpose.

#### 4. *Judicial Efforts to Buttress Congressional Agenda-Setting Power*

To the extent that the Court has resisted these trends, its efforts have been quixotic and without plainly beneficial effect. The Court has resisted extra-textual supplements to the legislative process in the form of the legislative veto, the line-item veto, and automatic fiscal adjustments.<sup>247</sup> But none of these additional veto-gates would necessarily compromise the stabilizing function of Article I, Section 7, nor undermine its status-quo-protective effect (to the extent that is even desirable). Rather, the effect of additional veto-gates would be merely to change the interbranch distribution of rents from the legislative process. Bargaining would continue within the space established by the bounds set by constitutional veto players, with the ultimate outcome moving to reflect the different balance of power between different participants.

For example, the line-item veto when enacted at the state level generates a pattern of fiscal outcomes that are somewhat more favorable for the president's party, without changing overall levels of deficit spending.<sup>248</sup> Although the legislative deal reached in specific cases might differ, the domain of possible legislative outcomes would—social theory predicts—remains constant. The separation of powers, of course, does not entitle legislative or executive actors to specific victories or particular outcomes. Indeed, it is likely that abolition of the legislative veto, the line-item veto, and the lockbox mechanism each analogously scrambled the distribution of rents from legislative bargaining—but not in any stable way. Provided that the range of expected legislative outcomes remains unchanged, however, it is hard to see why this distributive effect is significant, and, correspondingly, hard to see any constitutional reason to read Article I, Section 7 as exclusive. The line-item veto, the legislative veto, and the lockbox mechanism are more consistent with the constitutional design than the Court's pinched attention to text suggests.<sup>249</sup>

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<sup>247</sup> See supra text accompanying notes 92 to 96 (discussing cases).

<sup>248</sup> For example, Stearns theorized that the dynamic effect of an item veto would be “simply to change the players in that process” of bargaining. Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 417 (1992). Empirical studies suggest it has no effect on the size of the budget. See, e.g., Douglas Holtz-Eakin, *The line item veto and public sector budgets: Evidence from the states*, 36 J. PUB. ECON. 269 (1988); accord John R. Carter & David Schap, *Line-Item Veto: Where is Thy Sting?*, 4 J. ECON. PERSP. 103 (199) (formal model of line-item veto showing de minimus effect).

<sup>249</sup> There may be other normative justifications for objection to one or all of these measures. For example, recent work on budgetary allocations suggests that the president, even absent an item-veto, exercises large influence. Valentino Larcinese et al., *Allocating the U.S. Federal Budget to the States: The Impact of the President*, 68 J. POL. 447, 447-48 (2006) (examining interstate

To a certain extent, the foregoing echoes a familiar story of legislative decline and executive branch growth. A central difference from standard accounts, however, is the presence of a new causal mechanism. Explanations for today's balance of power between Articles I and II, I have suggested, are not to be found solely in contemporary institutional and political developments such as the rise of the regulatory state, the demand for complex rule-making for a rapidly expanding national economy, or America's post-World War II international hegemony. Instead, the seeds of the contemporary status quo lie deeper, buried in constitutional text. The powers lost by Congress and gained by the executive are directly and intimately linked to the agenda control devices woven into the constitutional fabric at the Philadelphia Convention. Whereas the devices assigned to the president, as well as the role of concurrence rules in impeding legislative impetuosity, have thrived, the devices meant to empower Congress have crumbled. If today's arrangements are to be condemned, in short, it is as much an inculcation of original constitutional design as of post-ratification institutional drift.

## **B. The Struggle for Agenda Control Between Congress and the Court**

The constitutional law of agenda control also casts light on the changing relationship of the federal courts to the political branches, Congress in particular. Recall that Part II identified two forms of agenda control regulating the issues presented to the judiciary: the congressional titration of federal lower court and Supreme Court appellate jurisdiction on the one hand, and standing doctrine's constraint on litigant manipulation of the order in which legal issues are presented on the other.<sup>250</sup> Neither of these constraints operates today as initially intended. At the Supreme Court level in particular, Congress has effectively delegated agenda-setting authority to the Justices, while standing doctrine has proved too malleable to impede interest groups from engaging in strategic litigation.<sup>251</sup> In practice, though, the main beneficiary of doctrinal ductility is the Court itself, which carves out exceptions for litigants and issues it disfavors while openly inviting other litigation. The critique of judicial activism leveled most recently by the dissenting Justices in *Obergefell v. Hodges*,<sup>252</sup> in other words, can be applied to the Court as

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federal budgetary expenditures, and finding that states that heavily supported the incumbent president in previous presidential elections tended to receive more funds, while marginal and swing states were not rewarded).

<sup>250</sup> See *supra* text accompanying notes 178 to 184.

<sup>251</sup> The following account focuses on the relationship between Congress and the Supreme Court rather than the relationship of Congress to the lower federal courts. Below the apex tribunal, though, statutory jurisdictional changes often, although not always, follow cues supplied by the judiciary. See Huq, *Judicial Independence*, *supra* note 166, at 18-22 (supplying examples of jurisdictional change by statute that follows a judicial cue).

<sup>252</sup> *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting); *id.* at 2629 (Scalia, J., dissenting) (accusing the *Obergefell* majority of staking "a naked judicial claim to legislative—indeed, *super-legislative*—power; a claim fundamentally at odds with our system of government").

a whole. Indeed, because those same dissenters have rank among the ideological majority of the Court, they have greater incentive than their liberal colleagues to use standing rules to sculpt both their docket and the flow of doctrine from the Court.<sup>253</sup> The net result of these trends is a shift of substantive power from the political branches to the Court—a power distilled, most importantly, in the Court’s almost unfettered authority to select which issues to adjudicate.

This shift began with the pathmarking 1891 Evarts Act, which started the move from mandatory to discretionary appellate jurisdiction, and was packaged in Congress as “a politically neutral performance attempt to relieve the workload of the Supreme Court.”<sup>254</sup> Subsequently, Congress’s approach to the courts reflected both the influence of the judiciary as a prestigious interest group<sup>255</sup> and also a bipartisan interest in maintaining a tribunal able to resolve nationally contested disputes of constitutional moment.<sup>256</sup> As a result, Congress has declined (with rare exceptions) to restrict the Court’s reach by use of its power to craft exceptions to its appellate jurisdiction notwithstanding its clear textual power to do so.<sup>257</sup> Instead, congressional exercise of its exception authority has had the effect of furthering the judiciary’s interests of maximizing discretion and minimizing the burden of unwanted adjudication.<sup>258</sup> In short, Congress has abandoned the effectual exercise of its agenda-setting power. The result is that the Court has gained substantially more power to determine which issues it addresses. Judicial control, once exogenous, is now endogenous.

Equally, Stearns’s aspirations for standing doctrine have been undermined by the incoherence of the injury-in-fact rule and also the willingness of Justices not only to use standing doctrine as a way of favoring or disfavoring litigants, but also to use their platform at the Court to invite new interest groups to seek review

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<sup>253</sup> To be clear, there is no particular reason to believe that a majority of liberal Justices would refrain from the same manipulation of the judicial agenda were they in authority.

<sup>254</sup> CROWE, *supra* note 169, at 184-187 (noting that certiorari had “previously [been] used only sparingly and only to summon the record of a case”). The Judicial Code of 1911, which abolished circuit riding similarly “sparked only token resistance from ... legislators.” *Id.* at 188.

<sup>255</sup> *Id.* at 201-09.

<sup>256</sup> Tara Leigh Grove, *The Exceptions Clause As A Structural Safeguard*, 113 COLUM. L. REV. 929, 945-46 (2013) (noting how both conservatives and liberals were “were willing to support measures that protected the Supreme Court’s settlement function”). This is a specific example of the more general tendency of elected actors to support judicial power as a delegation of power to resolve difficult national problems. See Keith E. Whittington, “*Interpose Your Friendly Hand*”: *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005).

<sup>257</sup> See Fallon, *supra* note 170, at 1045 (2010) (“Although jurisdiction-stripping bills are frequently introduced in Congress, they seldom pass.”). The exception is the limitation on habeas corpus review invalidated in *Boumediene v. Bush*, 553 U.S. 723 (2008) (extending constitutional habeas jurisdiction to Guantánamo Bay detentions).

<sup>258</sup> Grove, *supra* note 256, at 931 (“Congress has made “exceptions” and “regulations” that facilitate the Court’s role in providing a definitive and uniform resolution of federal questions.”).

of issues that might otherwise never reach the Court. Standing law is commonly condemned as “lawless, illogical, and dishonest.”<sup>259</sup> The injury-in-fact requirement, in particular, conduces to “open-ended, free-form, and near metaphysical inquiries into the adequacy of alleged injuries.”<sup>260</sup> Stearns argues that absent the constraint imposed by standing doctrine, “the Court’s nominal power of docket control would be largely illusory” because litigants could manufacture circuit splits that the Court would feel compelled to adjudicate.<sup>261</sup>

Stearns’ prediction, however, has not been borne out in practice. Only a “small proportion of the nation’s agenda ... directly before the Supreme Court in particular and the courts in general.”<sup>262</sup> There is little evidence that the Court is pressed against its collective will into addressing some issues and not others by conniving interest groups. To the contrary, the Court has retained a large measure of agenda control notwithstanding the inefficacy of standing doctrine for two reasons. First, the very fluidity of standing doctrine empowers the Justices to carve out favored and disfavored classes of litigants (and hence, legal issues) in ways that reassert judicial primacy. Both liberal and conservative Justices have deployed standing doctrine to close the courthouse door to disfavored litigants in hotly contested domains like Establishment Clause jurisprudence.<sup>263</sup> Depending on their priors, the Justices are also more or less rigorous when applying the presumption against facial challenges, especially in structural constitutional cases, and also in looking for traditional indicia of harm necessary for Article III standing.<sup>264</sup> And when litigants prove too reticent to press an issue that interests the Justices, they unheedingly introduce it themselves. The core constitutional question in *Zivotofsky*, for example, was of sufficient interest to the Justices that they added it a first-round certiorari petition.<sup>265</sup>

Second, the Justices have become increasingly willing and able to use their opinions as platforms to signal to potential litigants which legal issues they

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<sup>259</sup> Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 501 (2008).

<sup>260</sup> Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1460 (2013) [hereinafter “Huq, *Standing*”]; accord Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 167 (1992).

<sup>261</sup> Stearns, *Historical Evidence*, *supra* note 177, at 329.

<sup>262</sup> Frederick Schauer, *Foreword: The Court’s Agenda - and the Nation’s*, 120 HARV. L. REV. 4, 9 (2006).

<sup>263</sup> For conservative and liberal uses of standing doctrine to disfavor litigants in the Establishment Clause context, see respectively *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (rejecting taxpayer standing for executive actions that arguably violate the Establishment Clause), and *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004).

<sup>264</sup> Huq, *Standing*, *supra* note 260, at 1443-48 (collecting cases).

<sup>265</sup> *M.Z.B. ex rel. Zivotofsky v. Clinton*, 131 S. Ct. 2897 (2011) (order granting certiorari, but directing the parties to answer the additional question, “Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President’s power to recognize foreign sovereigns.”). For another example of wholesale change by the Court of the issue presented, see *Citizens United*, 129 S. Ct. 2893, 2893 (2009) (mem.).

should present to courts. For example, in the 2014 Term, Justice Thomas issued a series of striking opinions in which he invited litigants to challenge basic tenets of the regulatory state on originalist grounds.<sup>266</sup> None of these concurrences were strictly necessary to the resolution of a case at hand, even on Justice Thomas's own logic. All comprised dicta plainly aimed at influencing the behavior of future litigants. (As an aside, all also make a mockery of pretenses of judicial restraint or modesty). On the other side of the ideological spectrum, Justice Breyer exploited an Eighth Amendment challenge to a method of execution to invite reconsideration of the death penalty *tort court*.<sup>267</sup> Both liberal and conservative Justices, moreover, have also been willing to exploit opinions dissenting from the denial of a certiorari petition as a means to signal their interest in future litigation.<sup>268</sup> By signaling issues of potential interest, teasing flexibility from justiciability doctrine, and adding issues to certiorari petitions as necessary, the Justices obtain a large measure of discretion over the contents of their appellate docket, amplifying the endogenous agenda control vested by statute from 1891 onwards.

In his dissent in *Obergefell v. Hodges*, Chief Justice Roberts bemoaned the majority's willingness to "seize[e] for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question."<sup>269</sup> It is no great feat to parry Chief Justice Roberts with a *tu quoque*.<sup>270</sup> But trading allegations of judicial overreach hardly edifies: the more important point is that the power to pluck issues from the public agenda is deeply woven into the current constitutional matrix for judicial power. It is the shift from exogenous to endogenous agenda control that lies behind the Court's extraordinary rise in prestige and national prominence—a shift that liberals and conservatives alike have exploited and decried in almost equal measure.

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<sup>266</sup> See *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1603 (2015) (noting "doubts about the legitimacy of this Court's precedents concerning the pre-emptive scope of the Natural Gas Act," and in effect flagging the issue for future challenge); *Dep't of Transp'n v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1240-41 (2015) (calling into question the permissible scope of legislative guidance and purporting to "identify principles relevant to today's dispute, with an eye to offering guidance to the lower courts on remand"); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment) (calling into question "the legitimacy of our precedents requiring deference to administrative interpretations of regulations," including *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

<sup>267</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) ("I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.").

<sup>268</sup> *Rapelje v. Blackston*, 136 S. Ct. 388 (2015) (Scalia, J., dissenting from the denial of certiorari); *Delling v. Idaho*, 133 S. Ct. 504 (2012) (Breyer, J., dissenting from denial of certiorari).

<sup>269</sup> 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

<sup>270</sup> See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (invalidating the coverage formula of the Voting Rights Act as amended in 2008).

### C. Evaluating the Transformation of Constitutional Agenda Control

The standard story of how federal governance changed across the twentieth century focuses on the erosion of limits on congressional power, to the detriment of both the states and individuals' interests,<sup>271</sup> and the accretion of power by the executive branch.<sup>272</sup> It thus seeks to explain institutional change as a process of unraveling boundaries on institutional power.

My central aim in this Part has been to identify the constitutional law of agenda control as another important but underappreciated important site of constitutional conflict and transformation. To be sure, this alternative account has continuities with the standard story of how the federal government has changed over time. The demise of the nondelegation doctrine, for example, continues to play a central role in both explanations of shifting configurations of government power.<sup>273</sup> Nevertheless, I suggest that the constitutional law of agenda control has been an analytically distinct site of change to the interbranch balance of power across the twentieth century. To understand the increasingly robust authority of the executive and the judiciary alike, as well as the impoverishment of the legislative power, it is necessary to account for the legal assignment of agenda control as well as changing institutional capacities and positive law-making powers. Standard accounts that focus on bureaucratic personnel or on external legal constraints alone, by contrast, fail to tell the whole story.

The role that shifting agenda control has played in constitutional history further raises a normative question: What should we make of this erosion of a seemingly central element of constitutional design? And while it seems highly unlikely that courts, wielding the power of constitutional review, could undo the concatenated institutional changes described in this Part—doing so, after all would unwind much of their own power to identify and resolve constitutional issues—should courts invalidate new changes to the division of agenda-setting power between the branches? In part, the answers to these questions are

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<sup>271</sup> A leading statement of this view is Douglas H. Ginsburg, *Delegation Running Riot*, 18 REG. 84, 84 (1995). For reiterations from different parts of the political spectrum, see, e.g., Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 637 (2010) (decrying the possibility of limitless congressional regulatory power); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 857 n.255 (1995) (“[Wickard] construed Congress's commerce powers as virtually unlimited ...”).

<sup>272</sup> Tom C.W. Lin, *Ceos and Presidents*, 47 U.C. DAVIS L. REV. 1351, 1375 (2014) (noting how “the President's powers have ... expanded dramatically” with rise of the regulatory state); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 514 (2008) (same).

<sup>273</sup> See, e.g., Lawson, *supra* note 22, at 1243 (decrying the decline of the nondelegation doctrine); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 329 (2002) (noting that “more than half a century of case law by unanimously declar[es] the nondelegation doctrine to be effectively a dead letter”).

contingent on large, unresolved questions of constitutional theory. Originalists, for example, will offer different analyses from consequentialist scholars. Without offering a complete theory of constitutional interpretation, some tentative normative conclusions can be offered here.

The constitutional law of agenda control is part of what I have elsewhere called the *negotiated structural constitution*.<sup>274</sup> The institutional balance of power over agenda-control shifted in part because the Framers' selection of agenda setting mechanisms was not always successful: some of their design choices misfired, when others succeeded rather too well. As a result, branches vested with an agenda-control power that they could not effectively deploy found it beneficial to assign that power to a coordinate branch. Generally, this involved Congress legislating away its agenda-setting authority to either the executive branch or Congress. At the same time, branches capable of effectively wielding an agenda setting authority have wielded it to the exclusion of other branches. Institutional success in the use of some powers, in other words, engenders confidence to make broader claims to competence, which in turn are accepted or even ratified by other branches. On a very superficial view, this is a simple story of constitutional failure. The original dispensation and the primacy of Congress therein have collapsed. Its rectification would entail massive transfers of authority between the branches to recreate the primordial institutional status quo. Consistent with this view, Justice Thomas has recently proposed several radical changes to the law, including a reinvigorated nondelegation doctrine, a limit to agency adjudication, and a rollback of judicial deference to agencies' constructions of both organic statutes and their own regulations.<sup>275</sup>

Although Justice Thomas's arguments, and the originalist account that underpins them, have obvious continuing appeal to many, they are not the only way to gloss changes to the constitutional law of agenda control. In earlier work, I have argued that the Constitution need not be read to assign immutable obligations to specific institutions.<sup>276</sup> Rather, the Constitution provisionally assigns regulatory entitlements to different branches as a threshold matter. Just like individuals, each branch can waive or transfer its exercise of an institutional interest either because it receives something of benefit in return, or because it perceives the other branch as better suited to carrying out a given function. In military and foreign affairs matters, for example, Congress has ceded turf to the executive in part because it benefits by avoiding hard foreign-policy decisions, and in part because it views the executive branch as better positioned to make

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<sup>274</sup> Huq, *Negotiated Structural Constitution*, *supra* note 21, at 1568.

<sup>275</sup> For citations to the relevant cases, *see supra* note 10; *see also* Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 *YALE L. J.* F.94 (2015) (describing these opinions as a "sustained originalist critique of administrative law").

<sup>276</sup> *See* Huq, *Negotiated Structural Constitution*, *supra* note 21, at 1620-23.

such decisions.<sup>277</sup> The recognition of such *negotiated* interbranch arrangements are, I have argued, generally consistent with the Constitution’s ambition of effective governance, welfare-enhancing, and generally superior to any dispensation a court would reach through standard constitutional interpretation. It is also consonant with the growing recognition that an important element of our constitutional law comprises the “glosses” that institutional actors offer on the document’s text through their own efforts to deploy the constitution as a working tool of government under fluctuating social and political circumstances.<sup>278</sup> To recognize the products of institutional negotiation over agenda-control entitlements is not merely an act of *realpolitik*—a concession of the judiciary’s necessary frailty in the teeth of determined political opposition—but a Burkean recognition of the accumulated wisdom of many generations of Americans’ largely good-faith efforts to implement the Constitution.

Accordingly, I have argued, such bargained-for restructuring of institutional parameters should be seen as generally desirable evidence of a constitutional order that is adapting and evolving to fulfill the Framers’ larger ambition of sound governance. The collapse of constitutional agenda control mechanisms that is analyzed in this Part fits neatly within this account of a negotiated structural constitution. By and large, agenda control powers have shifted to the institution most capable and willing to use them. At the same time, Congress has retained a plethora of budgetary, regulatory, and rhetorical tools—as well as its powerful ability to block changes to the status quo—that it ensures it can play a role when it sees fit to do so. As a result, the constitutional values of democratic accountability, efficient government, and liberty-promotion do not seem obviously offended by the constitutional law of agenda control that I have described.

Instead, it is important to recognize, the main effect of constitutional agenda control’s erosion is distributive. Rule-making, whether through legislation, administrative regulation, or judicial precedent, creates winners and losers. Changing the allocation of agenda-control likely results in a different outcome, and hence a different pattern of gains and losses in given case. But it is not clear that the fact that a shift in agenda control influences who loses and who wins in regulatory battles should have constitutional salience. To be sure, the House’s loss of control over the budget, the president’s greater power to initiate regulatory initiatives, and the court’s power to set the constitutional agenda all mean that the interest groups that prevail in the political process *in a given case* are not those that would prevail under a pinched reading of the Constitution’s text. But the fact that winners and losers switch places in a single case is not of clear constitutional salience. Over the long term, the flow of benefits and burdens from

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<sup>277</sup> *Id.* at 1624-65 (discussing foreign affairs context).

<sup>278</sup> See Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417-24 (2012).

the modified constitutional dispensation is hardly predictable. Moreover, it is not plainly distinct from the long-term distributive patterns generated by rejecting changes to the constitutional law of agenda control.

To see this more clearly, consider a recent proposal to construe Article II to allow presidents to make agency appointments when the Senate fails to act on his proposed candidates.<sup>279</sup> In effect, this moves the influence over regulatory agendas currently embodied in the appointments process wholly over to the presidency. Such a change to the law would certainly “alter the bargaining game between the President and the Senate,” in the sense that the size and composition of the successful nomination pool would change.<sup>280</sup> The distribution of regulatory winners and losers would accordingly likely change. But it is quite plausible to think that the change would have no negative systemic effects, but would instead eliminate the nonconstitutional power of Senate minority factions to extract exorbitant political rents.<sup>281</sup> These factions would lose out, but they might well adapt by striving harder to obtain the presidency. Or they might turn to the courts. In the long term, therefore, the distributive effects of changing the constitutional law of agenda control are uncertain. Factions and interest groups adapt. With electoral cycle, congressional losers become in time White House winners. The *systemic* effects of this single shift in agenda control in contrast are largely positive or at best neutral, even if the *distributional* effects in given instances vary considerably.

The same analysis can be extended, *mutatis mutandi*, more generally to historical changes to the constitutional law of agenda control. The large shift of budgetary authority away from the House and from the legislature likely has yielded quite different patterns of fiscal winners and losers in discrete cases. But that alone does not make it suspect. A more robust account of the president’s recess appointment clause means regulatory missions endorsed by a historical Congress but disfavored by a contemporary Congress are more likely to advance. But it is not clear that there is any constitutional reason for concern as a result. The movement of war and foreign affairs powers away from Congress also results in a different array of overseas entanglements. Whether that difference is constitutionally salient is hard to say: Consequentialist analysis likely turns entirely on one’s views about the merits of specific deployments and international agreements. The Supreme Court’s functional hegemony over the path of constitutional adjudication has doubtless altered the mix of disputes and resulting precedent in comparison to a status quo of greater departmentalism. Again, it is

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<sup>279</sup> See Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without A Senate Confirmation Vote?*, 122 YALE L.J. 940, 942 (2013) (arguing that “the Constitution can and should be read to construe Senate inaction on a nominee as implied consent to the appointment, at least under some circumstances”).

<sup>280</sup> *Id.* at 946-47.

<sup>281</sup> *Id.* at 948-49.

hardly plain that this movement can be characterized as positive or negative without an implicit theory of constitutional interpretation, and a judgment of whether the Court or the political branches has gotten more questions correct.

One worry, nevertheless, is worth identifying as worthy of more extended consideration. A potential normative concern raised by the changes mapped in this Part turns on the gradual disempowerment of Congress, which has increasingly lost control of the national policy agenda over time.<sup>282</sup> At the same time, there has been a shift of discretionary policy-making authority to both the executive and the federal courts.<sup>283</sup> On this view, the accumulated weight of changes to the constitutional law of agenda control rises to the level of constitutional concern because of the imbalance between the branches that has ensued. Even if individual changes to agenda control, therefore, were negotiated, their net effect has been an unhealthy emasculation of what the Framers anticipated would be the most dangerous branch. On this view, for example, the Court's broad construction of the recess appointment power in *NLRB v. Noel Canning* is problematic.<sup>284</sup> Justice Breyer's majority opinion rested narrowly on a reading of the "Clause's purpose [that] demands the broader interpretation,"<sup>285</sup> one that emphasized the risk of vacancies in senior agency positions.<sup>286</sup> This "functionalist" argument, however, does not account for overall trends in the constitutional law of agenda control. It arguably risks further tilting an interbranch relationship that is already comprehensively asymmetrical.

A determination of whether Congress has lost 'too much' power implicates hard questions of democratic and constitutional theory. It is far from clear, to my mind, that a worry about constitutional imbalance against Congress is well-justified. To begin with, the asymmetry between the executive and Congress might depend primarily on the sheer size of the regulatory and military state at the president's putative command, and on the marked difference in collective institutional action. Law in general, and the constitutional law of agenda-control in particular might have only an inframarginal effect. Even if law's effect is significant, moreover, the notion of a balance between the branches rests on

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<sup>282</sup> In earlier work, I thus raised the possibility of "paternalism for institutional interests," given "collective pathologies that impede rational pursuit of recognized self-interest." Huq, *Negotiated Structural Constitution*, *supra* note 21, at 1669.

<sup>283</sup> See, e.g., Tom C.W. Lin, *Ceos and Presidents*, 47 U.C. DAVIS L. REV. 1351, 1375 (2014) (noting how "the President's powers have ... expanded dramatically" with rise of the regulatory state); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 514 (2008) (same).

<sup>284</sup> 134 S. Ct. 2550 (2014).

<sup>285</sup> *Id.* at 2561.

<sup>286</sup> *Id.* at 2564-65.

notoriously fragile intellectual premises.<sup>287</sup> Further, as a host of empirical studies show, the policy effects of separated powers are ambiguous, even at the level of cross-national studies.<sup>288</sup> Even discounting the local observation that Congress these days does not seem incapable of throwing its weight around,<sup>289</sup> there are compelling reasons to think that alarms about constitutional imbalance are not yet warranted. Instead, complaints of imbalance await a convincing theoretical and empirical underpinning to render them plausible grounds for complaint about the shifting terrain of constitutional agenda control.

### Conclusion

This Article has developed a new vocabulary for the analysis of constitutional problems. It has demonstrated that divergent forms of agenda control are embedded in the Constitution's text and the Court's jurisprudence. Focusing on the separation of powers, I have aimed to demonstrate that agenda control measures can have the effect of partitioning, dispersing, or concentrating state power. Future analyses of the Constitution's function and consequences, to say nothing of historical constitutional change, should account for the law of agenda control and the way it has channeled, enabled, and blocked exercises of state power above in ways that standard accounts fail to capture.

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<sup>287</sup> See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–57 (2000) (arguing that ideas of balance or separation provide no determinate answer to institutional design questions).

<sup>288</sup> For a summary of this research, see Aziz Z. Huq, *Libertarian Separation of Powers*, 8 NYU J.L. & LIBERTY 1006 (2014)

<sup>289</sup> See, e.g., Jennifer Steinhauser, *Influence of Freedom Caucus Ripples Through Washington*, N.Y. TIMES, Oct 19, 2015, at A1.