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The Negotiated Structural Constitution

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ARTICLES

THE NEGOTIATED STRUCTURAL CONSTITUTION

*Aziz Z. Huq**

*The Constitution allocates entitlements not only to individuals, but also to institutions such as states and branches of the federal government. It is familiar fare that individuals' entitlements are routinely deployed both as shields against unconstitutional action and as bargaining chips when striking deals with the state. By contrast, the paradigmatic models of interbranch and federal-state interactions derived from James Madison's writings in *The Federalist* underscore conflict and tension, rather than cooperation or mutually beneficial trades. Despite Madison's predictions, institutional negotiation and dealmaking over both federalism and separation-of-powers interests are not only endemic in practice but also unavoidable in theory. Although negotiation over institutional interests is an entrenched part of the constitutional landscape, it remains undertheorized as a systemic matter. To begin filling that gap, this Article develops a general normative theory of negotiated structural arrangements by leveraging insights into bargaining from basic microeconomic theory. Analysis of intermural negotiation reveals no categorical reason to reject such deals. This Article, however, identifies two general criteria for rejecting the specific outcomes of intermural negotiation. It further suggests that courts are not well positioned to sift out undesirable deals given their constrained institutional competence. Rather than being drawn through judicial review, boundary lines to institutional bargaining should be limned by elected officials.*

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INTRODUCTION

The Constitution vests individuals and institutions alike with entitlements. Individuals, for example, have familiar rights to due process and equal protection,¹ to free speech and free exercise.² But the text of the Constitution makes clear that institutions are also vested with distinct entitlements. Examples of specific allocation among the branches include Congress’s sole authority to appropriate funds³ and the President’s unique control of the pardon power.⁴ Along the federal–state margin, the Constitution’s text picks out treaties as exclusively a federal matter⁵ and, at least initially, remanded certain species of commerce to the exclusive regulatory domain of the states.⁶ Questions invariably persist about the exact boundaries of institutional entitlements.⁷ But durable uncertainty as to the location of some institutional boundaries does not undermine the fact that the Constitution’s text, no less than state real- and personal-property laws, assigns specific entitlements to discrete and

1. See U.S. Const. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

2. See *id.* amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech . . .”).

3. See *id.* art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

4. See *id.* art. II, § 2, cl. 1 (“The President shall . . . have Power to grant Reprieves and Pardons for Offences against the United States . . .”).

5. See *id.* art. I, § 10, cl. 1 (“No State shall enter into any Treaty . . .”).

6. See *id.* art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .”); see also Edward S. Corwin, *The Passing of Dual Federalism*, 36 *Va. L. Rev.* 1, 15–17 (1950) [hereinafter Corwin, *Dual Federalism*] (sketching conceptual development of “Police Power,” which encompassed idea that “certain subject-matters were segregated to the States and hence could not be reached by any valid exercise of national power” (emphasis omitted)).

7. See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2587–93 (2012) (opinion of Roberts, C.J.) (considering congressional authority to impose health-insurance purchase mandate on individuals).

identifiable entities.⁸ Only the habitual disciplinary demarcation between public law and private law impedes the recognition that these are property rights in all but name.

Once the kinship of ordinary property and constitutional entitlements is discerned, a set of hitherto underexamined questions comes into view. It is familiar fare that individuals can invoke their constitutional entitlements not only as shields against the state, but also as chips when bargaining with the state. Accepting a plea bargain, negotiating a regulatory exaction to zoning rules, and accepting speech restrictions as a condition of government funding—all these are familiar deals with the state involving the trade of a constitutional right. A voluminous literature addresses the permissible scope of such dealmaking.⁹ Legal scholars, however, are just beginning to explore systematically the analogous possibility that *institutions* such as states or federal branches might negotiate over their constitutional entitlements. Scholars have tended to pick off isolated instances of intermural bargaining for examination.¹⁰ They have

8. See *United States v. Craft*, 535 U.S. 274, 278 (2002) (noting property is commonly described as “a collection of individual rights” and “[s]tate law determines only which sticks are in a person’s bundle”). That is, property is defined by positive law and does not antedate such positive law. Specific institutional entitlements are explicitly defined by the Constitution.

9. Treatments include Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *Harv. L. Rev.* 4, 6–12 (1988) (identifying and analyzing “problem of unconstitutional conditions[,] [which] arises whenever a government seeks to achieve its desired result by obtaining bargained-for *consent* of the party whose conduct is to be restricted”); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. Pa. L. Rev.* 1293, 1294–98 (1984) (identifying same problem in context of government’s expansive role in post-New Deal resource allocation); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413, 1415–19 (1989) (analyzing “doctrine of unconstitutional conditions[,] [which] holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether”). These classic works are almost exclusively concerned with governmental bargaining with individuals, and not institutions.

10. Previous studies tend to focus on a single federal authority. For a discussion of the Spending Power, see Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 *Geo. L.J.* 861 (2013) (identifying conditions under which Congress may be found to have coerced states in exercise of Spending Power); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 *Colum. L. Rev.* 1911 (1995) (arguing Congress cannot use conditional federal spending to regulate states where it could not directly mandate state action); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 *Sup. Ct. Rev.* 85 (discussing scope of conditional spending after *South Dakota v. Dole*, 483 U.S. 203 (1987)); Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 *U. Colo. L. Rev.* 1003 (2014) (applying *Sebelius* doctrine to environmental law). For a discussion of the Eleventh Amendment, see Daniel Farber, *The Coase Theorem and the Eleventh Amendment*, 13 *Const. Comment.* 141 (1996) (applying Coase theorem to conditions supporting state waiver of Eleventh Amendment immunity). For a discussion of the commandeering doctrine, see Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 *U. Colo. L. Rev.* 1 (2010)

generally not strived for a wider, synoptic view of the conditions under which the negotiated reassignments of institutional entitlements, as distinct from dickering over policy outcomes, should be permitted or repudiated.

The lacuna is puzzling, for individuals are hardly alone in striking constitutional deals. To the contrary, landmarks of structural constitutionalism often turn on whether institutions such as states and branches can negotiate over institutional interests and then enshrine those deals in the form of positive, enacted law:

- Article I of the Constitution vests the executive with exclusive veto power over legislation.¹¹ During the twentieth century, Presidents have repeatedly transferred to Congress a portion of that veto power in exchange for greater regulatory discretion.¹²
- In the 1980s and 1990s, Congress enacted statutes singling out state officials to comply with administrative responsibilities set

[hereinafter Ryan, Cathedral] (suggesting replacing inalienability rule with property rule in commandeering context to allow for resolution of “interjurisdictional quagmires”); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *Vand. L. Rev.* 1629 (2006) [hereinafter Siegel, *Commandeering*] (questioning logic of anticommandeering doctrine in light of availability to Congress of preemption option); see also Erin Ryan, *Federalism and the Tug of War Within 185–214* (2011) [hereinafter Ryan, *Tug of War*] (proposing “Balanced Federalism” approach allocating responsibility for federalism inquiries among state and federal actors and exploring judicial role in balancing approach to federalism). For a dispute over the war powers, compare J. Gregory Sidak, *To Declare War*, 41 *Duke L.J.* 27, 63 (1991) (applying Coasean model), with Harold Hongju Koh, *The Coase Theorem and the War Powers: A Response*, 41 *Duke L.J.* 122, 129–30 (1991) (rejecting that model).

There are two previous articles that take a synoptic view of intermural bargaining. The first argues for bargaining in the context of “federalism markets” via secondary markets and auctions. See F.E. Guerra-Pujol, *Coase and the Constitution: A New Approach to Federalism*, 14 *Rich. J.L. & Pub. Int.* 593, 599–604 (2011) (describing processes for buying and selling government powers and functions based on which entity values them most highly). This proposal is both unnecessary (as intermural bargains happen without markets or auctions) and implausible. The second article, although focused on the allocation of warmaking and foreign-affairs authorities, contains a pathmarking discussion of institutional interactions through a bargaining lens. See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, *Law & Contemp. Probs.*, Autumn 1993, at 293, 295–99 (describing “model premised on the idea that branches may shape separation of powers doctrine through bargains and accommodation to advance their mutual institutional interests”). McGinnis’s insightful article argues that endogenous interbranch settlements by bargaining and accommodation will be pervasive, *id.*, but he does not develop an account of their proper boundaries. The account of institutional interaction developed here is in deep sympathy with McGinnis’s argument, but it draws on distinct economic models and different normative grounds and has a wider scope of application. It further identifies different limits on the permissible domain of exchange.

11. U.S. Const. art. I, § 7, cl. 2.

12. See *infra* notes 148–150 and accompanying text (discussing origin of legislative veto). The practice was held invalid in 1983. *INS v. Chadha*, 462 U.S. 919, 956 (1983).

forth in federal statutes,¹³ eschewing the alternative of preemption.¹⁴ Taking to the courts, states parried successfully by claiming an inalienable entitlement not to have administrative capacity commandeered by federal law.¹⁵

- Congress is constitutionally designated as the first mover on fiscal matters,¹⁶ but legislators tend to engage in excessive deficit spending.¹⁷ Legislators in 1985 tried to bind themselves by directing the Comptroller General to initiate the sequestration of funds when the budget exceeded designated annualized ceilings.¹⁸

These examples are not outliers. Institutional dealmaking populates the constitutional order as densely as trading over individual rights. Conditional-spending enactments, cooperative-federalism programs, and even preemptive legislation provide potent venues for federal–state exchange. Congress and the Executive have also long experimented with diverse permutations of the lawmaking process, including the legislative veto, fiscal-sequester mechanisms, line-item vetoes, and presidential budgeting. Institutional bargaining, then, is hardly the exception; it is often the rule.¹⁹

This Article offers a descriptive and a normative account of institutional negotiation and its limits. Its first, descriptive goal is to show that

13. See, e.g., 18 U.S.C. §§ 922, 924, 925A (2012) (provisions of Brady Handgun Violence Prevention Act).

14. See Siegel, *Commandeering*, *supra* note 10, at 1634 (arguing “anticommandeering doctrine undermines federalism values when the (clearly constitutional) alternative of preemption is reasonably available and the commandeering ban thus places states in danger of losing regulatory control in a greater number of future instances”). Indeed, this is how federal commandeering of state officials may have been understood by many in the 1780s. See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 *Yale L.J.* 1104, 1109 (2013) (arguing many Anti-Federalists believed “commandeering advanced that goal by making law enforcement more accountable to local interests”).

15. See *Printz v. United States*, 521 U.S. 898, 905, 924–33 (1997) (discussing and rejecting “compelled enlistment of state executive officers for the administration of federal programs”); see also *New York v. United States*, 505 U.S. 144, 167 (1992) (endorsing use of federal funds to “influence a State’s legislative choices”).

16. See, e.g., U.S. Const. art. I, § 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.”).

17. See John F. Cogan, *The Dispersion of Spending Authority and Federal Budget Deficits*, in *The Budget Puzzle: Understanding Federal Spending* 16, 26–27 (John F. Cogan et al. eds., 1994) (describing process leading to increased deficit spending).

18. See *Bowsher v. Synar*, 478 U.S. 714, 717–18 (1986) (discussing legislation requiring Comptroller General to report necessary budget reductions to President for sequestration order).

19. A threshold point about terminology: In this Article, the phrases “intermural bargaining,” “institutional bargaining,” and “structural constitutional negotiation” refer interchangeably to the same phenomenon. Variation in vocabulary is employed to avoid leaden prose.

intermural negotiation is a pervasive and enduring feature of the constitutional landscape. Both states and branches engage in such bargaining routinely, notwithstanding scholarly inattention to the practice. This observation, in turn, offers an instructive lesson in constitutional theory: The observed density of bargaining by institutions over their constitutionally created entitlements is at odds with James Madison's influential account of the structural constitution. In *The Federalist* No. 51, Madison famously predicted that each branch's "[a]mbition [would] counteract ambition" within the other branches, conducing to a desirable and liberty-friendly status quo.²⁰ Rather than relying on cooperation between branches, Madison anticipated that the separation-of-powers system would be endogenously regulated by self-regarding branches issuing "swift reprisals" against efforts by other branches to amass power.²¹ Invoking a parallel mechanism in the federal-state context in *The Federalist* No. 46, Madison anticipated that "ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only," but would be "signals of general alarm."²² Other scholars have observed that Madison omits any undergirding account of how individual incentives would be aligned with institutional interests, thereby sapping the force of his predictions.²³ These scholars, however, have tended to focus on the

20. *The Federalist* No. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

21. See Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 *Tex. L. Rev.* 447, 483 (1996) ("Madison believed that the system would be largely self-regulating, that any department that sought openly to steal another's power would be met with swift reprisals . . ."). Recalling the conflict between King and Parliament during the English Civil War, one commentator suggests that Madison might have been anticipating the deployment of actual force between branches. James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 *St. John's L. Rev.* 293, 300–01 (2005) (explaining Madison's depiction of interbranch relations in *Federalist* No. 48 contained "obvious echoes" of English Civil War).

22. *The Federalist* No. 46, *supra* note 20, at 300 (James Madison). Nor did Madison or Alexander Hamilton anticipate that the states would want for resources in the ensuing battle. See *The Federalist* No. 45, *supra* note 20, at 294 (James Madison) ("The State governments will have the advantage of the federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other."); see also *id.* (anticipating "rivalship for encroachments" between federal government and states and predicting states would prevail). The more consistently nationally oriented Alexander Hamilton also saw the states as independent, and implicitly rival, centers of political authority. See *The Federalist* No. 17, *supra* note 20, at 156 (Alexander Hamilton) ("I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State . . . hold[s] out slender allurements to ambition.").

23. See, e.g., Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 18 (2012) [hereinafter Posner & Vermeule, *Executive Unbound*]

task of reading the Framers' political science for analytic weaknesses.²⁴ They generally have not moved beyond criticism to look carefully at how actual patterns of institutional behavior have sustained the operation of the constitutional system.²⁵ They have not strived to understand, and to offer a tentative evaluation of, the actual mechanisms through which institutions interact in practice to fill the vacuum left once Madison's logic of institutional conflict had foundered. Hence, the pervasiveness of institutional negotiation has not only gone unremarked, but its implications for constitutional theory and institutional design also remain underappreciated.

This Article also aims to make two normative contributions in addition to this positive, taxonomical point. These can be briefly stated before being separately unpacked below. First, there is no reason to conclude that intermural bargaining is categorically forbidden or undesirable on standard legal or welfarist grounds. Second, the limits to intermural bargaining should not be policed by judges. Sifting good from bad intermural arrangements should be the task of elected actors and their publics, not the responsibility of federal courts. This normative conclusion supports the Court's recent conclusion in *NLRB v. Noel Canning* that judges should "hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached."²⁶

(arguing separation of powers has "collapsed" because of Madison's incorrect assumption that "individual ambitions of government officials would cause them to support the power of the institutions they occupy"); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 Harv. L. Rev. 915, 920 (2005) [hereinafter Levinson, *Empire-Building*] ("The behavior of government institutions depends upon . . . the interests of the officials who comprise them and the constituents these officials represent. Telling a persuasive story about how these political actors . . . will generate . . . self-aggrandizing institutions that constitutional law and theory envision turns out to be quite difficult.").

24. See, e.g., sources cited *supra* note 23.

25. An important exception is Posner and Vermeule's work on political substitutes for failed legal constraints on the branches. Posner & Vermeule, *Executive Unbound*, *supra* note 23, at 12–15 (identifying "political constraints" on executive power). Their account, however, fails. See Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. Chi. L. Rev. 777, 789–808 (2012) (rejecting claim that legal constraints have no effect on interbranch claim making).

26. 134 S. Ct. 2550, 2553 (2014). The argument developed here does not envisage any judicial superintendence of the balance of powers between the branches or that institutions such as branches and states should be directed to the political process to vindicate their constitutional interests. Hence, it would suggest that the *Noel Canning* Court's adjudication of the interaction between pro forma Senate sessions and recess appointments was out of bounds. See *id.* at 2573–78 (invalidating such appointments, as pro forma sessions "count as sessions, not as periods of recess"). In contrast, the argument here does not bite on an individual's claim that a state action was unlawful because ultra vires or otherwise unsupported by legal authority. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (invalidating as ultra vires presidential seizure of steel mills).

The first normative point—that intermural bargaining need not be categorically forbidden—draws inspiration from economic theories of bargaining between individuals. Private negotiation and bargaining are typically viewed as augmenting social welfare through Pareto efficient trades.²⁷ The apotheosis of that perspective is the Coase theorem, which predicts that private parties will bargain to efficient results, regardless of how the law assigns initial entitlements, provided that transaction costs are zero.²⁸ The argument developed here, to be clear, is *not* that institutional trades are akin to deals struck by utility-maximizing individuals in a thick private marketplace. The claim advanced is not that institutional deals are always Pareto efficient; it is rather that the private-law context provides rough-and-ready analogies to aid in thinking about when intermural bargaining will generate desirable results on roughly welfarist grounds and when it will founder. Rather than being ranked as categorically undesirable, intermural negotiation should be understood as a mechanism to promote mutual gains that have been identified by elected leaders of relevant institutions.²⁹ For example, both Congress and the executive branch achieve democratically desired goals by delegation and legislative checks on delegation. Cooperative federalism and federal commands to state actors to carry out joint programs will also often yield welfare gains, even if they do not maximize welfare.³⁰

Further, the private-law analogy illuminates the limits of negotiated structural constitutionalism. In that context, transaction costs can prevent efficient deals from being reached. The initial allocations of rights³¹ and the law's election between property and liability rules³² will often

27. Cf. F.A. Hayek, *The Use of Knowledge in Society*, 35 *Am. Econ. Rev.* 519, 520–22 (1945) (arguing efficient economic planning depends on best using knowledge dispersed among individuals).

28. R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1, 8 (1960) [hereinafter Coase, *Social Cost*]; see also George J. Stigler, *The Theory of Price* 113 (4th ed. 1966) (coining term “Coase theorem”).

29. The analysis that follows focuses on the two elected branches of the federal government and the states as political entities. It does not treat the federal or state courts as potential partners in intermural trading.

30. This Article does not aim to set forth the social-welfare function that the Constitution seeks to maximize. It suffices to say that although such a function is surely contested—i.e., both politicians and voters disagree on what goals the nation should pursue—there is a bundle of widely accepted public goods. These goals include promoting economic growth, individual well-being, and some kinds of democratic accountability.

31. See, e.g., Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 *Yale L.J.* 729, 729 n.1 (1992) [hereinafter Ayres & Gertner, *Strategic Contractual Inefficiency*] (collecting citations to literature regarding initial allocation of rights and gap filling in incomplete contracts).

32. A property rule means that property can only be transferred with the owner's consent; a liability rule allows transfer without consent but with compensation determined

thus have welfare effects. Therefore, the goal of legal-mechanism design is often understood to be the mitigation of losses attributable to transaction costs.³³ In addition, private-law theorists have identified conditions under which bargaining should be prohibited via inalienability rules.³⁴ In the public-law context, too, not all intermural bargaining will be desirable. Drawing on private-law analogies, this Article suggests two rules of thumb for estimating boundaries to acceptable institutional dealmaking: The outcomes of intermural bargaining should be considered valid *unless* there is a substantiated concern about *either* third-party effects (otherwise known as negative externalities) *or* what might be called “internalities” (i.e., reasons that a given institutional actor might be systematically incapable of effectually identifying and promoting its own interests). On the latter point, the paradigmatic case for concern is Congress, which will tend to sell short its institutional interests due to collective-action problems when dealing with the executive.³⁵ For this reason, in setting out the case for limiting intermural bargaining over structural constitutional rights, the focus is on interbranch bargains that may undervalue congressional interests.³⁶

This Article’s second normative claim concerns institutional choice: Even if externalities and internalities provide sound reasons for resisting an intermural deal, they do not provide *federal judges* with a basis for invalidating that agreement on constitutional grounds. The idea that courts should police the limits of legal bargaining is, of course, familiar from private law. But that does not mean that it should spill over from that context into the public-law domain. Instead, even given the exist-

by a third party. Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1106–10 (1972).

33. See, e.g., Anthony Niblett et al., The Evolution of a Legal Rule, 39 J. Legal Stud. 325, 326 (2010) (“[W]hen negotiating explicit contracts is costly, efficient resource allocation may require that the law create rules that give parties incentives to act efficiently—rules that steer parties to outcomes that mimic those that the market would produce if transaction costs were low.”).

34. See Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931, 934–35 (1985) (describing which activities should be required, permitted, or forbidden of entitlement owner).

35. Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 414–15 (2012) (“Congress as a body does not systematically seek to protect its prerogatives against presidential encroachment . . . [as] a result of both collective action problems and veto limitations . . .”).

36. The question of whether federal–state interactions will be systematically lopsided because of one-sided transaction costs is a complex one. The superficial identification of the states’ numerosity as a hindrance to their effectual assertion of political will against congressional initiatives is overstated. Instead, there is no generally applicable reason to think that states will not be able to organize to assert their interests as against federal actors. See Aziz Z. Huq, Does the Logic of Collective Action Explain Federalism Doctrine?, 66 Stan. L. Rev. 217, 299 (2014) [hereinafter Huq, Logic of Collective Action] (rejecting possibility of generally applicable model of collective action by states).

ence of boundaries beyond which institutional deals become undesirable, federal judges will be systematically worse than the political branches and the states at accurately drawing such boundaries. Accordingly, the normative framework developed here is meant to illuminate and guide directly the behavior of political-branch actors making front-line decisions about when to enter institutional bargains. It is also intended to facilitate public evaluation and criticism of “departmentalist” legal judgments underwriting intermural deals.³⁷ It is not meant to invite judicial superintendence.³⁸ The structural constitution should be negotiated, not litigated.

The argument developed here diverges from two previous treatments of institutional interactions in the legal and the economics scholarships, respectively. In the first line of analysis, legal scholars and jurists have suggested that the choice between formalist and functionalist approaches to these structural constitutional problems provides a central organizing principle for thinking about structural constitutionalism.³⁹ But, for reasons that by now are well explored in the scholarly literature, neither a formalist nor a functionalist lens is capable of generating stable, coherent solutions to structural constitutional problems.⁴⁰ Rather

37. For studies of departmentalist practice, see, e.g., Michael J. Gerhardt, *Non-Judicial Precedent*, 61 *Vand. L. Rev.* 713, 719–35 (2008) (cataloguing various instances of departmentalist practice with temporally enduring effects); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *Mich. L. Rev.* 676, 687–99 (2005) (explaining constraints on and opportunities for executive-branch constitutional interpretation).

38. The position this Article takes is consistent with, and complementary to, a more broadly skeptical view of judicial competence in structural constitutional matters. See, e.g., Aziz Z. Huq, *Removal as a Political Question*, 65 *Stan. L. Rev.* 1, 6–7 (2013) [hereinafter *Huq, Removal*] (arguing against any necessary correlation between judicial enforcement of presidential removal authority and democratic accountability); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 *Va. L. Rev.* 1435, 1440–41 (2013) [hereinafter *Huq, Standing*] (proposing highly circumscribed criteria for permitting individuals to sue to vindicate structural constitutional interests). These articles explain in greater depth why courts are ill equipped to resolve questions of structural constitutionalism; the instant Article explains how, in the absence of judicial resolution, such questions are to be addressed.

39. See, e.g., Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 *U. Chi. L. Rev.* 1089, 1099–1126 (2000) (demonstrating historical equivocation between formalist and functionalist modes of analysis); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *Cornell L. Rev.* 488, 491–92 (1987) (contrasting formalism and functionalism in separation-of-powers analysis).

40. Now-classic separation-of-powers work by Dean Elizabeth Magill is especially useful in demonstrating the weaknesses of both functionalist and formalist approaches. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 *U. Pa. L. Rev.* 603, 604 (2001) (“[C]laims made in the name of inter-branch balance—for instance, that a development has upset the balance of power between the branches—are made without conveying why we should care about that balance.”); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 *Va. L. Rev.* 1127, 1194–97 (2000)

than seeking answers in inconclusive constitutional texts, open-ended historical evidence, or abstract conceptual analysis, the theory of inter-mural relations herein developed directs attention to a central mechanism through which institutions interact.⁴¹ By modeling this mechanism's outcomes, the theory provides a parsimonious, transubstantive framework for analyzing a wide spectrum of novel institutional arrangements. The inquiry avoids controversial extrapolations from history and constitutional grammar⁴² in favor of a broadly shared benchmark of "welfare." As it is used here, the term is meant not in a technical, economic sense. Rather, it is used to encompass loosely generally shared goals of effectual, accountable government that furthers the production of some bundle of desired national public goods.

Second, the argument developed here should not be mistaken for what Daron Acemoglu has called a "political Coase theorem," which holds that bargaining among social groups "create[s] a strong tendency towards policies and institutions that achieve the best outcomes given the varying needs and requirements of society."⁴³ Reasoning from a model that accounts for the possibility of divergent elite and popular actors, Acemoglu rejects such a theorem. Instead, he argues, the "severe misalignments in the economic interests of politically decisive actors and the rest of society" will tend to generate serious inefficiencies.⁴⁴ Rather than attempting to resuscitate that claim in institutional garb, this Article makes the more modest claim that negotiation will often (but not always) yield desirable outcomes. As importantly, it argues that judicial oversight

[hereinafter Magill, *Real Separation*] ("We do not know what 'balance' means, and we do not know how it is achieved or maintained."). Her arguments, *mutatis mutandis*, can be extended to the federalism context.

41. Originalists of all stripes are unlikely to be persuaded by the avowedly consequentialist criteria at work here. But protestations of fidelity to original meaning notwithstanding, consequences of the kind discussed here are relevant even to the die-hard originalist.

42. See, e.g., *Noel Canning v. NLRB*, 705 F.3d 490, 505–07 (D.C. Cir. 2013) (invalidating President's recess appointments to NLRB based on reading of word "the" in Article II), *aff'd on other grounds*, 134 S. Ct. 2550, 2561–67 (2014) (upholding recess appointments except to extent they are made in short periods of recess punctuated by pro forma sessions of Senate).

43. Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics*, 31 *J. Comp. Econ.* 620, 620–21 (2003).

44. *Id.* at 622 (identifying absence of credible enforcement mechanisms as constraint on optimal political bargaining). Another application of the Coase theorem to constitutional law is the claim that the effects of judicial review are nugatory because "Americans will eventually bargain their way towards an interpretation that reflects their considered judgment as a people." Neil S. Siegel, *A Coase Theorem for Constitutional Law*, 2010 *Mich. St. L. Rev.* 583, 587 (describing core claim of Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009)). The influence *vel non* of judicial review is not addressed here.

is unlikely to weed out counterexamples, even if such counterexamples surely exist.⁴⁵

Part I defines the concept of “negotiation” or “bargaining” (hereinafter treated as synonyms) for the purposes of this inquiry. It then summarizes the dominant theories of bargaining in private law. Turning to structural constitutionalism, Part II demonstrates the pervasiveness of institutional negotiation by documenting the practice in both the separation-of-powers and federalism contexts. The ensuing taxonomy suggests that the Court’s current doctrine lacks coherence. The balance of this Article accordingly develops an alternative normative evaluation of the practice, building on private-law principles and focusing on the interbranch context. First, Part III defends a positive default rule for institutional bargains parallel to the default rule used in the ordinary marketplace. Part IV specifies two limiting conditions—analagized from the phenomena of externalities and internalities in private law—and Part V then evaluates the promise of judicial enforcement of such boundary lines. Whatever boundaries delimit the permissible scope of intermural bargaining, this Article concludes, should be drawn by elected officials and not by federal judges.

I. BARGAINING OVER INDIVIDUAL ENTITLEMENTS IN PUBLIC AND PRIVATE LAW

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

A. A Definition of Bargaining

This Article is concerned with instances in which institutions actively negotiate the allocation of entitlements created by the Constitution, resulting in a bargained-for agreement between institutional actors. What, though, counts as a negotiated bargain over an entitlement, constitutional or otherwise? According to the Restatement (Second) of Contracts, a bargain is “an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.”⁴⁶ The Restatement elaborates as follows: “A performance or return promise is bargained for if it is sought by the promisor in exchange for

45. This Article does not make the error of proposing that “the constitution is essentially perfect,” a notion that Henry Monaghan persuasively condemned more than thirty years ago. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 358 (1981).

46. Restatement (Second) of Contracts § 3 (1981).

his promise and is given by the promisee in exchange for that promise.”⁴⁷ Bargains thus are instances of “reciprocal . . . inducement”⁴⁸ that are recognized by law. Importantly, this definition focuses on externally available indicia, rather than psychological states. In contract law, there is a debate as to whether to account for the understandings of the parties, or whether to rely on a “formal” rule that can be applied by reference solely to objectively verifiable data.⁴⁹ States and branches lack interior mental states. Evidence of a bargain is to be found in the reallocation of regulatory entitlements, not the “intent” of Congress or the White House.

In harmony with this objective approach, intermural bargains are defined for the purposes of this Article as follows:⁵⁰ (1) They result in a reasonably stable state of affairs that endures over some time, which in common parlance might be called a stable equilibrium;⁵¹ (2) they comprise a distinct allocation of institutional authority either between levels of government or between the federal branches; and (3) they are the outcome of some process of interbranch or intergovernmental negotiation between officials acting in their official capacity. They are not, in other words, merely the expressions of directives contained in the constitutional text, but divergences from that baseline. In contrast, it is *not* part of the definition that specific individual officers or legislators believe that they have engaged in some quid pro quo. Legislative intent, or its Article II analog, therefore is not necessarily relevant to the identification of such bargains. Rather, it suffices if a reasonable observer would discern two institutions (branches or states) signaling assent to an agreement that disposes of a given institutional entitlement between them.

This definition does not resolve all boundary disputes (e.g., how long must an arrangement endure before it counts as stable? when are officials acting in an official, as opposed to a partisan, capacity?). But it is sufficiently precise to pick out a class of phenomena familiar to most scholars of American constitutional law—e.g., the line-item veto, the

47. *Id.* § 71.

48. Oliver Wendell Holmes, Jr., *The Common Law* 293–94 (Dover Publ’ns, Inc. 1991) (1881); see also Restatement (Second) of Contracts § 71 cmt. b (“In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement.”).

49. See Douglas G. Baird, *Reconstructing Contracts* 36 (2014) (discussing this dispute).

50. This definition captures a discernable and distinct class of phenomena. It is not the only definition one might imagine but rather the most useful for examining a distinct class of constitutional dynamics.

51. This is not meant to invoke the formal concepts of Walrasian or Nash equilibrium. See Kartik B. Athreya, *Big Ideas in Macroeconomics: A Nontechnical View* 77–78 (2013) (providing brief nontechnical accounts of those terms). Indeed, because it is perfectly possible for one institutional participant to defect and thereby unravel the arrangement, institutional bargains are not Nash equilibria.

budget lockbox, the use of limitations on presidential removal authority, conditional-spending programs, and federal legislation that commanders in the name of enforcing a compromise hammered out by the several states. Further, the definition is sufficiently capacious that it reaches both bargains that are instantiated in the form of law or regulations and bargains distilled into formal accords or informal agreements that are enforced through a tacit threat of future retaliation.⁵²

The objective definition offered here does, however, rule out the possibility that institutions can be coerced, or that coerced agreements might be ranked as involuntary in some circumstances. There is a large literature about coercion in both private and public law,⁵³ most of which focuses on individuals rather than institutions.⁵⁴ The Supreme Court has also recognized the possibility that states could be coerced in the context of conditional-spending programs.⁵⁵ At a minimum, the extension of coercion as a concept to institutions raises complex evaluative puzzles. For example, it is not immediately clear what it means to say that a corporate entity “feels” coerced. Nor is it clear that there is any shared view as to how to determine when an institution has been “wronged” by a coordinate institution’s promise or threat, such that the latter counts as coercive.⁵⁶ The argument presented here does not depend on contest-

52. Cf. Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 *Colum. L. Rev.* 295, 297 (1987) (discussing differences between legal agreements subject to judicial enforcement and cartel agreements, which depend on parties’ shared beliefs about consequences of breach).

53. The classic treatments are Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 *Va. L. Rev.* 79 (1981), which analyzes the intersection of consent and coercion in forming individual’s obligation to follow law, and Robert Nozick, *Coercion*, in *Philosophy, Science and Method* 440 (Sidney Morgenbesser et al. eds., 1969, which explores the concept of coercion).

54. For an exception, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 *Geo. L.J.* 1, 30–42 (2001) (critiquing Supreme Court’s current approach).

55. See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604–07 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.) (“The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”).

56. In recent work, Professor Mitchell Berman has developed the possibility that institutions can be compelled, even if they lack the requisite psychological states to fairly be described as being coerced, because legal actors may have legal or moral duties toward institutions and these duties can be violated by certain threats or offers. See Mitchell N. Berman, *Conditional Spending and the (General) Conditional Offer Puzzle 8* (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 522, 2013), available at <http://ssrn.com/abstract=2292755> (on file with the *Columbia Law Review*) (identifying “wrongful pressure” as pivotal to coercion). Even if Berman’s claim about the possibility of moral duties obtaining between institutions is correct, there is no a priori definition of such a duty that limits the bargaining space between institutions. Instead, the aim of this Article is to develop the substance of such limits from (broadly welfarist) first principles. I am grateful to Professor Berman for patient discussion of this point.

able claims about institutional psychology or the a priori rights of corporate entities.⁵⁷ Instead, it deploys an objective definition of what counts as a bargain and then traces a broadly welfarist account of the boundaries to permissible bargains based on the likely effects of such bargaining upon values that the Constitution aims to promote, including democratic accountability and the provision of national public goods.

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

This section canvasses private- and public-law literatures on bargaining to extract general principles that can be translated, *mutatis mutandis*, to the structural constitutional context. Beginning with the treatment of bargaining in private law, this section then turns to bargaining over individual constitutional entitlements.

1. *Negotiation and Bargaining in Private Law.* — In private-law contexts, bargaining is typically viewed as a desirable mechanism for realizing social-welfare gains. Starting with Ronald Coase, law-and-economics scholars have argued that a resource will be assigned to its highest-value use via private ordering in the absence of transaction costs.⁵⁸ The theory suggests that rational parties will trade until a resource is assigned to its highest-value use and then “agre[e] upon terms that maximize their joint surplus.”⁵⁹ Given bargaining’s welfare-enhancing effects, scholars posit that states should strive to create and administer property entitlements and enforcement regimes to facilitate bargaining.⁶⁰ This often entails an inquiry into how law should craft interests—e.g., as property or liability rules⁶¹—to maximize welfare.⁶² It

57. The U.S. Constitution has evolved considerably from its origins in the contract-like patents and charters of the several colonies. See Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *Yale L.J.* 502, 504 (2006) (tracing template for Constitution back to English municipal corporations). For an analysis of the social-psychological roots of corporate rights, see Avital Mentovich, Aziz Huq & Moran Cerf, *The Psychology of Corporate Rights* 26–30 (July 16, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2467372> (on file with the *Columbia Law Review*) (finding “strong priority of individual over corporate rights—regardless of the political preferences of the respondent or the nature of the corporate entities”).

58. Coase, *Social Cost*, *supra* note 28, at 8; accord Calabresi & Melamed, *supra* note 32, at 1096–98 (“[T]he assumption of no transaction costs . . . helps us see how . . . the goal of economic efficiency starts to prefer one allocation of entitlements over another.”).

59. Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 *Colum. L. Rev.* 396, 397 (2009).

60. For the classic statement, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347 (1967) (“A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities.”); see also Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 *J.L. & Econ.* S77, S95 (2011) [hereinafter Merrill & Smith, *Coasean Property*] (“[P]roperty rights assume the form they do in significant part to conserve on transaction costs.”).

61. See Calabresi & Melamed, *supra* note 32, at 1106–10 (defining property rules and liability rules).

also entails an analysis of the reasons for prohibiting bargains.⁶³ This second line of analysis provides a useful starting point for thinking about endogenous ordering in public-law contexts and is therefore summarized here.

Within the dominant welfarist approach to private bargaining, limits to freedom of contract are usually justified based on either the presence of a negative externality or an appeal to paternalism.⁶⁴ Both can be understood as species of transaction costs. First, “contracts are optimal . . . only if the contracting parties bear the full costs of their decisions and reap all the gains.”⁶⁵ But when a deal fails to account for

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

63. There is also a literature that examines nonwelfarist justifications for limiting private bargaining. E.g., Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1907–09 (1987) (developing “personhood” theory of inalienability); accord Rose-Ackerman, *supra* note 34, at 961–68 (developing inalienability theory through concept of citizenship). Deontological values of the kind that Radin marshals do not translate well into the institutional context.

64. Calabresi & Melamed, *supra* note 32, at 1111–15 (noting distributional motives may lie behind asserted paternalistic reasons); Rose-Ackerman, *supra* note 34, at 938 (discussing efficiency rationales for inalienability rules); accord Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87, 88 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*] (identifying “surprising consensus among academics at an abstract level on two normative bases” for inalienability: paternalism and externalities). Paternalism and externalities are not the only conceivable exceptions to contracting’s domain. Michael Trebilcock offers a broader range of exceptions to contracting, but he includes paternalism and externalities. Michael Trebilcock, *The Limits of Freedom of Contract* 58–77, 147–163 (1993). This Article focuses on externalities and internalities because they are generally uncontroversial. Ayres & Gertner, *Filling Gaps*, *supra*, at 88.

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

“adverse effects on third parties,” i.e., externalities, the presumption of optimality fails.⁶⁶ Identification of an externality is implicitly a claim about the existence of transaction costs: The third party affected by the deal is unable to participate in the deal because of the existence of some kind of friction—generally, if somewhat unhelpfully, labeled “transaction costs”—that renders such participation infeasible or excessively costly.⁶⁷ While there is no canonical accounting of the term “transaction costs,” it suffices here to suggest that they include epistemic costs, coordination costs, and decision costs.⁶⁸ Under standard welfarist assumptions,⁶⁹ the default response to an externality is to require the “internalizing [of] the externality through fees or taxes, [or] subsidizing the provision of information.”⁷⁰ Mandatory terms are deployed only when these fail. For example, it has been argued that negative externalities can justify the absolute prohibitions of usury law, which prevents overconsumption of social security.⁷¹

The notion of externalities as downstream symptoms of transaction costs is straightforwardly analogized to the public-law context. A standard concern in the design of democratic institutions is the possibility that the agents selected by the electorate will deviate from the expressed wishes of the voters or will engage in rent-seeking to the detriment of the demo-

66. Easterbrook & Fischel, *supra* note 65, at 1434. Externalities can also be defined in relation to the competitive equilibrium resulting from a Walrasian auction. Trebilcock, *supra* note 64, at 59 (explaining model of externalities as divergences between real-world allocation of resources and allocation resulting from hypothetical auctioneer “grinding out prices and soliciting bids in a transaction-cost-free world”).

67. Coase himself was clear that “there are transaction costs and . . . they are large.” R.H. Coase, *The Firm, the Market, and the Law* 26 (1988) [hereinafter *Coase, The Firm, the Market, and the Law*]. The precise definition of “transaction costs” is contested, see Pierre Schlag, *The Problem of Transaction Costs*, 62 *S. Cal. L. Rev.* 1661, 1674–76 (1989) (including coordination, search, decision, and information costs), but plainly capacious. The epistemic costs associated with the operation of the price system rank among Coasean transaction costs. See Harold Demsetz, *The Problem of Social Cost: What Problem? A Critique of the Reasoning of A.C. Pigou and R.H. Coase*, 7 *Rev. L. & Econ.* 1, 9–10 (2011) [hereinafter *Demsetz, What Problem?*] (discussing costs associated with acquiring information as transaction costs).

68. Ellickson, *supra* note 62, at 615 (suggesting this rough categorization). In private law, it is generally recognized that legal complexity can itself produce epistemic transaction costs. See, e.g., Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 *Duke L.J.* 1, 18 (1992).

69. This Article does not address the hard question of what counts as an adverse externality in private law. See generally Trebilcock, *supra* note 64, at 61–64 (offering alternative accounts rooted in competing moral philosophies).

70. Rose-Ackerman, *supra* note 34, at 938.

71. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 *J. Legal Stud.* 283, 285 (1995).

cratic principal. This is the problem of agency slack.⁷² Importantly, voters may not be able to mitigate agency slack without compromising other goals. It is not costless to install checks against political self-dealing. Every dollar used to that purpose is a dollar that is not available for the production of public goods. The institutional reshufflings pursued by imperfect agents may thus deviate from a democratic optimum, but the voting public may be in want of effective tools to force its agents to internalize this cost.

The second exception, paternalism, is a more fluid concept.⁷³ Loosely defined, paternalism is the law's "intervention in a person's freedom aimed at furthering her own good."⁷⁴ Its justifications are diverse. They include appeals to heterogeneity in rational capabilities;⁷⁵ efforts to reconcile accounts of bounded rationality with libertarian values;⁷⁶ and flat-out denials that individual autonomy is "valuable enough to offset what we lose by leaving people to their own autonomous choices."⁷⁷ Most commonly, paternalists tend to search for internalities, or "problems of self-control and errors in judgment that . . . occur[] when we make choices that injure our future selves."⁷⁸ A large literature mines behavioral law and economics for such internalities.⁷⁹ Another related literature asks how individual preferences should be "laundered"

72. See Terry M. Moe, *The New Economics of Organization*, 28 *Am. J. Pol. Sci.* 739, 758–72 (1984) (applying concept of agency costs to structure of state).

73. Cf. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *Yale L.J.* 763, 765 (1983) ("It would be a mistake . . . to assume that there is a single principle that best explains every paternalistic restriction in our law of contracts.").

74. Eyal Zamir, *The Efficiency of Paternalism*, 84 *Va. L. Rev.* 229, 236 (1998); see also Trebilcock, *supra* note 64, at 147 (asking whether "parties' present preferences" equate to "their own best interests").

75. See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 *U. Pa. L. Rev.* 1211, 1212 (2003) (advocating "asymmetrical paternalism" to correct errors by those who deviate from rational-choice models).

76. See, e.g., Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 *U. Chi. L. Rev.* 1159, 1160–61 (2003) (seeking to reconcile behavioralist prescriptions with libertarian preferences).

77. Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* 1 (2013).

78. Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 *Yale L.J.* 1826, 1845 (2013) [hereinafter Sunstein, *Behavioral Economics*]. One example is limits on cross-collateralization in consumer contracts, barred because purchasers tend to discount their likelihood of default. Baird, *supra* note 49, at 139.

79. For a summary of the relevant literature, see Sunstein, *Behavioral Economics*, *supra* note 78; see also Daniel Kahneman, *Thinking, Fast and Slow* 109–234 (2011) (enumerating cognitive biases). For criticism of the resulting prescriptions, see Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 *Harv. L. Rev.* 1593, 1597 (2014) (criticizing work of advocates of behavioral law and economics, including Sunstein, as "often artificially and wrongly exclud[ing] more traditional regulatory tools, such as direct mandates, from its analysis of policy options . . . [and] fail[ing] to properly evaluate how its own regulatory tools actually function").

to eliminate adaptive and otherwise distorted preferences.⁸⁰ Rather than focusing on external, environmental transaction costs, that is, paternalists locate the constraints on efficient bargaining within the parties to the bargain. By looking within rather than at external circumstances, the paternalist generates an additional set of bounds to the permissible domain of Coasean bargaining.

Obviously, paternalism arguments based on individual “human behavior” or “human error”⁸¹ cannot be directly transposed to the institutional context. Institutions, unlike individuals, do not engage in cognition. They therefore do not suffer directly from availability bias or other heuristics. Errors that infect individual decisionmaking also may not occur in collective decisionmaking, even if collective entities can coherently be assigned specific intentions.⁸²

Other accounts of internalities, however, do not rely solely on theories of human psychology. For example, paternalism in contract law can rest on accounts of second-order preferences, or preferences over preferences.⁸³ This is the idea that individuals can have preferences over the sort of end-stage goals they should seek.⁸⁴ *Mutatis mutandis*, the idea of second-order preferences might be extended to the institutional context. For example, an institutional interest held in common by a group of individuals—say, several states or numerous legislators—might be degraded by individual members’ free-riding. A familiar example involves spending: Each legislator might wish to engage in spending for her constituents, but out of concern for overall deficits, she might also have a preference regarding her own views on and action in respect to spending. The institutional interest in deficit control, on this account, is thwarted by the individual interest in spending for one’s own constituents. When the members of a collectivity suffer from this sort of dilemma, intervention might be justified to solve the ensuing conflict between first-order and second-order preferences.

80. See Robert E. Goodin, *Laundering Preferences*, in *Foundations of Social Choice Theory* 75, 81–86 (Jon Elster & Aanund Hylland eds., 1989) (listing five potential grounds for laundering preferences). For a careful analysis of the relevance of adaptive preferences to rational-choice consequentialism, see generally Jon Elster, *Sour Grapes—Utilitarianism and the Genesis of Wants*, in *Utilitarianism and Beyond* 219, 219–38 (Amartya Sen & Bernard Williams eds., 1982).

81. Sunstein, *Behavioral Economics*, *supra* note 78, at 1832.

82. Legal scholars versed in social-choice theory are quick to repudiate the possibility of group agency, but recent work in political theory points to the possibility of precisely such an account, which turns on individual authorization of and consent to be bound by institutional decisions. See Christian List & Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* 7–11 (2011) (identifying two approaches to group-agent realism and proposing alternative form).

83. Zamir, *supra* note 74, at 242.

84. See *id.* at 242 & n.34 (defining and elaborating on concept of second-order preferences).

The private-law approach to bargaining, in short, is simple. A permissible default position is combined with exclusionary rules triggered by one of two species of transaction cost: negative externalities or paternalism-warranting internalities. Even brief consideration of this framework, moreover, hints that it can be usefully deployed by analogy to model bargaining between institutions.

2. *Bargaining over Individual Constitutional Rights.* — To motivate the main analysis further, it is worth considering briefly bargaining over constitutional rights. This raises issues absent from the private-law context, although it also evinces sufficient commonalities to suggest that private-law concepts are not wholly inapposite to public-law analyses.

Constitutional law is characterized by pervasive worries about government infringement on individual choice.⁸⁵ Worries about unequal bargaining power that might be diffuse in the private-contracting context⁸⁶ come into crisp focus when one party's wealth is sourced through taxes on the other party.⁸⁷ Government also possesses a monopoly on the use of legitimate force that allows it to bargain not merely with dollars, but also under the shadow of licit coercion.⁸⁸ Wielding either the purse or the sword, government can use its overwhelming resources to "divide and conquer"⁸⁹ potential adversaries in civil society, thereby degrading important political liberties. Nevertheless, the basic framework developed in private-law contexts can be discerned in the complex jurisprudence concerning bargaining over individual rights. The Court has developed two distinct and divergent sets of rules for noncriminal and criminal procedural rights, respectively. In both domains, bargaining is generally permitted, with exceptions very roughly tracking the externalities and paternalism exceptions.

Consider first the rules for noncriminal contexts. When government offers money in exchange for the exercise or nonexercise of a constitu-

85. This is the lesson of state-action doctrine. Cf. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 *Harv. L. Rev.* 69, 70 (1967) ("It is not too much to have said that the state action problem is the most important problem in American law.").

86. In economic terms, bargaining power depends on plural factors, including bargaining procedures, parties' relative costs of delay and relative patience, outside options, and more. Martin J. Osborne & Ariel Rubinstein, *Bargaining and Markets* 50–55 (1990).

87. Kreimer, *supra* note 9, at 1296 ("The greatest force of a modern government lies in its power to regulate access to scarce resources.").

88. See Max Weber, *Politics as a Vocation*, reprinted in *From Max Weber: Essays in Sociology* 77, 78 (Hans Gerth & C. Wright Mills eds., 1958) ("The state is considered the sole source of the 'right' to use violence.").

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

tional right (e.g., speech), it can purchase individual behavior in the same way it can buy any other good.⁹⁰ Government thus routinely purchases private speech.⁹¹ It cannot, however, purchase supererogatory conditions that aim to leverage funding and thereby to regulate speech “outside the contours of the program itself.”⁹² This limit on contractual conditions might be explained by a worry about “the indoctrinating effect of a monopolized marketplace of ideas” created when government buys out vocal participants through conditional funding—i.e., it is a limit motivated by concern about negative externalities.⁹³ A different rule applies in Takings Clause cases. Imposing regulatory exactions, the state may extract only conditions with “an essential nexus and rough proportionality” to the “impacts of a proposed development.”⁹⁴ The limit to regulatory takings is sometimes justified by vague grumbling about the risk of “extortionate” government action.⁹⁵ But the doctrine can be more cogently explained by a concern that landowners as a group cannot resist government extortion through the political process, because individually they are vulnerable to “divide and conquer” tactics.⁹⁶ This is an argument from paternalism-warranting internalities.

Quite different rules apply to bargaining over criminal procedural entitlements.⁹⁷ In cases of “mistake or overt deception,”⁹⁸ the Court has

90. See, e.g., *United States v. Am. Library Ass'n*, 539 U.S. 194, 212 (2003) (plurality opinion) (analyzing unconstitutional-conditions problem); *Rust v. Sullivan*, 500 U.S. 173, 193–95 (1991) (same).

91. This is usually addressed through the government-speech doctrine. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (rejecting challenge to retaliation action based on government speech); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558–59 (2005) (discussing interaction of government-speech and compelled-speech doctrines). Government can also effectively purchase the Fourth Amendment rights of government employees. See, e.g., *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677 (1989) (endorsing drug-testing program for certain federal employees); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 633 (1989) (endorsing drug-and-alcohol-testing program for certain federal employees).

92. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013).

93. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675, 680 (1992).

94. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); accord *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (adopting “rough proportionality” as judicial standard for assessing appropriateness of exactions); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (requiring permit conditions to have “essential nexus” with regulatory purpose to be valid).

95. See, e.g., *Koontz*, 133 S. Ct. at 2596 (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause . . . because they impermissibly burden the right not to have property taken without just compensation.”).

96. See Posner, Spier & Vermeule, *supra* note 89, at 426–33.

97. The regulation of bargaining over criminal penalties, however, must be distinguished from the possibility of unilateral waivers, which have become increasingly frequent. See, e.g., *Salinas v. Texas*, 133 S. Ct. 2174, 2180 (2013) (plurality opinion)

tended to police plea bargaining.⁹⁹ It otherwise assumes, however, that pleas reflect Pareto optimal compromises.¹⁰⁰ Hence, threats by prosecutors to bring charges that would not otherwise be lodged render a plea “no less voluntary than any other bargained-for exchange.”¹⁰¹ Recent shifts in Sixth Amendment jurisprudence narrow that gap by imposing new obligations related to defense-side representation in plea bargaining.¹⁰² These new Sixth Amendment rules have been justified as correcting the previously operative, but flawed, assumption that defendants would have enough information to “rationally forecast[]” the likely conviction and sentence in their case.¹⁰³ The new rules instead reflect the reality that defendants will rarely be fully informed, but rather plagued by internalities of psychological biases and heuristics.¹⁰⁴ In the criminal

(holding suspects must expressly invoke Fifth Amendment in noncustodial interrogations to preclude later use of silence against them in criminal trial); *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2258, 2260 (2010) (holding in context of post-*Miranda* silence that defendant failed to invoke his Fifth Amendment right to cut off police questioning when he remained silent for two hours and forty-five minutes).

98. William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 763 (1989).

99. See, e.g., *Bousley v. United States*, 523 U.S. 614, 618–19 (1998) (holding guilty plea constitutionally invalid where “neither [defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged”); *Smith v. O’Grady*, 312 U.S. 329, 334 (1941) (holding guilty plea constitutionally invalid where defendant was “inveigled by false statements of state law enforcement officers into entering a plea of guilty”).

100. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1970–71 (1992) (discussing advantages of plea bargains over trials).

101. *Ricketts v. Adamson*, 483 U.S. 1, 9 n.5 (1987) (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984)). Criminal-procedure rights are thus less protected than other rights. Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1045–46 (2006) (“For example, the Supreme Court concluded that it was lawful for a prosecutor to offer to recommend a five-year sentence if a defendant pleaded guilty but to threaten to bring charges subjecting the defendant to a mandatory life sentence if he did not.”).

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

103. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1126 (2011).

104. *Id.* at 1127 (noting Supreme Court’s now-discarded plea-bargain jurisprudence “ignored the many psychological biases and heuristics that color defendants’ assessments of their own cases in plea bargaining”). Another internalities-based argument against plea bargaining suggests that prosecutors exploit a collective-action problem among defendants to secure convictions on charges defendants would never have faced in the first instance. Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners’ (Plea Bargain) Dilemma*, 1 J. Legal Analysis 737, 740 (2009) (“[T]his collective action problem allows the prosecutor to leverage a limited budget into many harsh plea bargains.”).

context, as in noncriminal contexts, constraints on bargaining with the state are thus grounded on internalities concerns.

The jurisprudence of bargaining over individual constitutional rights highlights one important discontinuity from the private-law setting: In many public-law contexts, it cannot be assumed that the two parties engaged in negotiation stand on a level playing field. To the contrary, the state often exercises effectual monopoly power in relation to a private actor seeking to exchange his or her constitutional rights for some discretionary governmental benefit. The persistence of asymmetries in bargaining in this familiar constitutional domain suggests that bargaining in public law cannot generally be conceptualized as arms-length bargaining between equals. Indeed, by developing the analogy to internalities in the private-law context, the argument developed below will explore a conceptual toolkit for thinking about how asymmetries between branches or between the national government and the states might influence a normative accounting of intermural bargaining.

* * *

This brief survey of bargaining over individual rights reveals a parallel basic architecture in both private and public law: An affirmative default rule is fenced in by concerns about third-party externalities and paternalism. The question now is whether these basic insights can be translated over to the structural constitutionalism context.

II. THE VARIETIES OF INSTITUTIONAL BARGAINING

This Part extends the bargaining model familiar from private law to the constitutional context. It aims to demonstrate, initially as a descriptive matter, that dynamic interaction between institutions creates many opportunities for bargains over institutional allocations. To motivate the analysis, and to resist skepticism about the analogy between institutional entitlements and property rights, three threshold points are warranted. First, the Constitution vests a rich menu of institutional entitlements in the branches of the federal government and the several states. But these interests are rarely labeled “property interests.” Nevertheless, the label is less outlandish than it first might appear.¹⁰⁵ As Coase himself noted, there is nothing magical about the labels of property or contractual rights since “what are traded on the market are bundles of rights, rights

105. But see Koh, *supra* note 10, at 130 (“[A]nalogizing constitutional powers to ‘property rights’ oversimplifies to the point of distortion.”). Koh explains that, unlike property, structural constitutional entitlements lack “sharp boundaries.” *Id.* It is true that structural constitutional entitlements have ambiguous edges, but so do many real- and personal-property entitlements. It is precisely in the absence of “sharp boundaries” to real-property entitlements that bargaining may be especially important, as many of Coase’s examples demonstrate.

to perform certain actions.”¹⁰⁶ Familiar institutional entitlements, such as the power to veto legislation, the appropriations power, and the authority to execute the law, all fall easily within this wide definition. Indeed, the Court often treats institutional entitlements not only as assigned to one owner but even as inalienable.¹⁰⁷ That is, the Justices routinely analyze institutional entitlements as a form of property, albeit one so special that such entitlements may resist alienation.

Second, bargaining over institutional entitlements can be conceptualized by simple analogy to bargaining in the private-law context. Institutional bargains arise when an entitlement held initially by one institution is voluntarily transferred to another institution. The absence of a formal price mechanism is irrelevant. Usually, the “seller” of the entitlement realizes a policy benefit in exchange for relinquishing the entitlement. Intermural bargaining occurs between Congress and the executive over elements of the national lawmaking process. States and the federal government, by contrast, negotiate over regulatory jurisdiction (i.e., the power to set rules for a certain population) and enforcement-related infrastructure.

Finally, key differences between institutions and individuals render bargaining *more* salient for institutional holders of constitutional entitlements than for individual holders. Branches of the federal government and states, unlike individuals, cannot exit from undesirable constitutional arrangements by physically departing a jurisdiction.¹⁰⁸ Changing the constitutional dispensation through textual amendment is often practically impossible given Article V’s rigidity.¹⁰⁹ The absence of an exit or a realistic amendment option puts pressure on postratification generations of elected and appointed officials to find solutions to pressing policy concerns within extant institutional arrangements. One potentially important way of doing this is via bargaining.

106. Ronald H. Coase, The 1987 McCorkle Lecture: Blackmail, 74 Va. L. Rev. 655, 656 (1988). The Coase theorem, however, operates within the field of neoclassical economic models, which “deduc[e] no conclusions about the resource allocation that results from actions taken by non-market institutions such as courts and legislatures.” Demsetz, *What Problem?*, supra note 67, at 8.

107. See supra text accompanying notes 13–18 (providing examples).

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

109. See Aziz Z. Huq, The Function of Article V, 162 U. Pa. L. Rev. 1165, 1165–85 (2014) [hereinafter Huq, *Function of Article V*] (“The amendment rule . . . renders the Constitution ‘one of the most inflexible’ ever written.”); see also infra text accompanying notes 281–283 (noting difficulty of amendment process established by Article V).

A. Bargaining Between Branches

This section catalogues diverse forms of interbranch bargaining over lawmaking, regulation, and spending. To enable identification of intermural bargains, it begins by specifying a baseline of constitutional entitlements.

1. *The Constitution's Baseline Allocation of Lawmaking Interests.* — The Constitution's first provisions contain a baseline set of entitlements. Article I of the Constitution partitions lawmaking power between the two Houses of Congress—each has the right to a separate vote on a bill—and the President—he or she has the right to sign, veto, or pocket veto that enrolled bill.¹¹⁰ Article II contains no explicit grant of legislative-like authority¹¹¹ (although Presidents do exercise de facto decree power¹¹²). This asymmetry is amplified in the fiscal domain. To begin with, revenue-raising measures must “originate” in the House of Representatives, not in the Senate.¹¹³ Executive fiscal authority is also tightly limited. Absent an “[a]ppropriatio[n] made by Law,” the Treasury cannot disburse funds.¹¹⁴ Military appropriations cannot last more than two years.¹¹⁵ The Constitution by these means reposes the “‘power of the purse’ . . . in the Congress” alone, with particular care to ensure legislative control over military power that (to eighteenth-century eyes) might provide a basis for plenary executive control.¹¹⁶ Pursuant to this authority, Congress created

110. U.S. Const. art. I, § 7, cl. 2.

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

112. See Brian R. Sala, *In Search of the Administrative President: Presidential “Decree” Powers and Policy Implementation in the United States*, in *Executive Decree Authority* 254, 254–73 (John M. Carey & Matthew Soberg Shugart eds., 1998) (arguing President can exercise significant lawmaking power through influence over federal bureaucracy).

113. U.S. Const. art. I, § 7, cl. 1.

114. *Id.* art. I, § 9, cl. 7 (requiring also publication of “regular Statement and Account of the Receipts and Expenditures of all public Money”); see also 31 U.S.C. §§ 1341(a), 1350 (2012) (imposing criminal penalties of up to two years' imprisonment and \$5,000 in fines upon federal officials engaging in knowing expenditure of funds absent legislative appropriation). The President's authority to issue new debt is constrained by statute. See *id.* § 3101(b) (providing statutory debt limit).

115. U.S. Const. art. I, § 8, cl. 12.

116. Kenneth W. Dam, *The American Fiscal Constitution*, 44 *U. Chi. L. Rev.* 271, 278 (1977).

in 1974 a complex set of procedures¹¹⁷ for discretionary and direct spending organized around its longstanding committee structures.¹¹⁸

What the Constitution proposes, politicians dispose. Observed deviations from the text's modular disposition are typically "consensual arrangements among the branches, not unilateral action by one branch."¹¹⁹ Generally, they concern either rulemaking or fiscal authority. When these deals are challenged in federal court, the ensuing jurisprudence illuminates the landscape of interbranch bargaining over structural entitlements.¹²⁰

2. *Bargaining over Rulemaking Authority I: Permitted Trades.* — For more than a century after the Constitution's ratification, the textual division of lawmaking authority between Congress and the President endured without much controversy. As late as 1892, the Supreme Court could assume that no interbranch delegation of legislative authority was permissible.¹²¹ An "intelligible principle" was (and technically still is) required to guide any exercise of executive-branch discretion.¹²² Although the Court permitted executive clarification of statutes through rulemaking by the early twentieth century,¹²³ it remained committed to the nondelegation doctrine. In 1935, the Justices invalidated two early New Deal regulatory regimes on nondelegation grounds.¹²⁴ In effect, these cases suggested that Article I entitlements were protected with an inalienability rule.

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

118. See Tim Westmoreland, Standard Errors: How Budget Rules Distort Lawmaking, 95 *Geo. L.J.* 1555, 1564, 1569–80 (2007) (describing current congressional budgeting structures).

119. Jacob E. Gersen, Unbundled Powers, 96 *Va. L. Rev.* 301, 356 (2010).

120. In addition to the species of bargaining discussed below, it is possible to think of statutes amending the House's or the Senate's internal procedures as interbranch bargains. See Aaron-Andrew P. Bruhl, Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause, 19 *J.L. & Pol.* 345, 346–47 (2003) (describing "statutized rules"). Bruhl analyzes these bargains in light of entrenchment concerns. *Id.* at 372–76.

121. *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

122. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [take lawmaking action] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

123. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 521 (1911) ("[T]he authority to make administrative rules is not a delegation of legislative power . . .").

124. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935) (invalidating elements of National Industrial Recovery Act on nondelegation grounds); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 414–20 (1935) (invalidating other elements of same statute on similar grounds).

Since 1935, however, the Court has permitted Congress and the executive to negotiate broad delegations of rulemaking authority to federal administrative agencies. Delegation is now a necessary element of the modern regulatory state.¹²⁵ The political branches appear to agree that nondelegation constraints have no contemporary bite.¹²⁶ And even scholars critical of this development perceive “no serious real-world legal or political challenges” to it.¹²⁷ Instead, the majority of federal law is now produced in the form of “agency rules, guidances, opinion letters, manuals, and websites.”¹²⁸ In a limited number of cases, to be sure, the Court imposes “nondelegation canons” in the course of statutory interpretation, but these tend to enforce discrete values external to Article I, such as federalism and individual rights, rather than serving as blanket prohibitions on delegation.¹²⁹ What once was subject to an inalienability rule, in short, is now regulated through a property rule.¹³⁰

Delegation has been enabled by developments in administrative law. The default scope of Article I authority transferred with any given statute was amplified in 1983 with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹³¹ Provided a statute adequately signals congressional intent

125. See Louis Jaffe, *Judicial Control of Administrative Action* 33 (1965) (describing delegation as “dynamo of modern government”).

126. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1241 (1994) [hereinafter Lawson, *The Rise*] (describing judicial and executive concessions to necessity of delegation of legislative power in modern government).

127. *Id.* Justice Thomas, however, has indicated his willingness to “reconsider [the Court’s] precedents on cessions of legislative power.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). Litigated efforts to rekindle the nondelegation doctrine sputter. See, e.g., *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 222–23 (1989) (finding “no support . . . for [the] contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power”); see also *Touby v. United States*, 500 U.S. 160, 164–69 (1991) (declining to overturn criminal statute on nondelegation grounds); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. Chi. L. Rev.* 1721, 1722 (2002) [hereinafter Posner & Vermeule, *Nondelegation Doctrine*] (arguing nondelegation doctrine has no practical effect).

128. Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 *Colum. L. Rev.* 1727, 1730 (2010); accord Peter L. Strauss, *The Rulemaking Continuum*, 41 *Duke L.J.* 1463, 1468–69 (1992) (noting federal staff offices generate “technical [guidelines] or staff manuals . . . in a profession that overwhelms” formal rulemaking).

129. Cass R. Sunstein, *Nondelegation Canons*, 67 *U. Chi. L. Rev.* 315, 330–37 (2000) (listing examples).

130. When Congress overrides a presidential veto to delegate authority to the federal government, it is hard to describe the outcome as consensual. Delegation of this sort is a (legitimately) forced transfer.

131. 467 U.S. 837, 843–44, 865 (1984) (arguing because “[j]udges are not experts in the field, and are not part of either political branch of the Government,” they should defer to reasonable agency rules unless Congress has directly spoken to issue).

to vest the executive with gap-filling authority,¹³² *Chevron* holds that a delegation to an agency is now packaged with a large margin of policy-related discretion. Even a “general delegation to the agency to administer the statute will often suffice to satisfy the court that Congress has delegated interpretive authority over the ambiguity at issue.”¹³³ *Chevron* deference matters because one important way for Congress to control ex post executive-branch policymaking is by constructing “fire alarms . . . that enable individual citizens and organized interest groups to examine administrative decisions . . . [by giving] them standing to challenge administrative decisions.”¹³⁴ Judicial deference to agency interpretations renders this strategy less effective. Courts operating within a deferential regime are less likely to heed “fire alarms” sounded by private citizens. *Chevron* therefore not only amplifies the baseline transfer of Article I rulemaking authority, but also handicaps an important instrument of legislative control.¹³⁵ It thus alters the ordinary operation of statutory delegation by inflating the unit currency of regulatory transfer.

The demise of the nondelegation doctrine and the rise of *Chevron* deference enabled an intragovernment market for lawmaking authority. Once, if Congress could not overcome its own veto gates and attain policy outcomes through statutory enactments, it was out of luck. Now, an effectual majority of Congress has another option: It can bargain with the executive over an open-ended delegation of rulemaking authority coupled with open-ended goals as a way to achieve policy change. As empirical studies confirm, members of Congress knowingly include a “willful lack of clarity” in statutes as a means of obtaining consensus, while also influencing subsequent agency interpretations.¹³⁶ Dollars may

132. See Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006) (identifying this threshold problem as “*Chevron Step Zero*”).

133. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1884 (2013) (Roberts, C.J., dissenting); accord id. at 1871 (majority opinion) (providing examples of Court’s deference where agency construed jurisdictional provision of statute it administers). But judicial deference is not stably allocated. Cf. Jud Mathews, *Deference Lotteries*, 91 Tex. L. Rev. 1349, 1352–53 (2013) (arguing administrative agencies face “‘deference lottery’ when they advance a statutory interpretation in a notice-and-comment rulemaking or formal adjudication”).

134. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 Am. J. Pol. Sci. 165, 166 (1984). When an agency’s preferences align more closely with Congress’s than with private litigants’, judicial deference does not undermine congressional control.

135. Cf. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum. L. Rev. 1749, 1769 (2007) (observing “fire-alarm” oversight “is efficient because it shifts to third parties the cost of gathering and processing information”).

136. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 596–97 (2002); see also Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 Vand. L. Rev. 363, 369–70 (2010) [hereinafter Lemos, *Consequences*] (stating “Congress often opts for legislation that addresses [a] problem generally but leaves the most contentious details unresolved,” thereby “delegating the

not be the coin of this marketplace. But delegation nonetheless has a transactional character. By delegating, legislators are not merely waiving their Article I prerogatives: They are engaged in deliberate and reciprocal deals in which legislative authority is alienated *in order to* secure policy goods legislators could not otherwise obtain.¹³⁷ Delegation matters more, indeed, as the complexity, difficulty, and enactment costs of legislative specificity rise, since the relative gain from writing a brief and conflict-free delegation to the executive tends to rise as legislative transaction costs go upward.¹³⁸

Alternatively, interbranch transfers of regulatory authority have historically been achieved through customary interbranch accords. Courts, however, diverge on when such practice matters and how much weight it should receive. In military and foreign-affairs matters, the Court permits unilateral executive action based not only on a present legislative delegation, but also on prior congressional action. The Court has held that a

ultimate decision to an agency”); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405, 428 (2008) (“Legislation is the process of competition among policy interests. When Congress enacts a statute, it inevitably resolves some policy disputes and leaves others open. All legislation leaves some residuum of policymaking power to the institution . . . charged with administering it.”); cf. Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 Stan. L. Rev. 627, 641 (2002) (finding in tax context “competing factions of Congress . . . ‘agree to disagree’ in the drafting of a statute” and seek resolution by another institution).

137. See Grundfest & Pritchard, *supra* note 136, at 641 (“When faced with a conflict among competing legislative coalitions, carefully crafted ambiguous language can allow legislators with divergent interests to adopt competing, inconsistent interpretations of the same statutory text.”); Lemos, *Consequences*, *supra* note 136, at 369–70 (postulating intentionally ambiguous statutory language enables legislators to enact otherwise-gridlocked legislation, at expense of effectively delegating some legislative power to judiciary); Nourse & Schacter, *supra* note 136, at 596–97 (describing congressional staffers’ awareness that “deliberate ambiguity” serves to delegate lawmaking to courts and agencies).

138. See David Epstein & Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* 197 (1999) (arguing as complexity, difficulty, and enactment costs of legislative specificity rise, legislators will increasingly tend to delegate decisions rather than resolve hard questions themselves). Delegation, indeed, matters more in a separation-of-powers system because the plurality of legislative veto gates means that the possibility of enacting anything other than incremental measures via statute recedes. George Tsebelis, *Veto Players and Law Production in Parliamentary Democracies: An Empirical Analysis*, 93 Am. Pol. Sci. Rev. 591, 605 (1999) (“If there are many veto players separated by large ideological distance, then legislation can only be incremental.”). The formal models of delegation offered by Epstein, O’Halloran, and Tsebelis, upon which the main text draws, simplify from certain features of observed legislative action. For example, delegations in the wake of intracameral disagreement are likely to be opposed by at least some legislators, who might exploit veto gates to derail or delay legislation. The resulting delegation, moreover, is by no means certain to line up with the median legislator’s preferences. Such details, however, are not salient to the basic insight that the models offer into the conditions under which delegation occurs.

historical interbranch consensus can operate as a “gloss” on ambiguous constitutional text.¹³⁹ In *Dames & Moore v. Regan*, for example, the Court endorsed executive power to create unilaterally a supranational claims tribunal through an agreement with Iran on the ground that previous “Congress[es] ha[d] implicitly approved the practice.”¹⁴⁰ The holding rested on the principle that “a practice by one branch of government that implicates the prerogatives of another branch gains constitutional legitimacy only if the other branch can be deemed to have ‘acquiesced’ in the practice over time.”¹⁴¹ More recently, the D.C. Circuit has relied on “post-ratification” practice to hold that Presidents have exclusive power to recognize foreign sovereigns.¹⁴² Another opinion from the same court, on the scope of the President’s recess-appointment power, declined to attribute dispositive weight to such evidence.¹⁴³ Reversing the latter circuit court ruling, a five-Justice majority of the Supreme Court took a broad lens to history, accounting for practice from James Madison’s presidency up to the present day.¹⁴⁴

Like formal interbranch transfers of authority, the theory of historical gloss is a theory of interbranch agreements. It is not a constitutional analogue to adverse possession. But the operative concept of agreement is ambiguous.¹⁴⁵ As a result, the historical-gloss doctrine diminishes Congress’s leverage. It creates the possibility that acquiesced-in delegations will not be accompanied by reciprocal gains for legislators.¹⁴⁶ Infor-

139. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (relying on “historical glosses” on executive power); see also *Raines v. Byrd*, 521 U.S. 811, 826–28 (1997) (citing absence of historical practice as one ground for denying congressional standing).

140. 453 U.S. 654, 680, 686 (1981); accord H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 *Geo. Wash. L. Rev.* 527, 539 (1999) (“Agreement between the political branches on a course of conduct is important evidence that the conduct should be deemed constitutional.”).

141. *Bradley & Morrison*, *supra* note 35, at 432.

142. *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197, 207–13 (D.C. Cir. 2013), cert. granted sub nom. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 134 S. Ct. 1873 (U.S. Apr. 21, 2014) (No. 13-628).

143. *Noel Canning v. NLRB*, 705 F.3d 490, 501–02 (D.C. Cir. 2013) (relying on practice during early Republic, but not later), *aff’d* on other grounds, 134 S. Ct. 2550 (2014).

144. *Noel Canning*, 134 S. Ct. at 2560 (“[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when the practice began after the founding era.”); *id.* at 2561–64 (examining historical practice).

145. The problem is discussed in detail in *Bradley & Morrison*, *supra* note 35, at 433–38, which canvasses various possible meanings of “acquiescence.”

146. By analogy with custom, it could be argued that the scope of federal-court jurisdiction is “the subject of an ongoing dialogue between [Congress and the judiciary].” Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 *Nw. U. L. Rev.* 1, 10 (1990). Indeed, in the course of the serial opinions over jurisdiction-stripping legislation respecting the Guantánamo detentions, the Court

mally negotiated arrangements, therefore, raise normative questions that are absent with formal arrangements.

3. *Bargaining over Rulemaking Authority 2: Forbidden Trades.* — A different regime, however, applies when an interbranch bargain slices up the lawmaking entitlement into something other than a cognizable delegation. In such instances, the Court has resisted new permutations of lawmaking authority by imposing inalienability rules. Its resistance echoes the private-law *numerus clausus* principle, which directs that real-property rights conform to certain standardized forms.¹⁴⁷

The legislative veto is an instructive example. As with delegations, there is little doubt that the device emerged as a deliberate strategy to pursue policy goals in a separation-of-powers context. Indeed, the idea of reserving a veto to either one or both Houses did not germinate on Capitol Hill, but instead “originated because presidents wanted it Presidents asked Congress to delegate additional authority and were willing to accept the legislative veto that controlled the delegation.”¹⁴⁸ President Hoover, seeking broad authority from Congress to reorganize the federal executive, first proposed a legislative veto, and he secured one in 1933 reorganization legislation.¹⁴⁹ Legislative vetoes were then incorporated into hundreds of statutes as the price of legislative delegations.¹⁵⁰

INS v. Chadha was the occasion for the Court’s invalidation of the legislative veto.¹⁵¹ It arose out of deportation proceedings in which the House of Representatives had exercised a legislative veto to evacuate relief from deportation granted to six noncitizens.¹⁵² Chief Justice Burger reasoned that the House veto was “essentially legislative in purpose and effect” because it “had the purpose and effect of altering the legal rights, duties, and relations of persons,” and hence could only be valid if passed through bicameralism and presentment.¹⁵³ Scholars quickly condemned

referred to itself as embedded within an “ongoing dialogue between and among the branches of Government.” *Boumediene v. Bush*, 553 U.S. 723, 738 (2008). Whether the outcome of this “dialogue” reflects the preferences of all branches, however, is quite another question. Cf. Aziz Z. Huq, *What Good Is Habeas?*, 26 *Const. Comment.* 385, 402–07 (2010) (presenting empirical evidence suggesting Supreme Court intervention in military detentions at Guantánamo has failed to have any significant libertarian effect).

147. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *Yale L.J.* 1, 4 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*] (noting *numerus clausus* means “the number is closed”).

148. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, *Law & Contemp. Probs.*, Autumn 1993, at 273, 275–76.

149. *Id.* at 278–79.

150. William West & Joseph Cooper, *The Congressional Veto and Administrative Rulemaking*, 98 *Pol. Sci. Q.* 285, 286 (1983).

151. 462 U.S. 919, 944–59 (1983).

152. *Id.* at 926–27.

153. *Id.* at 951–52.

the decision's formalist character¹⁵⁴ and noted that it failed to recognize the realities of delegation in the post-New Deal regulatory state.¹⁵⁵ The legislative veto proved so indispensable that in the sixteen months *after* the device's judicial repudiation, Congress still enacted fifty-three legislative vetoes.¹⁵⁶

4. *Bargaining over Fiscal Authority*. — Congress and the President have agreed on a series of legislative enactments that move substantial fiscal authority between chambers and across the interbranch divide.¹⁵⁷ Some of these deals have been durable, others evanescent. Each embodies a negotiated reallocation of the fiscal authorities initially assigned by Article I of the Constitution. Once more, the Court has applied a *numerus clausus* principle to rule out of bounds certain arrangements.

Perhaps the most salient example of bargaining over fiscal authority is the 1990s effort to assign the President the ability to strike out discrete items of spending in omnibus appropriations statutes (the “line-item veto”). Like the legislative veto, the line-item veto endeavored to rearrange lawmaking authority between the branches by moving a quantum of congressional discretion to the President. The Line Item Veto Act allowed the President to cancel “(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.”¹⁵⁸ Like the legislative veto, the line-item veto was a voluntary deal. It was proposed by the branch that lost power (Congress) at a time the other branch was led by a political foe.¹⁵⁹ Members of Congress understood that they were engaged in what they perceived to be

154. See, e.g., Harold H. Bruff, *The Incompatibility Principle*, 59 *Admin. L. Rev.* 225, 250 (2007) (noting formalist style of *Chadha* opinion).

155. See, e.g., Lawson, *The Rise*, *supra* note 126, at 1252–53 (“A first-best world would have neither delegations nor legislative vetoes, but a world with both . . . is closer to the correct constitutional ‘baseline’ than [one] with only delegations.”).

156. Louis Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 *Pub. Admin. Rev.* 705, 706 (1985).

157. See William G. Dauster, *The Congressional Budget Process*, in *Fiscal Challenges: An Interdisciplinary Approach to Budget Policy* 4, 6–15 (E. Garrett et al. eds., 2008) (discussing development of congressional budget process, Congressional Budget Act, and Budget Enforcement Act).

158. Pub. L. No. 104-130, sec. 2, § 1021(a), 110 Stat. 1200, 1200 (1996), invalidated by *Clinton v. City of New York*, 524 U.S. 417 (1998).

159. It was the newly elected Republican House majority in 1994 that proposed and pushed the line-item veto, which most immediately empowered President Clinton. Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 *Cardozo L. Rev.* 871, 872 (1999) [hereinafter Garrett, *Accountability and Restraint*] (discussing Republican Congress's push for line-item veto during Clinton's presidency). This was not the first time a line-item veto had been proposed in Congress. See Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 *Va. L. Rev.* 403, 404 (1988).

excessive and unsustainable spending.¹⁶⁰ Legislators were also under no illusions about what they had renounced and what they were transferring to another branch. “Make no mistake about it,” prophesied Republican Senator Jon Kyl (a supporter of the proposal), a line-item veto “will shift a great deal of new power to . . . President [Clinton].”¹⁶¹ One way of interpreting the line-item veto therefore is as a solution to an intentional “tragedy of the commons” problem facing the federal fisc.¹⁶²

In *Clinton v. City of New York*, the Court invalidated the line-item veto on formalist grounds similar to those relied on in *Chadha*.¹⁶³ Writing for the Court, Justice Stevens reasoned from the Presentment Clause to conclude that “constitutional silence” about unilateral presidential action repealing or amending parts of duly enacted statutes should be “construe[d] . . . as equivalent to an express prohibition.”¹⁶⁴ *Clinton* distinguished between “cancellation and modification delegations on the one hand and the familiar lawmaking delegations.”¹⁶⁵ Although the distinction can be understood as another application of a constitutional *numerus clausus* principle, its cogency can fairly be doubted. As Justice Scalia in his *Clinton* dissent noted, Congress can achieve substantially the same effect as a line-item veto by the simple expedient of drafting a statute differently—an obvious-enough alternative that the Court could be criticized for being merely “fak[ed] out” by the Act’s title.¹⁶⁶

The line-item veto case is puzzling for another reason: In effect, the Court has permitted delegations with respect to regulatory matters, but not spending questions. Such a distinction might initially seem justified in terms of the Constitution’s clear allocation of appropriations authority to Congress.¹⁶⁷ But surely Congress has equally clear authority to make regulations through its various enumerated powers. And there is something perverse about allowing the executive to control expenditures indirectly by ratcheting up or down the activity level of the regulatory state, while denying it any direct power to alter levels of spending.

160. See H.R. Rep. No. 104-491, at 15 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 892, 892 (describing need for legislation to help reduce “run-away federal spending and a rising national debt”).

161. 142 Cong. Rec. 6551 (1996) (statement of Sen. Kyl).

162. See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 Mich. L. Rev. 71, 100 (2003) (noting line-item vetoes can solve collective-action problems).

163. *Clinton v. City of New York*, 524 U.S. 417, 421 (1998).

164. *Id.* at 439.

165. Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 Geo. Wash. L. Rev. 1, 4–5 (1998).

166. *Clinton*, 524 U.S. at 468–69 (Scalia, J., dissenting).

167. See, e.g., U.S. Const. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives . . .”).

The line-item veto is the most notorious instance, moreover, of a larger pattern of bargaining over fiscal powers. Other instances tend not be litigated and hence are not so visible. Consider another example of shifting entitlements between legislative chambers. The Origination Clause allocates first-mover rights on fiscal matters to the House. But the Senate often “takes a revenue bill passed by the House . . . strikes the language of the bill entirely, and replaces it with its own revenue bill unrelated to the one that began in the House.”¹⁶⁸ In addition, even though the House lacks a constitutional role in drafting or enacting revenue-raising tax treaties, these “have become an important and frequently used coordination device between countries, with the United States entering into nearly seventy such instruments.”¹⁶⁹ The net effect is to cut the House out of important fiscal decisions. This tax-treaty practice also demonstrates how an arrangement can objectively embody a stable rearrangement of institutional entitlements without necessarily representing an agreed-upon bargain. That is, even if the House has not expressly agreed to the practice, the mere fact that it is a consistently observed, seemingly durable arrangement that moves institutional entitlements away from the baseline set in the Constitution’s text suffices to treat it as an intermural bargain for the purposes of this Article.¹⁷⁰

Bargaining over fiscal power can be discerned between the branches beyond the contested example of the line-item veto. Indeed, there is a long history of reallocations of fiscal authority between the branches that the Court has not disturbed to date. Negotiated reworkings of constitutional authority over the federal fisc predate World War II.¹⁷¹ In 1919, the House Appropriations Committee established a Select Committee on the Budget that drafted a new framework, one that “vested responsibility for the preparation of the budget solely in the President and provided for the establishment in his office of a Bureau of the Budget to give him technical assistance.”¹⁷² The ensuing 1921 law reallocated Congress’s

168. Rebecca M. Kysar, *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*, 91 Wash. U. L. Rev. (forthcoming 2014) (manuscript at 3), available at <http://ssrn.com/abstract=2271261> (on file with the *Columbia Law Review*).

169. Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 Yale J. Int’l L. 1, 2–3 (2013) [hereinafter Kysar, *Tax Treaties*]; see also *id.* at 29–31 (arguing Origination Clause should be read as constraint on Treaty Power to preserve House role in fiscal matters).

170. See *supra* text accompanying notes 48–51 (discussing objective definition of bargaining).

171. For the pre-twentieth-century history, see Kysar, *Tax Treaties*, *supra* note 169, at 7–10; see also Kate Stith, *Congress’ Power of the Purse*, 97 Yale L.J. 1343, 1364–77 (1988) (discussing the two major pieces of nineteenth-century framework legislation to exercise control over budgeting).

172. Paul Studenski & Herman E. Krooss, *Financial History of the United States* 323 (2d ed. 1963).

right to set the fiscal agenda to the President.¹⁷³ The executive also gained authority to identify the baseline against which proposed fiscal changes are measured.¹⁷⁴ The executive's agenda-setting authority is further amplified by an implicit delegation bundled into most appropriations measures: Congress no longer enacts line-by-line appropriations targeting discrete offices. Instead, it parcels out funds in agency-specific lump sums denominated in the millions to hundreds of millions of dollars.¹⁷⁵ As a result, the President wields large influence on the intra-governmental and geographic distributions of federal dollars.¹⁷⁶

Executive dominance of budgeting is not immutable. Between 1990 and 2002, for example, budgeting operated under the "PAYGO rules" negotiated between President George H.W. Bush and Congress, which required that a class of new tax cuts and spending programs be funded via revenue offsets.¹⁷⁷ When Congress failed to offset new covered spending, the President was empowered to issue a mandatory sequestration order.¹⁷⁸ PAYGO, however, expired in 2002 and has not since been renewed, ratcheting back the scope of authority delegated to the executive.¹⁷⁹

173. See Budget and Accounting Act, 1921, ch. 18, tit. II, 42 Stat. 20, 20–23 (granting President greater budgetary powers), amended by Reorganization Act of 1939, ch. 36, § 201, 53 Stat. 561, 565 (expanding President's budgetary control to include "any independent regulatory commission or board"). The persuasive effect of the President's budget, nevertheless, is debated. See Dauster, *supra* note 157, at 17 ("Congress can and often does treat the president's budget as just so many suggestions.").

174. For instance, after the enactment of temporary tax cuts, President George W. Bush proposed that those cuts be treated as permanent for subsequent budgeting purposes such that any extensions of the cuts would be recorded as budget neutral. Rebecca M. Kysar, *Lasting Legislation*, 159 U. Pa. L. Rev. 1007, 1028 (2011).

175. See Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 Calif. L. Rev. 593, 611 (1988) [hereinafter Stith, *Fiscal Constitution*] ("[A]ppropriations legislation has generally contained less line-item detail than it did in the preceding 150 years . . . [and] appropriations acts fund each broadly defined federal program or activity in one lump sum, termed a budget 'account.'" (footnote omitted)). The use of lump-sum appropriations remains the norm in current and pending appropriations measures. See, e.g., H.R. 1, 112th Cong. (2011) (allocating lump sums to various branches of armed forces).

176. See Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 Am. Pol. Sci. Rev. 783, 786 (2010) (discussing presidential direction of funds after final budget passage).

177. See Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. Chi. L. Rev. 501, 507–12 (1998) (describing PAYGO).

178. Budget Enforcement Act of 1990, Pub. L. No. 101-508, tit. XIII, § 13101, 104 Stat. 1388, 1388-574 to -582 (codified as amended at 2 U.S.C. §§ 900-903 (2012)).

179. For an evaluation of PAYGO, see Elizabeth Garrett, *A Fiscal Constitution with Supermajority Voting Rules*, 40 Wm. & Mary L. Rev. 471, 481 (1999).

The Court has been largely absent from these negotiations.¹⁸⁰ The only significant judicial intervention was *Bowsher v. Synar*, which invalidated elements of the Gramm-Rudman-Hollings Act.¹⁸¹ Enacted in the wake of broad legislative recognition of a fiscal crisis,¹⁸² this statute allocated sequestration authority to the Comptroller General, whom the Court found to be an agent of Congress.¹⁸³ The statute was understood at the time as a radical reordering of budgeting authority between the branches.¹⁸⁴ Deploying a formalist logic parallel to *Chadha's*, Chief Justice Burger explained that this allocation of sequestration authority “plac[ed] the responsibility for execution of the [law] in the hands of an officer who is subject to removal only by . . . Congress,” which “in effect . . . retained control over the execution of the Act and . . . intruded into the executive function.”¹⁸⁵ Later cases gloss *Bowsher* in terms of a functionalist concern about congressional self-aggrandizement.¹⁸⁶ Indeed, Congress reacted to *Bowsher* by delegating sequestration authority to the (executive-branch) Office of Management and Budget.¹⁸⁷ But *Bowsher*, like *Chadha* and *Clinton*, can equally be understood in terms of a constitutional numerus clausus principle: Congress can delegate fiscal discretion wholesale, but it cannot unbundle that discretion to reserve a meaningful veto at the margin.

180. In 1975, the Court declined to find implied presidential impoundment authority without statutory authorization. *Train v. City of New York*, 420 U.S. 35, 44–46 (1975). This occurred at a time of great political controversy over President Nixon’s employment of impoundment, see Louis Fisher, *Constitutional Conflicts Between Congress and the President* 133–34 (4th ed. 1997), and so might be tallied in the ranks of judicial intrusions into fiscal institutional design. The Court has allowed private litigants to bring Origination Clause challenges but adopted a narrow view of the Clause’s reach. *United States v. Munoz-Flores*, 495 U.S. 385, 400 (1990).

181. 478 U.S. 714, 736 (1990) (invalidating section of Balanced Budget and Emergency Deficit Control Act of 1985, better known as Gramm-Rudman-Hollings Act).

182. See, e.g., 131 Cong. Rec. 24,902 (1985) (statement of Sen. Symms) (“There is one word in the bill’s title which catches the eye—‘emergency.’ I believe that many of my colleagues share my view that this Nation is sliding toward a precipice, and that this spending gluttony, if we do not reverse it, is going to mean our ruination.”).

183. *Bowsher*, 478 U.S. at 733–34.

184. For a contemporary view, see Stith, *Fiscal Constitution*, *supra* note 175, at 596–97 (“[Gramm-Rudman-Hollings] is especially important, however, because it did not purport merely to effect a marginal reduction in spending. Rather, it sought to establish a new regime to govern the federal budget process, a regime that would *guarantee* spending and deficit reduction.”).

185. *Bowsher*, 478 U.S. at 734.

186. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 685–86 (1988) (characterizing congressional action in *Bowsher* as “go[ing] beyond the words and implications of the [sic] [Appointments Clause] and . . . infring[ing] the constitutional principle of the separation of governmental powers” (second alteration in original) (quoting *Myers v. United States*, 272 U.S. 52, 161 (1926)) (misquotation)).

187. Dauster, *supra* note 157, at 11.

B. *Bargaining Between the States and the Federal Government*

The Constitution bifurcates regulatory jurisdiction between the several states and the federal government. Efforts to police the ensuing line occupy an inordinate share of judicial bandwidth.¹⁸⁸ Despite the vigor and persistence of judicial invigilation, however, the federal–state border is still characterized by vigorous trading. This section documents diverse forms of regulatory exchange between the federal government and the states to suggest that the common image of a static and unchanging “federal balance”¹⁸⁹ misreads operational realities. This survey suggests that the Court has treated federalism and separation-of-powers bargaining differently. In the separation-of-powers context, the Court has tended to police closely the permissible scope of bargaining. In the federalism context, however, it has permitted, and even enabled, bargaining by stepping in to delineate more crisply the contours of institutional entitlements. For this reason, the normative critique of judicial limits on interbranch bargaining that is developed in Parts III and IV of this Article does not bear on federalism jurisprudence in the same way it bears on separation-of-powers case law. Instead, the Court’s federalism jurisprudence, which surely can be criticized on other grounds,¹⁹⁰ shows how effectual interbranch bargaining can be.

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

— The Constitution’s central mechanism for dividing federal and state domains hinges on the textual enumeration of national governmental authorities.¹⁹¹ This mechanism is less successful than the Constitution’s interbranch allocation of responsibilities over lawmaking. Due to the constitutional text’s underspecification and ambiguity, judicial responsibility for drawing the margins of national authority has taken on large significance.¹⁹² The baseline is harder to discern. With great respon-

188. For a survey of relevant doctrine, see Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. Chi. L. Rev. 575, 586–611 (2013) [hereinafter Huq, *Tiers of Scrutiny*].

189. See *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

190. See, e.g., Huq, *Tiers of Scrutiny*, supra note 188, at 652–55 (recommending fundamental changes to structure of judicial review in federalism cases).

191. See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (“[R]ather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers.... The Constitution’s express conferral of some powers makes clear that it does not grant others.”).

192. See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm. & Mary L. Rev. 1733, 1748–49 (2005) (“The open-textured nature of the Constitution’s structural commitments calls for judicial implementation through doctrine: There is simply no way to administer our federal system without developing rules to flesh out the allocation and balance of authority.”). The era in which it was plausible to imagine dual, mutually exclusive

sibility, however, comes great divisiveness. The Justices differ not only on how to construe the Constitution's grants of national power, but also on how to read its general rule of construction, which is contained in the Necessary and Proper Clause.¹⁹³ Divisive public and judicial disagreement about federalism may be so pervasive as to be an identifying trait of American constitutionalism.

Federal regulatory power rests centrally in the Commerce Clause, which licenses broad superintendence over the national economy and its constituent parts.¹⁹⁴ Proper invocation of the Commerce Clause permits Congress to preempt contrary state laws or regulations.¹⁹⁵ This regulatory jurisdiction is plenary when licitly exercised.¹⁹⁶ If a federal law is presented in state court, state judicial officials have no option but to respect

sovereignties is long passed. See generally Corwin, *Dual Federalism*, *supra* note 6, at 21–23 (summarizing transformation in federalism until 1950).

193. U.S. Const. art. I, § 8, cl. 18 (authorizing Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States”). For an example of how Justices differ in their construction of this clause, see *United States v. Kebodeaux*, 133 S. Ct. 2496, 2499–2505 (2013) (upholding civil-registration requirement for those who had been subject to conviction in military court martial before enactment of relevant registration statute). Of the seven Justices who agreed with the judgment, only four characterized the case as straightforward under a broad reading of the Necessary and Proper Clause. *Id.* at 2502. Chief Justice Roberts and Justice Alito both concurred in the judgment, registering disapproval of the majority’s method for resolving the scope of Necessary and Proper related powers. *Id.* at 2507–08 (Roberts, C.J., concurring in the judgment); *id.* at 2508–09 (Alito, J., concurring in the judgment). Given that dissenting Justices Scalia and Thomas each offered slightly different accounts of the Necessary and Proper Clause, it would seem that there are (at least) four different doctrinal accounts of that central constitutional provision on the Court. Compare *id.* at 2508–09 (Scalia, J., dissenting) (“I do not agree [with Justice Thomas] that what is necessary and proper to enforce a statute validly enacted pursuant to an enumerated power is not itself necessary and proper to the execution of an enumerated power.”), with *id.* at 2509–17 (Thomas, J., dissenting) (“Congress lacks authority to legislate if the objective is anything other than ‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.” (quoting *United States v. Comstock*, 130 S. Ct. 1949, 1972 (2010) (Thomas, J., dissenting) (internal quotation marks omitted))).

194. U.S. Const. art. I, § 8, cl. 3 (authorizing Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”). For a discussion of the broad Commerce Clause power, see, e.g., Ernest A. Young, “The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court, 2011 *Sup. Ct. Rev.* 253, 259 [hereinafter Young, *Presumption Against Preemption*] (discussing Court’s expansion of reach of Commerce Clause after 1937 “to include activities that were small in themselves but, in the aggregate, had substantial economic effects”).

195. For an excellent introduction to the Court’s preemption jurisprudence, see generally Young, *Presumption Against Preemption*, *supra* note 194.

196. For example, a state law that is preempted is “without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

the federal preferences embodied therein.¹⁹⁷ In addition to its enumerated regulatory authorities, the national government also can draw on its power to collect taxes and expend funds for “the common Defense and general Welfare,”¹⁹⁸ a power until recently unbounded by other restraints on national regulatory authority.¹⁹⁹ Congress can accordingly offer subsidies to subnational governments upon the condition that they undertake other policies.²⁰⁰

The Court has also imposed two significant constraints on the deployment of most (but not all) enumerated powers, both of which enhance intergovernmental markets over regulation. First, when a federal law singles out state legislative or executive officials with a legal obligation that does not fall on private actors, it violates an “anticommandeering” principle.²⁰¹ That rule entails that “the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.”²⁰² The Court here might be understood as clarifying the terms of trade between levels of government. Such clarification can facilitate trade by eliminating uncertainty about the scope and initial allocation of entitlements.

Because “[s]tate sovereignty is not just an end in itself” but a means to promoting individual liberty, the Court held that “departure[s] from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”²⁰³ Commandeering is impermissible even if Congress had

197. See *Testa v. Katt*, 330 U.S. 386, 389 (1947) (holding Rhode Island state court must entertain federal claim arising under Emergency Price Control Act); see also Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 *Colum. L. Rev.* 1001, 1027 (1995) (exploring scope of this obligation).

198. U.S. Const. art. I, § 8, cl. 1.

199. See Joseph Story, *Commentaries on the Constitution of the United States* § 489 (Carolina Academic Press 1987) (1833) (opining Congress’s taxation and spending powers are not limited “to cases falling within specific powers enumerated in the Constitution”). For discussion of limitations imposed on the Spending Clause in recent jurisprudence, see *infra* text accompanying notes 267–273.

200. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (finding “within constitutional bounds” withholding federal highway funds from states with legal drinking ages below twenty-one).

201. See *Printz v. United States*, 521 U.S. 898, 918–25 & n.13 (1997) (holding “[o]ur system of dual sovereignty” is incompatible with commandeering of state executive officials to implement gun-control and -registration provisions of Brady Bill); *New York v. United States*, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern [i.e., legislate] according to Congress’ instructions.”).

202. *Kentucky v. Dennison*, 65 U.S. 66, 107 (1861), overruled by *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

203. *New York*, 505 U.S. at 181–82.

available the option of preemptive legislation.²⁰⁴ Nevertheless, the federal government can “purchase the services of state and local government” in the same way it purchases private services.²⁰⁵ Accordingly, state administrative capacities are subject to a “modified property rule” under which the right may be sold but not given away.²⁰⁶

Second, glossing the Eleventh Amendment, the Court has directed that the federal government cannot use any of its original constitutional powers to oust directly the states’ sovereign immunity from individual litigants’ damages actions in state or federal court.²⁰⁷ Such ouster, however, is permitted under the Reconstruction Amendments, leading to statutes that can intrude further on states’ operations.²⁰⁸ Moreover, the federal government can purchase compliance through a conditional grant to the states, provided that the legislation in question articulates with heightened precision the scope of the immunity waiver.²⁰⁹

Although proffered as vindications of states’ rights, the anti-commandeering and sovereign-immunity doctrines can be glossed in a different way: Both create property-like entitlements rather than the inalienability rules observed in cases such as *Chadha*, *Bowsher*, and *Clinton*—and both leave open the possibility that states can engage in mutually beneficial trading with Congress using those property rules. These doctrines do not immunize states’ regulatory jurisdiction but

204. See Siegel, *Commandeering*, supra note 10, at 1634–65 (exploring this doctrinal detail and suggesting “commandeering should carry a presumption of unconstitutionality [only] when preemption is not a feasible alternative”); see also Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 Sup. Ct. Rev. 71, 85–86 (noting tension between commandeering case law and Congress’s preemption power).

205. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 Mich. L. Rev. 813, 819 (1998) [hereinafter Hills, *Cooperative Federalism*].

206. See Rose-Ackerman, supra note 34, at 949–51 (describing “modified property rule” under which “property may be sold at market prices but cannot be given away”).

207. See *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding Congress could not abrogate states’ immunity from suit in state court); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (forbidding ouster of state sovereign immunity under Article I powers). Oddly, bankruptcy is an exception. See, e.g., *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006) (holding bankruptcy trustee’s proceeding to set aside debtor’s preferential transfers to state agencies is not barred by sovereign immunity).

208. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (permitting money-damages actions under family-care provision of Family and Medical Leave Act); see also *Tennessee v. Lane*, 541 U.S. 509, 532–33 (2004) (upholding applications of Title II of Americans with Disabilities Act that implicated fundamental rights, including right of access to courts). The Court’s recent limitations on congressional action under the Fourteenth Amendment narrow the gap between that provision and other sources of legislative authority.

209. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”).

instead facilitate its trade. This contrasts sharply with the Court's approach in separation-of-powers jurisprudence, where inalienability rules dominate.

The balance of this section accordingly shows how this basic framework is employed in intergovernmental bargaining. First, the section shows that preemptive national laws can be sites for bargaining both pre- and postenactment. It then analyzes two special cases—when a federal law is the result of interstate bargaining outside Congress and when a cooperative-federalism program has been installed. Finally, it examines conditional federal spending as a bargain. The bottom line is that the federal–state border, unlike the interbranch context, is an active marketplace for institutional exchange.

2. *Federal Law as Intergovernmental Bargain: Preenactment and Post-enactment Bargaining.*— Though states have no formal voice in national lawmaking,²¹⁰ some federal laws are the outcomes of intergovernmental negotiation within Congress. These laws therefore reflect the interests of both the federal government and the states and reallocate regulatory authority. This subsection describes the process whereby these statutes are negotiated and notes how the final product of negotiations falls squarely within the scope of this Article's definition of bargaining.²¹¹

To begin with, states' shared interests are expressly reflected in many federal statutes. Consider, for example, the 1945 McCarran-Ferguson Act,²¹² which reversed a 1944 Supreme Court ruling²¹³ to the effect that insurance was amenable to federal regulation alone. A half-century later, Congress enacted the Unfunded Mandates Reform Act of 1995, which installed procedural barriers within the lawmaking process to certain kinds of fiscal burden sharing with the states.²¹⁴ No other interest group secures such durable procedural protection from fiscal burdens via legislated congressional rules. More recently, federal healthcare-reform legislation has incorporated states' interests and regulatory ambitions in diverse and overlapping ways.²¹⁵ Even once a federal law is enacted, it can create opportunities for the reallocation of regulatory entitlements. Federal laws, even when preemptive in general effect,

210. The Seventeenth Amendment eliminated the possibility of direct transmissions of preferences between state and federal legislatures. See U.S. Const. amend. XVII (revoking power of state legislatures to fill Senate seats).

211. See *supra* Part I.A (discussing definition of “bargaining”).

212. Ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2012)).

213. *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 552–53 (1944).

214. Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501–1504 (2012)).

215. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *Yale L.J.* 534, 582–89 (2011) (cataloguing five federal–state interactions embodied in Patient Protection and Affordable Care Act).

sometimes assign property interests to states allowing vetoes of federal regulatory efforts. For instance, the Coastal Zone Management Act requires federal-agency compliance with state management programs.²¹⁶ The federal Clean Water Act also allows states to condition their certification of covered projects upon any limitations deemed necessary by the state to ensure compliance with state water-quality standards.²¹⁷

These examples of federal legislative recognition of states' interests could be multiplied.²¹⁸ They all demonstrate that states routinely wield influence in Congress through lobby groups to secure recognition of their regulatory goals within federal legislation.²¹⁹ States have a robust and effectual lobbying operation in Congress.²²⁰ Part of that lobby's influence results from the property rules that the Supreme Court has recognized in its anticommandeering and state-sovereignty case law.²²¹ As importantly, states are able to wrest away regulatory entitlements because they, unlike the federal government, have the institutional capacity to manage programs or to investigate and enforce rules of primary conduct.²²²

States' property-like entitlements to certain regulatory fiefdoms can induce federal legislative action in another way: A grant of statutory entitlements to the several states can operate as prophylaxis against anticipated constitutional challenges. In *Arizona v. Inter Tribal Council of*

216. 16 U.S.C. § 1456(c)(1)(A) (2012).

217. See, e.g., *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 711–12 (1994) (interpreting section 401 of Clean Water Act to authorize states to restrict federal activity to preserve water-quality standards).

218. See Huq, *Logic of Collective Action*, supra note 36, at 280–88 (collecting examples of federal legislative solicitude for state interests).

219. Erin Ryan's excellent article catalogues in exhaustive detail the forms such negotiation takes. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 75–76 (2011) [hereinafter Ryan, *Negotiating Federalism*] (noting states "engag[e] Congress either in a spending power deal they have designed . . . or in bargained-for commandeering negotiations"); see also Ryan, *Tug of War*, supra note 10, at 265–367 (covering same ground).

220. See Huq, *Logic of Collective Action*, supra note 36, at 289–91 (documenting history of states' lobbies in Washington, D.C.).

221. Even in the absence of any constitutional entitlement, states have both a stake in and an influence on legislated bargains. States have an incentive to participate in the federal legislative process because they stand to gain when national public goods are realized. Alternatively, they might seek federal legislation to muffle interstate competition and protect their own inefficient rules. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L.J. 75, 110 (2001) (defining horizontal aggrandizement as phenomenon of majority of states using federal political process to "impose . . . policy preferences on a minority of states with different preferences").

222. See Ryan, *Negotiating Federalism*, supra note 219, at 79 ("States, however, often possess the most important positive leverage, given their generally superior capacity for enforcement, implementation, and innovation (and reciprocal negative leverage when they can credibly threaten to withhold it).").

Arizona, Inc., for example, the Court held that a provision of the National Voter Registration Act (NVRA)²²³ requiring states to “accept and use” a federally produced voter-registration form²²⁴ preempted an Arizona statutory provision that required proof of citizenship to register to vote by mail.²²⁵ The Court responded to Arizona’s argument that such preemption impinged upon its sovereign authority to establish voting qualifications by explaining that “no constitutional doubt is raised” when an “alternative means of enforcing [the state’s] constitutional power to determine voting qualifications remains open to Arizona.”²²⁶ The Court noted that the NVRA allowed states to petition the federal Election Assistance Commission to change the mandated registration template.²²⁷ Postenactment exercise of a statutory veto, that is, mitigated federalism concerns. But a future federal failure to respond to such a request, cautioned Justice Scalia pointedly, might lead to a constitutional order.²²⁸ The Court, in other words, glossed the state’s potentially uncertain statutory entitlement under the NVRA in ways that rendered it more credible by construing it as the instantiation of a constitutional mandate.

In sum, judicial allocation of property-like interests to the states qua states has not stalled federalism bargaining in the same way that it has inhibited interbranch deals. To the contrary, observed patterns of congressional action demonstrate a healthy market for regulatory exchange between the states and the national government.

3. *Federal Law as an Impermissible Intergovernmental Bargain: The Case of Bargaining Outside the National Legislative Process.* — The federal courts’ general hospitality to laws that embody federalism bargains has notable exceptions. Examination of the seminal anticommandeering case, *New York v. United States*,²²⁹ reveals that when federal law emerges out of bargaining between states outside the Beltway, the Court has impeded bargains by failing to recognize the potential for mutual gains from trade. That case arose from a classic collective-action problem, when the handful of states with radioactive-waste disposal facilities threatened to

223. 42 U.S.C. § 1973gg to gg-10 (2012).

224. *Id.* § 1973gg-4.

225. 133 S. Ct. 2247, 2257 (2013).

226. *Id.* at 2259.

227. *Id.* (discussing 42 U.S.C. § 1973gg-7(a)(2)).

228. *Id.* at 2260 n.10. A further wrinkle in the *Inter Tribal Council* case is that the Election Assistance Commission lacked a quorum to function, and a concurrent D.C. Circuit ruling precluded the White House from using recess appointments to fill the post. See *Noel Canning v. NLRB*, 705 F.3d 490, 499 (D.C. Cir. 2013) (identifying Recess Appointments Clause as basis of challenge), *aff’d* on other grounds, 134 S. Ct. 2550, 2561–67 (2014). Hence, a seizure in interbranch bargaining may well lead to a breakdown in intergovernmental bargaining—an example of entanglement between the two species of negotiation discussed in this Part.

229. 505 U.S. 144 (1992).

close their facilities entirely.²³⁰ Led by New York, states negotiated a solution with one another and with Congress.²³¹ The resulting Low-Level Radioactive Waste Policy Act (LLRWPA)²³² imposed a federal regime respecting the production and disposal of radioactive waste. That federal mandate “resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem.”²³³ The Court’s application of the anticommandeering rule to negate this bargain did not serve the interests of the states as against federal overreaching. Rather, it enabled one state (New York) to continue imposing costs generally perceived as disproportionate or unfair without internalizing a share of the collective burden.²³⁴ From this perspective, the Court’s choice to frame its analysis about whether New York was “estop[ped]” from challenging its earlier agreement as a violation of state sovereignty was question begging.²³⁵

This analysis suggests that a federal statute that “commandeers” a state’s executive or legislative process can have diverse explanations. On the one hand, a federal law that engages in commandeering may be a malignant effort by Congress to impose unfunded mandates on the states while taking credit for downstream policy achievements.²³⁶ On the other hand, commandeering may also be a signal that the states and the federal government have reached a welfare-enhancing deal that solves collective-action problems among the several states.²³⁷ Such deals might

230. *Id.* at 150; see also Ryan, *Cathedral*, *supra* note 10, at 41–42 (describing other collective-action problems rendering *New York* decision potentially insurmountable hurdle for states).

231. Ryan, *Negotiating Federalism*, *supra* note 219, at 43 (describing negotiations).

232. Pub. L. No. 96-573, 94 Stat. 3347 (1980), amended by Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. §§ 2021b–2021j).

233. *New York*, 505 U.S. at 189 (White, J., concurring in part and dissenting in part).

234. The LLRWPA, however, contained other punitive mechanisms that waste-importing states might have employed. *Id.* at 152–53 (majority opinion) (describing monetary and access incentives).

235. *Id.* at 183 (“That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation.”).

236. In *Printz v. United States*, however, the Court suggests in passing that the anticommandeering rule would also apply to mandatory commandeering with offsetting federal subsidies. 521 U.S. 898, 930 (1997) (“[E]ven when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.”).

237. Siegel, *Commandeering*, *supra* note 10, at 1660–64 (arguing that in thwarting state-based solution, Court’s decision in *New York* was ultimately more destructive to state-sovereignty interests than would have been decision to uphold take-title provision). In addition, commandeering may be preferable to a voluntary program with cash transfers because the latter would be vulnerable to moral-hazard problems. See Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 *Nw. U. L. Rev.* 351, 353–54 (1999) (“Under a system of funded mandates, recipient governments have an

build on the long history of federal legislative ratification of interstate deals in territorial disputes.²³⁸ Hence, the anticommandeering rule installed in *New York* and *Printz v. United States* may at times enable bargaining by clarifying the contours of one regulatory entitlement allotted to the states, but at other times can stifle a potent source of future dealmaking among states and the national government.²³⁹ At least where an objecting state can be shown to have secured benefits through an interstate deal that yields commandeering, there is reason to pause before assuming that the state's right against commandeering should be treated as inalienable.

4. *Intergovernmental Bargaining in Law Implementation: The Case of Cooperative Federalism.* — Bargaining between state and federal actors extends beyond the legislative to the implementation stage of governance. Congress often employs its Article I, Section 8 enumerated powers to establish “cooperative federalism” programs. Narrowly defined, cooperative federalism encompasses “programs in which the federal government establishes minimum standards that states may opt to implement through programs that are no less stringent.”²⁴⁰ In such programs, “non-federal governments help implement federal policy in a variety of ways: by submitting implementation plans to federal agencies, by promulgating regulations, and by bringing administrative actions to enforce federal statutes.”²⁴¹ Cooperative-federalism programs “seek[] to exploit economies of scale by establishing national . . . standards while leaving their attainment to state authorities subject to federal oversight.”²⁴² They are

incentive to overspend federal funds and to lobby the central government for unwise mandates.”).

238. See Joseph Blocher, *Selling State Borders*, 162 U. Pa. L. Rev. 241, 247–54 (2014) (“[T]he Constitution’s . . . requirement that Congress consent to interstate agreements or compacts [was] designed in part to govern state border negotiations.”).

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

240. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Envtl. L.J. 179, 188–204 (2005) (providing examples from environmental domain); accord Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1696 (2001) [hereinafter Weiser, *Enforcement of the Telecom Act*] (noting cooperative federalism empowers “states to experiment with different approaches and tailor federal law to local conditions”). For a different definition, see Carrie Gombos, *Alaska Department of Environmental Conservation v. E.P.A.*, 28 Harv. Envtl. L. Rev. 537, 542 (2004) (“There are several conceptions of cooperative federalism, but the Supreme Court has suggested that cooperative federalism best describes those instances in which a federal statute provides for state regulation or implementation of plans to achieve federally prescribed policy goals . . .”).

241. Hills, *Cooperative Federalism*, supra note 205, at 815.

242. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1148–78 (1995).

observed in environmental,²⁴³ social services,²⁴⁴ telecommunications,²⁴⁵ and healthcare domains.²⁴⁶ These efforts are typically created through conditionally preempting legislation.²⁴⁷ State agencies are invited, but not required, to participate.²⁴⁸ In effect, these deals reflect the exercise of a modified liability rule vested in the federal government: The federal government can regulate directly if it pays the costs of administration, or it can allow the state to maintain administrative primacy, albeit in pursuit of federal aims.

Studies of cooperative-federalism schemes suggest that despite its preemptive authority, the national government does not hold all the cards. Instead, “states can continue to exert influence through enforcement of federal law.”²⁴⁹ The practical effect of the constitutional structure is to assign to states a set of regulatory resources that can be leveraged to secure shifts to federal policies. Most importantly, state governments tend to have “the local expertise [and] . . . boots on the ground [and] perceived legitimacy” necessary for the implementation of programs that the federal government lacks.²⁵⁰ Indeed, the federal government may be unable to achieve national public goods without state officials’ voluntary cooperation.²⁵¹ States also use their monopoly on implementation resources to negotiate alternatives to policy calibrations initially specified by the federal government. On one view, “local tailoring” of this kind is a central benefit of cooperative federalism.²⁵² Some federal programs even formalize this possibility by including explicit

243. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012); Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

244. See, e.g., Social Security Act, 42 U.S.C. §§ 1396–1396v (Medicaid).

245. See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

246. See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).

247. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288–89 (1981) (“If a state does not want to submit a . . . program that complies . . . the full regulatory burden will be borne by the Federal Government.”).

248. See, e.g., Philip J. Weiser, *Chevron*, Cooperative Federalism, and Telecommunications Reform, 52 Vand. L. Rev. 1, 19 (1999) (describing operation of cooperative federalism under 1996 Telecommunications Act).

249. Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 703 (2011); see also Weiser, Enforcement of the Telecom Act, *supra* note 240, at 1732 (“[C]ooperative federalism statutes give state agencies considerable discretion to address interstitial matters left open by federal agencies.”).

250. Ryan, Negotiating Federalism, *supra* note 219, at 90.

251. Cf. William J. Stuntz, Local Policing After the Terror, 111 Yale L.J. 2137, 2139 (2002) (noting federal need for state and local police).

252. Weiser, Enforcement of the Telecom Act, *supra* note 240, at 1699–1700.

waiver provisions that allow state opt-outs from certain conditions.²⁵³ For example, as of April 2013, thirty-three states had secured waivers from mandates imposed by the No Child Left Behind Act of 2001 (NCLB).²⁵⁴

Alternatively, states might deploy their discretionary authority under cooperative-federalism programs to adopt policies at odds with federal goals.²⁵⁵ In one striking example, Congress amended the Social Security Act in June 1980 to compel increased scrutiny of beneficiaries' disability status—a priority of the Reagan Administration—but state resistance brought the initiative to a halt.²⁵⁶ In this way, the exercise of enforcement-related discretion can influence and alter the direction of federal statutes. Putatively nationalized policies are in effect relocated by the assertion of states' prerogatives. In this case, enactment of a cooperative-federalism statute can be viewed as an invitation to, not an absolute ousting of, intergovernmental bargaining.

5. *Intergovernmental Bargaining over Money: The Case of Conditional Spending.* — Congress's conditional-spending power allows it not only to purchase anticommandeering and sovereign-immunity entitlements, but also to buy state legislation that cannot be preempted.²⁵⁷ Congress commonly uses its spending power to offer states “bargains[] in which the federal government negotiates to extend its regulatory reach into zones otherwise constitutionally reserved to the states.”²⁵⁸ To the extent the Court recognizes policy “areas such as criminal law enforcement or education where States historically have been sovereign,”²⁵⁹ such recognition marks the beginning of intergovernmental negotiation, not its terminus.

Conditional-spending legislation is “in the nature of a contract: in return for federal funds, the States agree to comply with federally

253. See David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 Colum. L. Rev. 265, 275–85 (2013) (discussing waiver provisions and providing examples in cooperative-federalism programs concerning education and social welfare).

254. *Id.* at 280–81.

255. See Roderick M. Hills, Jr., Federalism in Constitutional Context, 22 Harv. J.L. & Pub. Pol'y 181, 187–88 (1998) (narrating how states obtained changes to federal welfare policy in 1960s through resistance to executive positions in Congress).

256. Martha Derthick, *Agency Under Stress: The Social Security Administration in American Government* 36–39 (1990).

257. See, e.g., *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (holding Congress could condition offer of federal funds to states on latter's curtailing of certain officials' partisan political activities even though “United States . . . has no power to regulate[] local political activities as such of state officials”).

258. Ryan, *Negotiating Federalism*, *supra* note 219, at 37.

259. *United States v. Lopez*, 514 U.S. 549, 564 (1995); see also *id.* at 577 (Kennedy, J., concurring) (expressing concern at federal takeover of “entire areas of traditional state concern”); accord *United States v. Morrison*, 529 U.S. 598, 611 (2000) (citing Justice Kennedy's *Lopez* concurrence for same proposition).

imposed conditions.”²⁶⁰ NCLB exemplifies such an intervention into a domain of traditional state control.²⁶¹ Notwithstanding the take-it-or-leave-it character of Spending Power deals, states still possess the unappreciated power to resist the federal government.²⁶² To begin with, states’ lobbies are actively involved in petitioning over the content of conditional-spending enactments, “asking for either . . . unconditional grants . . . or . . . grants with conditions that, as a practical matter, are already consistent with the states’ own spending priorities.”²⁶³ States can also decline federal funding, holding out for a better deal. Since the Supreme Court limited the Medicaid expansion in the Patient Protection and Affordable Care Act,²⁶⁴ for example, fourteen states have rejected health funding totaling about \$8.4 billion and covering roughly 3.6 million of their citizens.²⁶⁵ Once grants are made, states draw on political resources in Congress to “bargain with the national government over how stringently the national government will enforce the conditions ostensibly attached to the national funds.”²⁶⁶ Outcomes achieved through conditional spending, in short, are bargained for all the way down.

Judicial doctrine nevertheless imposes two constraints on intergovernmental bargaining over conditional spending. First, the Court requires that conditions be unambiguous and “[r]elated ‘to the federal interest in particular national projects or programs.’”²⁶⁷ This ensures that

260. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“Congress may fix the terms on which it shall disburse federal money to the States.”).

261. Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301–7941 (2012)); see James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. Rev. 932, 939–44 (2004) (summarizing key provisions). The other important federal intervention on education, the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482), is also conditional-spending legislation.

262. See Ryan, *Negotiating Federalism*, supra note 219, at 78–80 (describing various state advantages in federalism bargaining).

263. Hills, *Cooperative Federalism*, supra note 205, at 859.

264. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601–09 (2012) (Roberts, C.J., joined by Breyer & Kagan, JJ.).

265. Carter C. Price & Christine Eibner, *For States that Opt Out of Medicaid Expansion: 3.6 Million Fewer Insured and \$8.4 Billion Less in Federal Payments*, 32 *Health Aff.* 1030, 1030 (2013).

266. Hills, *Cooperative Federalism*, supra note 205, at 861; see also Martha Derthick, *The Influence of Federal Grants 196–97* (1970) (noting enforcement strength may vary, as Congress is tasked with determining conditions on which grant programs “may win the widest possible acceptance while safeguarding certain federal interests”); John E. Chubb, *The Political Economy of Federalism*, 79 *Am. Pol. Sci. Rev.* 994, 1008–11 (1985) (describing influence of congressional delegations).

267. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)). The *Dole* Court also required that conditions be in furtherance of the general welfare and not independently barred by another

“the State voluntarily and knowingly accepts the terms of the ‘contract.’”²⁶⁸ Courts’ increasing use of the contract metaphor to describe Spending Clause legislation might be read as belated recognition of the fundamentally negotiated nature of such rules.²⁶⁹ Second, notice and nexus requirements have recently been supplemented by an inchoate anticoercion rule. The Court thus partially invalidated the Medicaid expansion contained in the Affordable Care Act on coercion grounds.²⁷⁰ Unlike earlier Spending Clause enactments considered by the Court, the Affordable Care Act tied new funding to an ongoing funding stream in a way that attached “significant . . . new conditions . . . to continued participation in an entrenched and lucrative cooperative program” in a way the Court deemed objectionable.²⁷¹ The Court’s opaque formulation of its anticoercion rule renders its precedential force uncertain.²⁷² But the new rule does not foreclose bargaining and should not be glossed as an inevitable entailment of the contract metaphor.²⁷³ Somewhat perversely, it renders bargaining less likely in the short term by introducing uncertainty into federal–state relations in a way that may hinder the striking of mutually beneficial deals.

C. *The Pervasiveness of Intermural Bargaining*

In her majority opinion in *New York*, Justice O’Connor ventured that “[t]he Constitution’s division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.”²⁷⁴ Justice O’Connor’s observation of separate domains that can be subject to

constitutional provision. *Id.* But these conditions do no meaningful work and can safely be ignored here.

268. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

269. For recent uses of the contract metaphor, see, e.g., *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 328–29 (5th Cir. 2009) (finding Spending Clause legislation operates “like a contract”), *aff’d sub nom. Sossamon v. Texas*, 131 S. Ct. 1651 (2011); *Smith v. Allen*, 502 F.3d 1255, 1273–75 (11th Cir. 2007) (analyzing Spending Clause legislation as contract), *abrogated by Sossamon*, 131 S. Ct. 1651.

270. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601–09 (2012) (plurality opinion) (Roberts, C.J.) (“In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.” (quoting *Dole*, 483 U.S. at 211)).

271. *Bagenstos*, *supra* note 10, at 871.

272. See *id.* at 864–65 (offering relatively restrained reading); Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 *Am. U. L. Rev.* 577, 582 (2013) (predicting education statutes would survive *Sebelius* analysis).

273. Conditional-spending legislation was attended by no coercion constraint until 2013. This demonstrates that it is perfectly possible to conceptualize such laws as bargained-for deals without any attendant concept of coercion.

274. 505 U.S. 144, 182 (1992).

invasion arguably rests on the Madisonian account of branches and government standing in adverse and quasi-hostile relationships toward one another.²⁷⁵ Whatever its merit as judicial aspiration, her observation (as well as Madison's prediction) falls far short as an account of current constitutional practice on either the separation-of-powers or the federalism side of the ledger. Branches and states do not in practice stand in tensile contest with one another as Publius anticipated. To the contrary, intermural bargaining to reallocate institutional entitlements created by the Constitution is the norm, not the exception, on both sides of the ledger.

The failure of Madison's account of ambition, however, is only the first element of the story limned in this Part. As importantly, there is a large gulf between the Court's treatment of horizontal and vertical bargaining. On the separation-of-powers side, the case law is spackled with inalienability rules that formalistically limit the forms of permissible interbranch bargaining. Congress is allowed to alienate lawmaking power.²⁷⁶ In doing so, however, it cannot reserve a quantum of such authority to itself. The elected branches are also free to rearrange fiscal decisionmaking, provided the resulting arrangements do not reserve to the President any line-item authority. Yet if the executive employs its large delegated powers to achieve fiscal effects (either by, say, spending less or by more aggressively enforcing federal tax laws), no constitutional concern is raised. Adding additional suppleness to fiscal arrangements, the House can lose its right to originate revenue bills through shell legislation or tax treaties, apparently with impunity.

On the federalism side, by contrast, the Court has generally accommodated bargaining, albeit within occasional constraints. It has created entitlements in the form of the anticommandeering rule, state sovereign immunity, and exclusive domains of state regulation. Given Congress's conditional-spending authority, states can bargain away these entitlements in exchange for federal funds. More mundanely, the passage and implementation of cooperative-federalism schemes supply ample opportunities for intergovernmental bargaining. Rather than a general prohibition, therefore, federalism bargaining has been lubricated by judicial rules that endeavor to create crisp entitlements. Whatever the distributive effects of such rules, they cannot be condemned as frictions on bargaining.

However pervasive intermural bargaining is in contemporary constitutional law, it is not well theorized. Both the Court and commentators tend to view intermural bargaining in piecemeal fashion, not as a

275. See *supra* text accompanying notes 20–22 (discussing Madison's accounts of separation of powers and federalism).

276. See *supra* Part II.A.3 (cataloguing formalistic judicial policing of interbranch bargaining).

coherent, singular phenomenon.²⁷⁷ Perhaps both remain too much entranced by Madison's predictions²⁷⁸ and insufficiently attentive to the manner in which branches and states in fact interact.²⁷⁹ Whatever the reason for the analytic lacuna, it is simply unclear whether the Court has permitted the optimal amount or distribution of structural constitutional bargaining. The Court may have erred in either direction by allowing too much or too little bargaining. Ascertaining whether there is sufficient or excessive bargaining requires a normative framework for evaluating its downsides and its rewards. The next two Parts take up that task.

III. THE DEFAULT RULE FOR INTERMURAL BARGAINING

When representatives of institutions negotiate mutually beneficial deals—to reallocate roles in the lawmaking process, elements of regulatory authority, or enforcement and administrative capacity—should the approbatory presumption employed in the private-law context apply? This Part argues for a presumption in favor of intermural bargaining in both the federalism and the separation-of-powers contexts. To be clear, the claim is not that all institutional bargains are instances of Coasean bargaining in action. The claim advanced here is the much weaker proposition that *there is no reason to generally reject the results of intermural bargains on welfarist grounds*. Questions of the proper limits to intermural bargaining and how such limits should be enforced are deferred to subsequent Parts.

This Part develops the positive case for intermural bargaining in two stages. First, it examines and finds wanting three potential grounds for taking Justice O'Connor at her word and flatly prohibiting all intermural bargaining.²⁸⁰ Even accounting for textual, historical, and consequential concerns, a generalized and pervasive suspicion of all interbranch and intergovernmental deals is unwarranted. Second, it identifies positive consequences flowing from institutional dealmaking, amplifying further the case for an affirmative default. The Court, in short, has correctly declined in practice to view intermural bargains with the uniform suspicion urged by Justice O'Connor.

277. See sources cited *supra* note 10 (detailing narrow focus of commentators when analyzing intermural bargains).

278. See *supra* text accompanying notes 20–25 (describing these predictions and noting critics' failure to see beyond opposition to Madison's theory to consider whether his prediction has borne out in practice).

279. See *supra* Part II.A–B (discussing instances of intermural bargaining and concluding courts have not taken these realities into account).

280. See *New York v. United States*, 505 U.S. 144, 182 (1992) (“The constitutional authority of Congress cannot be expanded by the ‘consent’ of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.”).

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

Three—unsuccessful—arguments may be put forth to defend a blanket ban on intermural bargaining. These arguments rest respectively on the definition of a constitution, on the core functions of a constitution, and on the claim that institutions (unlike individuals) do not possess the right incentives. None of these arguments yields a reason to adopt a presumption against institutional bargaining.

1. *The Argument from Entrenchment Against Intermural Bargaining.* — A common feature of constitutions, including the U.S. Constitution, is some measure of entrenchment beyond change via the ordinary procedures of quotidian democracy.²⁸¹ Entrenchment so defined is more than mere temporal endurance.²⁸² It also requires procedural rules that make constitutional change more onerous than the mine run of lawmaking action. Article V of the Constitution does so by setting forth a two-stage procedure of proposal and ratification that makes textual amendment to the Constitution inordinately difficult.²⁸³ If entrenchment beyond ordinary politics is a necessary aspect of constitutionalism, as Article V might suggest, then the prospect of intermural bargaining should seem deeply troubling: How can foundational entitlements—the basic building blocks of our nation’s democracy—be lightly frittered away by transient officeholders in exchange for mere policy advantages? Perhaps a “working [c]onstitution”²⁸⁴ is one that political actors “treat as ‘not subject to abrogation or material alteration.’”²⁸⁵ On this view, a strong presumption against institutional bargaining is implied in the definition of a constitution. A reading of the Constitution that permitted such bargaining would defeat the purpose of adopting a constitution, because it would permit alterations to the basic law in the absence of supermajority action.²⁸⁶ This

281. See David Fontana, Comment, A Case for the Twenty-First Century Constitutional Canon: *Schneiderman v. United States*, 35 Conn. L. Rev. 35, 44 (2002) (“To believe in the Constitution means believing in . . . fundamental principles, and to believe in the Constitution means that you cannot believe in changing these principles.”); see also Laurence H. Tribe, *American Constitutional Law* 111–14 (3d ed. 2000) (discussing entrenchment as defining feature of constitutional design).

282. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitments*, 124 Harv. L. Rev. 657, 702–04 (2011) (criticizing definitions of constitutional entrenchment that rely solely on endurance).

283. U.S. Const. art. V; see also Huq, *Function of Article V*, supra note 109, at 1176–79 (discussing amendment procedures and documenting consensus view that Article V is very resistant to change).

284. K.N. Llewellyn, *The Constitution as an Institution*, 34 Colum. L. Rev. 1, 28–29 (1934).

285. Ernest A. Young, *The Constitution Outside the Constitution*, 117 Yale L.J. 408, 426, 450 (2007) (quoting Llewellyn, supra note 284, at 29) (noting function of many constitutions “to entrench certain legal arrangements against change”).

286. For a normative argument for such symmetry as a matter of U.S. law, see John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and*

argument might not only be framed in definitional terms, but also be developed as a claim about the original public meaning of a constitution as a legal norm meant to stand beyond ordinary politics.

This argument from entrenchment against institutional bargaining, whether pitched in definitional or originalist terms, is less persuasive than it first appears for three reasons. First, the definitional alignment of constitutionalism and entrenchment is weak. The argument from definitions is really an argument from the U.S. experience, not from the definition of a constitution *per se*. Not all nations' constitutions are entrenched beyond ordinary politics; accordingly, there is no definitional link between constitutionalism and entrenchment. Many other nations' constitutions, in contrast to the United States', invite constitutional amendment through procedures that resemble those of ordinary politics. Israel, for example, employs ordinary Knesset procedures and voting rules for adopting new Basic Laws.²⁸⁷ The Colombian Constitution of 1886 allows the legislature to amend it after three readings and a supermajority vote in a subsequent legislative session.²⁸⁸ Closer to home, "some fourteen American states to this day require the people to be consulted on a regular basis by the legislature as to whether to call a constitutional convention."²⁸⁹ In effect, these state constitutions invite the electorate, as a matter of quotidian politics, to renegotiate questions of perceived constitutional magnitude. That is, even the local experience of the United States disproves the equation of constitutions with rigidity. If entrenchment is not a necessary feature of constitutions as a definitional matter, even in the parochially defined American context, it is hard to see why it should be required in respect to discrete elements of a constitution, such as the location of lawmaking or regulatory entitlements. On the other side of the ledger, commentators have recently pointed out that many federal statutes are perhaps even more entrenched than constitutional rules.²⁹⁰ Not only is entrenchment not necessarily a constitutional feature, it is also not exclusively produced through constitutional means.

Normative Theory, 89 Va. L. Rev. 385, 388 (2003) (arguing for need to have symmetry in size of majority adopting and amending entrenched statutes).

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

288. Zachary Elkins, Tom Ginsburg & James Melton, The Endurance of National Constitutions 101 (2009).

289. *Id.* at 13.

290. See William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1216 (2001) (conceptualizing "super-statutes" as laws that "seek[] to establish a new normative or institutional framework for state policy and . . . 'stick' in the public culture such that . . . [they] have a broad effect on the law—including an effect beyond the four corners of the statute").

Second, it is not clear that the Constitution's text mandates a prohibition, or even a presumption, against institutional bargaining. It may be tempting to assume that the textual vesting of entitlements should be read as inviolate, so that Congress could never bargain away a sliver of legislative power, the executive could not trade on its veto, and the states could not negotiate away fragments of their sovereignty. But the text of the Constitution contains no rule barring any and all bargaining over institutional powers.²⁹¹ Nothing in the text, that is, uncontroversially directs that institutional entitlements should be read as inalienable, as opposed to default, assignments.²⁹² Nor is there a negative implication to be drawn from the absence of positive authorization of intermural bargaining. To the contrary, the immediate historical context of ratification supports a favorable view of negotiation over the structural constitution. Madison's proposal to the first Congress that the Constitution's distribution of power among the branches be read as exclusive, precluding any innovations by later generations,²⁹³ was passed by the House but failed in the Senate for now-unknown reasons.²⁹⁴ The fact that Madison saw a need for such a proposal suggests that the distribution of regulatory allotments between the branches was not exclusive or immutable. The rejection of Madison's proposal to fix those entitlements powerfully suggests that the Constitution's then-extant textual distribution of institutional authorities now should be read as a set of default entitlements subject to alteration by later political-branch negotiation.

The Framers were, moreover, familiar with default rules. They implicitly employed a default rule in respect to the size of Article III institutions. The Constitution's text requires only the creation of one

291. There are, of course, arguments to the effect that the Vesting Clauses of Articles I, II, and III imply various immutability rules. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541, 570–81 (1994) (conceptualizing Vesting Clause as granting general “executive power” to President and contributing to textual argument in favor of unitary executive); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1175–81, 1194–98 (1992) (rejecting possibility of divestment of executive power from President based on reading of Vesting Clause as granting President “all of the executive power” and analogizing between Article II and Article III Vesting Clauses). The originalist predicates of those arguments, though, are controversial, and their historical readings are far from undisputed. Indeed, originalist readings can supply support for intermural negotiation. See *infra* text accompanying note 313.

292. See McGinnis, *supra* note 10, at 295 (suggesting “initial distribution of [branches'] rights” may be “merely a baseline”).

293. See 1 *Annals of Cong.* 435–36 (1789) (Joseph Gales ed., 1834). The amendment would have provided that the “Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.” *Id.*

294. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 2015–16 (2011).

Supreme Court staffed with solely one Justice.²⁹⁵ In what came to be known as the Madisonian compromise, the decision whether to depart from this default state was assigned to subsequent Congresses.²⁹⁶ The Madisonian compromise left a central element of interbranch design and intergovernmental relations to postratification legislators' discretion.²⁹⁷ Federal jurisdiction, in consequence, became a battlefield on which "the sometimes-ill-defined scheme of federal government" was fought out between the national government and the states.²⁹⁸ Once created, moreover, Article III tribunals complement, and also compete with, state tribunals. Congress can award federal courts exclusive jurisdiction over certain subject matters²⁹⁹ or allow removal as a tool for disciplining state tribunals.³⁰⁰ The scope of jurisdictional optionality, moreover, may be even greater than the Madisonian compromise if Article III, Section 2, Clause 2³⁰¹ is read to enable Congress to move grants of jurisdiction freely between the Supreme Court's original and appellate wings. Of course, the Supreme Court famously held otherwise in 1803.³⁰² *Marbury v. Madison's* conclusion that Congress could not add to the Court's enumerated original jurisdiction, though, has been powerfully challenged, if

295. See U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

296. See Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1619–20 (1990) (describing Madisonian compromise).

297. It could be argued that the Framers' familiarity with default rules cuts against the thesis herein advanced: Their failure to signal that departure from the text's origin point, on this view, would be telling. But at best that argument would tend to show that the text was neutral as between bargaining away from textual starting points.

298. Alison L. LaCroix, *The Ideological Origins of American Federalism* 177 (2010) (describing judiciary acts as "experiments in fleshing out" federal government's structure).

299. See, e.g., 28 U.S.C. § 1338(a) (2012) (granting federal courts exclusive jurisdiction over cases "arising under any Act of Congress relating to patents").

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

301. See U.S. Const. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

302. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–75 (1803) (holding Constitution's enumeration and distribution of powers among supreme and inferior courts precludes legislature from enlarging Supreme Court's original jurisdiction); see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1484–87 (2000) (exploring *Marbury's* distinction between appellate and original jurisdiction).

not unsettled.³⁰³ There is no reason, moreover, to think the Constitution's use of default rules is limited to Article III. Article I, for example, uses defeasible defaults in respect to the first congressional apportionment³⁰⁴ and the timing of Congress's first meeting.³⁰⁵

Finally, theories of original public meaning do not furnish any basis for a *per se* bar on institutional deals. To the contrary, conventional originalist analysis incorporates the outcomes of interbranch negotiation into its hermeneutical matrix. In the view of one leading advocate of originalism, political actors are said to fashion "constitutional constructions . . . in the context of political debate, but to the degree that they are successful [such constructions] constrain future political debate."³⁰⁶ For example, one much-analyzed question concerns the President's authority to remove certain executive-branch officials as pursuant to Article II.³⁰⁷ Such power arguably lies at the cusp of the President's power to "take Care" that the laws are enforced³⁰⁸ and Congress's horizontal "Necessary and Proper" power³⁰⁹ to structure other branches of the federal government.³¹⁰ To resolve this dispute, leading originalists focus not just on the constitutional text (which at best is indeterminate), but instead find definitive resolution in the postratification bargain reached by the first Congress and President Washington over the

303. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 30–33 (explaining Marshall's reading of Article III, Section 2, Clause 2 as excluding Supreme Court original jurisdiction over mandamus actions is hardly necessary or right). It may be that *Marbury's* grip on the American legal imagination causes us to see mandates too often where the Framers installed defaults. That Van Alstyne's penetrating analysis is not more commonly accepted is evidence, if anything, of *Marbury's* canonical status as a decision more cited than analyzed.

304. See U.S. Const. art. I, § 2, cl. 3 ("The actual Enumeration [of representatives] shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.").

305. See *id.* art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."). It may be that this clause is best understood as a penalty default rule, since it is far from clear that requiring Congress to meet midwinter was, given the transportation options of the 1790s, a desirable rule.

306. Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 6 (1999).

307. See, e.g., Calabresi & Prakash, *supra* note 291, at 597–98 (arguing Vesting Clause grant of executive power to President authorizes his removal of executive officers); Calabresi & Rhodes, *supra* note 291, at 1165–71 (examining approaches to removal power in context of various arguments favoring unitary executive).

308. U.S. Const. art. II, § 3.

309. *Id.* art. I, § 8, cl. 18.

310. Cf. Patricia L. Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 *Geo. Wash. L. Rev.* 1371, 1382–88 (2012) (analyzing removal-power question by taking Vesting Clause, Take Care Clause, and Necessary and Proper Clause as defining landmarks).

first cabinet departments of War, Foreign Affairs, and Treasury.³¹¹ If it is feasible to use postratification intermural settlements as a *source* of constitutional meaning, no necessary incongruity obtains between an originalist account of the Constitution and an accommodation of intermural bargaining.

To be sure, the application of originalist tools to specific institutional entitlements might generate the conclusion that specific bargains lie out of constitutional bounds. For example, there is a vigorous debate on whether delegations of Article I rulemaking authority to administrative agencies are consistent with the original understanding.³¹² Without seeking to settle that intractable debate here, it suffices for present purposes to say that no version of originalism in circulation today rejects all interbranch bargains. Indeed, one of the leading originalist accounts of Article I allows for intermural bargaining over legislative power. This account, which was developed by Professor Thomas Merrill, suggests that “Congress has the power to vest executive and judicial officers with authority to act with the force of law, including the authority to promulgate legislative regulations functionally indistinguishable from statutes,” yet notes that “executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law.”³¹³ Although Merrill’s account focuses on the idea of vesting rather than interbranch bargaining, it demonstrates that even in respect to core Article I entitlements, there is a plausible originalist reading of the Constitution consistent with some broad leeway for interbranch dealmaking.

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

2. *Bargaining and the Functions of Constitutionalism.* — A second argument against intermural bargaining under any circumstances might rest

311. See, e.g., Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *Cornell L. Rev.* 1021, 1029–34 (2006) (invoking postratification history to explore removal power). Such history is informative in originalist terms if one presumes that the Framers of the Constitution, once they became politicians in the new federal republic, stayed true to the deals struck at Philadelphia. Of course, whether or not they did is an empirical question.

312. Compare Gary Lawson, *Delegation and Original Meaning*, 88 *Va. L. Rev.* 327, 334 (2002) (no), with Posner & Vermeule, *Nondelegation Doctrine*, *supra* note 127, at 1722 (yes). While pitched in originalist, historical terms, the nondelegation debate is entangled with contemporaneous questions about the desirability of the federal regulatory state.

313. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 *Colum. L. Rev.* 2097, 2101 (2004).

on functional grounds. A categorical bar might be justified, that is, if the deals that result undermine core, irreducible functions of a constitution. Jon Elster has posited that “[t]he purpose of entrenched clauses [in a constitution] . . . is to ensure a reasonable degree of stability in the political system and to protect minority rights.”³¹⁴ In this light, the Constitution’s initial distribution of institutional entitlements might stabilize expectations and permit the development of democratic norms and traditions.³¹⁵ Institutional stability might enable specific public goods such as accountability through regular elections. Further, it might enable the cultivation of private goods by allowing long-term planning to achieve slow-growing investments and life projects.³¹⁶ Stable governmental arrangements, for example, can induce expectations over monetary policy and inflation in ways that facilitate investment and productive activity. Such expectations, however, might turn on the endurance of specific constitutional or quasi-constitutional arrangements, such as central-bank independence.³¹⁷ On this view, an “important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done.”³¹⁸ Intermural bargaining should therefore be rejected because it unsettles expectations of what the basic law is, where that law comes from, and how law changes—and hence such bargaining robs federal law and institutions of beneficial stability.

The argument from stability, if not without force, does not justify a categorical bar on institutional bargaining. To begin with, even accepting the proposition that institutional stability is required to secure public and private goods, it is not clear this warrants a bar on intermural bargaining. American constitutional history, as Part II demonstrated, is characterized by nontrivial levels of intermural bargaining, with concomitant shifts in

314. Jon Elster, *Intertemporal Choice and Political Thought*, in *Choice over Time* 35, 38 (George Loewenstein & Jon Elster eds., 1992); see also Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359, 1376 (1997) (noting “settlement and coordination functions of law”).

315. See Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 163 (1995) (comparing constitutional rules to grammatical rules, which “do not merely restrain a speaker” but also “allow interlocutors to do many things they would not otherwise have been able to do or even have thought of doing”); see also Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 *Tex. L. Rev.* 1985, 1995 (2003) (describing Constitution as “blueprint for democratic governance”).

316. For a related idea, although specified with less detail, see Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* 164 (2004) (“[T]he Article V requirements for the amendment of the Constitution are an attractive part of the pragmatic justice-seeking quality of our constitutional institutions.”).

317. See Alex Cukierman, *Central Bank Independence and Monetary Policymaking Institutions—Past, Present and Future*, 24 *Eur. J. Pol. Econ.* 722, 728 (2008) (documenting connections between central-bank independence, low inflation, and growth).

318. Alexander & Schauer, *supra* note 314, at 1377.

responsibility for policies ratcheting between branches or rattling up and down the ladder between the national government and the states.³¹⁹ If the basic stabilizing functions of a constitution were impeded by institutional bargaining, then the 1787 organic document would have failed to enable democratic-norm development or effective private investment.

The evidence, however, suggests otherwise for a number of reasons. First, it is hardly plain that some quantum of intermural bargaining is inimical to institutional stability. To be sure, if trades between institutions were sufficiently dense and frequent, voters might have difficulty determining how to allocate blame or praise for policy outcomes. Unable to predict which institutions would be responsible for regulation or taxation, individuals would in theory be precluded from engaging in long-range planning. But in practice there is no reason to believe that intermural bargaining occurs at such a rapid clip. There is also no reason to think voters are unable to understand the mechanics of stable, longstanding arrangements such as the administrative state or cooperative federalism. Second, even though the institutional locus of policy-making might shift over time, the existence of a stable national-party system dampens the degree of policy oscillation by limiting the field of policy contestation.³²⁰ Third, and relatedly, voters rely on partisan proxies and other heuristics in determining how to act at the ballot box.³²¹ Democratic accountability is preserved so long as those proxies remain effective at aggregating information. There is no reason to think intermural bargaining generally undermines the epistemic value of democratic proxies.

3. *Bargaining and Institutional Incentives.* — A final objection to permitting institutional bargaining focuses on the perceived gap between individual incentives and institutional incentives. The private-law model of bargaining generally assumes that individuals seek to maximize their own welfare. In the absence of transaction costs, that is, private entities

319. See *supra* Part II.A–B.

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

321. See Christopher S. Elmendorf & David Schleicher, Informing Consent: Voter Ignorance, Political Parties, and Election Law, 2013 *U. Ill. L. Rev.* 363, 366 (noting “political science has revealed certain mechanisms through which a low-information electorate may behave as if reasonably well informed” and identifying political parties as most important of such mechanisms). The positive epistemic effects of such heuristics, however, are not evenly distributed through the population. See Richard R. Lau & David P. Redlawsk, Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making, 45 *Am. J. Pol. Sci.* 951, 955, 966–69 (2001) (describing disparate effects of heuristics and related factors).

“will achieve a Pareto efficient result.”³²² Institutions, in contrast, have a more heterogeneous set of preferences. As many commentators have observed, it cannot be assumed that the officials elected or appointed to lead various institutions will have stable and reliable incentives to maximize institutional welfare (however that is defined).³²³ It seems equally implausible to postulate that institutional decisionmakers will consistently strive to maximize constitutional compliance.³²⁴ Absent consistent incentives, it might be thought, the normative case for respecting the outcomes of intermural bargaining shrivels. Adding to this concern about incentives, previous commentators have expressed concern that the market for institutional trades will be suboptimal, because it is either too thin³²⁵ or too complex to allow for simple deals.³²⁶

It is worth stressing once more that the claim advanced in this section is not that intermural dealmaking necessarily generates efficient or optimal outcomes.³²⁷ Rather, it is that there is no reason to view intermural deals with suspicion *in general*. Such a diffuse and general skepticism, if founded on a concern about institutional incentives, would in effect be skepticism of the democratic credentials of the various elective institutions created or recognized by the Constitution. The elected branches of the federal government and the several states may not consistently act in a self-aggrandizing fashion or persistently pursue the public good (however defined). But they do respond, again imperfectly, to the electorate and thereby to some distribution of public preferences over policy.³²⁸ It seems likely that the public’s preferences include prefer-

322. Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 *Cornell L. Rev.* 783, 785 (1990); see also Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 *J.L. & Econ.* 73, 73 (1982) (noting Coase theorem requires “expected utility-maximizing consumers”).

323. See, e.g., Levinson, *Empire-Building*, *supra* note 23, at 920 (expressing skepticism about reliability of institutional incentives).

324. Professor McGinnis makes the parallel observation that “[w]hile there may certainly be a relation between the branches’ utility and the production of public goods . . . the branches will act in their own interests rather than in the interest of the public.” McGinnis, *supra* note 10, at 296 n.9.

325. *Id.* at 296–97 (noting “limited number of actors” may inhibit search for Pareto efficiency in institutional trades).

326. Koh, *supra* note 10, at 129–30 (doubting private-law bargaining models apply given presence of complex institutions and “multiparty transactions” in separation-of-powers context).

327. See *supra* text accompanying notes 27–36 (developing this caveat).

328. See David R. Mayhew, *Is Congress “the Broken Branch”?*, 89 *B.U. L. Rev.* 357, 360 (2009) (“Congress exhibits a particular kind of popular democracy. It tends to incorporate popular ways of thinking—the tropes, the locutions, the moralisms, the assumptions, the causal stories and the rest that structure the meaning of political life in the mass public.”); Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 *B.U. L. Rev.* 387, 388 (2009) (“Congress is more capable now than it was in the past of producing legislation that responds to reasonably strong popular demands.”).

ences for legality and compliance with the Constitution, even if fidelity to those ambitions can be fickle.³²⁹ To install a default approbation of the expressed preferences of the branches and the states is to do no more than to recognize that their expressed preferences will generally, if imperfectly, reflect an effort to advance needful public policy goals within at least roughly conceived constitutional constraints. To reject intermural bargaining on diffuse institutional-competence grounds is therefore to reject the democratic predicates of the branches and states, or else it is to repudiate the linkage between democratic mechanisms and the attainment of public goods within constitutional bounds. Such skepticism may be conceivable, but it would be radical in both scope and effect. At least for the purposes of the present argument, it can therefore be put to one side.

Moreover, the observed products of intermural bargaining along both the federal–state and the interbranch axes do not give cause for pervasive skepticism about the practice. To the contrary, innovations such as the legislative veto, federal commandeering, and the line-item veto can be glossed as responses to the substantial difficulties of managing a complex, highly networked, and dynamic national economy. In almost all the cases canvassed in Part II, it is hard to see how sinister motives can be assigned to the branches and governments instituting intermural deals. Such a generally benign track record does not, of course, preclude the possibility that certain kinds of bargains would yield objectionable results. It does suggest, however, that blanket skepticism is, at least at this juncture, an unwarranted response.

B. *The Inevitability of Institutional Bargaining*

Whereas the previous section dispatched arguments against intermural bargaining, this section offers a positive case for the practice. Intermural bargaining of some sort is both inevitable and desirable for two reasons. First, spillover effects and the absence of complete specification of constitutional entitlements both make some mechanism to resolve boundary disputes unavoidable. Bargaining is the obvious solution, at least given a judicial-review regime that requires concrete cases and controversies. Second, the Constitution is not a homeostatic system, but an evolutionary one. The inevitable translation of constitutional con-

329. Indirect evidence for this is supplied by work that shows how diffuse support for the Supreme Court is a result of its perceived separation from politics and its legalistic character. See James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 *Am. J. Pol. Sci.* 354, 356–59 (2003) (attributing public’s institutional loyalty to Court in part to general lack of concern about Court “politics and partisanship”); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *Duke L.J.* 703, 765–67 (1994) (attributing Supreme Court legitimacy in part to public perceptions surrounding fairness of Court decisionmaking procedures and outcomes).

cepts forward in time—against the backdrop of shifting institutional, social, and economic circumstances—necessarily generates intermural conflicts, even when the initial text has been completely specified. Bargaining is needed to resolve these conflicts in the first instance.

1. *Spillovers Between Constitutional Entitlements.* — The Constitution is incomplete in the sense that it does not resolve all potential questions concerning the allocation of endogenously defined entitlements.³³⁰ As in real property, questions about how to assign the costs of mitigating spillover effects arise.³³¹ Unlike in the real-property context, however, the allocation of spillover-related costs will often lack a natural and intuitive answer. Instead, the resolution of such costs is best achieved through intermural bargaining in the absence of a judicial mechanism to resolve abstract constitutional problems before concrete disputes have arisen. In this way, the existence of spillovers causes intermural bargaining.

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

[A] confectioner . . . used two mortars and pestles in connection with his business (one had been in operation in the same position for more than 60 years and the other for more than 26 years). A doctor then came to occupy neighbouring premises (in Wimpole Street). The confectioner's machinery caused the doctor no harm until, eight years after he had first occupied the premises, he built a consulting room at the end of his garden right against the confectioner's kitchen. It was then found that the noise and vibration caused by the confectioner's machinery made it difficult for the doctor to use his new consulting room.³³²

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

330. The observation here draws from the literature on incomplete contracting. See Ayres & Gertner, *Strategic Contractual Inefficiency*, supra note 31, at 730 (noting term "incomplete contract" can refer either to (1) obligational incompleteness, excluding term such as price or quantity in ordinary contracting context or (2) insufficient state contingency, because of failure to "fully realize the potential gains from trade in all future states of the world"). This Article does not aim to import wholesale the complex conceptual framework used for analyzing incomplete contracts into the public-law context. For an analysis that does so in order to explicate the operation of Article V's amendment rules, see Huq, *Function of Article V*, supra note 109 (analyzing role of Article V's textual rigidity in long-term survival of necessarily incomplete Constitution).

331. For a useful discussion, see Daniel B. Kelly, *Strategic Spillovers*, 111 *Colum. L. Rev.* 1641, 1660–72 (2011) (discussing spillovers in real-property context).

332. Coase, *Social Cost*, supra note 28, at 8–9 (discussing *Sturges v. Bridgman*, (1879) 11 Ch.D. 852 (Eng.)).

of bargaining might also have occurred, with the entitlement still ending up in the hands of the party that valued it more highly.³³³ This symmetry of outcomes under disparate legal rules yielded a lesson: In many cases in which the use of one entitlement has a spillover effect on the use of another entitlement, there is no obvious, natural, or inevitable way to parcel out the entitlements. It is simply “not useful to speak of one party to an externality as being the cause of any problem of incompatible demands.”³³⁴

Spillover effects are not limited to doctors and confectioners. There are many instances in which one institution’s exercise of a structural entitlement will interact with another institution’s exercise of an entitlement and in which the “default package of entitlements” described in the constitutional text provides no obvious or natural benchmark for resolving the conflict.³³⁵ In such spillover cases, something more than mere invocation of the constitutional text is required to justify an outcome. Just as in the case of the doctor and the confectioner it is otiose to ask who is to “blame,” in the public-law context there also will be no obvious way of determining who is in the “right.” Intermural negotiation, similar to the sort that Coase predicts arising between the doctor and the confectioner,³³⁶ provides an obvious (if not obviously exclusive) means of resolving the conflict and allocating the disputed right to its highest-value user.

The existence of intermural spillovers in the absence of any such intuitive or obvious default disposition can be illustrated with examples from both federalism and separation-of-powers domains. Spillover effects are pervasive in a geographic federation in which member states are con-

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

334. Merrill & Smith, *Coasean Property*, *supra* note 60, at S91. Merrill and Smith point out that the situation is arguably different in the real-property context, because in rem property rights are “good against the world” and so have “a built-in asymmetry.” *Id.* at S92. (And so the judges thought in *Sturges*. See A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 *J. Legal Stud.* 53, 90 (1996) (noting judicial preference for respecting individual’s right to do as he pleases on his property so long as activity violates no legal prohibitions).) Their epistemic transaction-cost justification for this position, however, does not translate into the public-law context. Put otherwise, “the strongly locational nature of the parties’ rights” in real-property law, Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 *Va. L. Rev.* 965, 1001–02 (2004), has no public-law analogue.

335. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 *Wm. & Mary L. Rev.* 1849, 1861 (2007).

336. See *supra* notes 332–334 and accompanying text (discussing Coase’s example of doctor whose practice is interrupted by neighboring confectioner’s manufacturing equipment).

tiguous with one another and jurisdictional lines are porous.³³⁷ The Court's Dormant Commerce Clause case law, which targets state enactments that dampen the flow of interstate commerce, is an effort to manage trade-related spillovers between states and to maintain a national market.³³⁸ Similarly, the Privileges and Immunities Clause is a mechanism for citizens of one state to remedy disabilities imposed by citizens of another.³³⁹

Spillover effects also occur between states and the federal government. The constitutional text's failure to provide any simple rule for allocating spillover costs between the states and the national government was at issue in *Inter Tribal Council*.³⁴⁰ At issue there, as noted previously, was a provision of the NVRA requiring states to "accept and use" federal voter-registration forms.³⁴¹ Although Justice Scalia's majority opinion resolved the case on statutory-interpretation grounds, the nub of the case involved a conflict between two constitutional entitlements. On one hand was Congress's authority pursuant to the Elections Clause to "make or alter" any state law concerning the "Times, Places and Manner of holding Elections for Senators and Representatives."³⁴² On the other hand, the states maintain authority to determine "the composition of the federal

337. See, e.g., Daniel A. Farber, Climate Adaptation and Federalism: Mapping the Issues, 1 San Diego J. Climate & Energy L. 259, 266–67 (2009) (discussing environmental spillovers); Robert L. Glicksman & Richard E. Levy, A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change, 102 Nw. U. L. Rev. 579, 599–600 (2008) (discussing regulatory spillovers); Nestor M. Davidson, Leaps and Bounds, 108 Mich. L. Rev. 957, 969 (2010) (reviewing Gerald E. Frug & David J. Barron, *City Bound: How States Stifle Urban Innovation* (2008)) (concluding emergence of "megapolitan" regions poses difficulties for state governance).

338. See Leslie Meltzer Henry & Maxwell L. Stearns, Commerce Games and the Individual Mandate, 100 Geo. L.J. 1117, 1121 (2012) ("[T]he criterion separating successful and unsuccessful Commerce Clause challenges is whether the contested law implicates only economic externalities, meaning effects on private parties, or implicates political externalities, meaning effects on the laws of other states."). For an argument that some of the case law can be explained as an effort to realize positive network externalities, see Maxwell L. Stearns, A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine, 45 Wm. & Mary L. Rev. 1, 112–15 (2004) (explaining Dormant Commerce Clause can be used to discourage state defection from mutually beneficial activities and promote superior gains for all states). Of course, Dormant Commerce Clause jurisprudence may fail to give a full account of all relevant spillovers. See, e.g., Jack L. Goldsmith & Alan O. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L.J. 785, 797–98 (2001) (arguing for need to theorize better "state regulation of cross-border externalities").

339. See Mark D. Rosen, The Surprisingly Strong Case for Tailoring Constitutional Principles, 153 U. Pa. L. Rev. 1513, 1584 (2005) (explaining Privileges and Immunities Clause "counteract[s] the political malfunction of spillover effects").

340. 133 S. Ct. 2247 (2013).

341. See supra text accompanying notes 223–228 (discussing *Inter Tribal Council* and interplay between federal and state regulations).

342. U.S. Const. art. I, § 4, cl. 1.

electorate.”³⁴³ Intergovernmental frictions arise because time, place, and manner regulations—such as the NVRA’s streamlined framework for by-mail voter registration—necessarily alter the composition of the voting electorate by lowering or raising the cost of accessing the polls.³⁴⁴ Less costly registration enlarges the pool of expected voters while costlier registration shrinks it. The Constitution distinguishes between federal laws that regulate the time, place, and manner of voting and state laws that concern the composition of the electorate as if these were hermetically sealed categories. As the example of the NVRA provisions at issue in *Inter Tribal Council* shows, that boundary is elusive. Like Coase’s doctor and confectioner, the national government and the states are locked in a bilateral relationship in which plenary employment of one party’s powers necessarily impinges on plenary employment of others’ authorities.

Similar ambiguities in the boundaries between different institutions’ constitutional entitlements can be found in separation-of-powers contexts. For example, the Court’s removal jurisprudence is animated by the overlap of the President’s power to take care that laws are enforced and Congress’s power to structure the executive branch pursuant to the horizontal component of the Necessary and Proper Clause.³⁴⁵ To analyze removal disputes as raising solely the powers of one or the other elected branch is to gloss over the question of how institutional borders are to be drawn when the text engenders overlap.³⁴⁶ It is to assume, rather than reason out, an answer.

Spillovers also underlie cases such as *Chadha*³⁴⁷ and *Bowsher*.³⁴⁸ As framed by the Court, both cases hinged on a conceptual distinction between legislative functions and executive functions. In *Chadha*, the Court characterized the “altering [of] legal rights, duties and relations” as “essentially legislative in purpose and effect.”³⁴⁹ In *Bowsher*, it stated that “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law,” and

343. *Inter Tribal Council*, 133 S. Ct. at 2257–58 (citing U.S. Const. art. I, § 2, cl. 1).

344. In fact, the NVRA’s effect on turnout was relatively modest. See Benjamin Highton & Raymond E. Wolfinger, Estimating the Effects of the National Voter Registration Act of 1993, 20 *Pol. Behav.* 79, 79–80 (1998) (summarizing findings including “[m]ail registration will have no independent effect on turnout” and “NVRA limitations on purging will produce a modest increase in turnout”).

345. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3165 (2010) (Breyer, J., dissenting) (noting removal cases arise at “intersection of two general constitutional principles,” the Take Care Clause and Necessary and Proper Clause).

346. Hence, Chief Justice Roberts’s opinion in *Free Enterprise Fund* begins with the Take Care Clause and then never fairly accounts for the Necessary and Proper Clause. *Id.* at 3146 (majority opinion).

347. 462 U.S. 919 (1983).

348. 478 U.S. 714 (1986).

349. 462 U.S. at 952.

hence a task for Article II authorities alone.³⁵⁰ A spillover arises because interpreting a law often necessarily means changing rights and duties. Hence, the (forbidden) application of the legislative veto against Mr. Chadha is also an interpretation of the immigration statute. The budgetary reductions that would have been effected by the Comptroller General under the Gramm-Rudman-Hollings Act also altered “rights, duties and relations” by changing the fiscal entitlements of diverse federal grantees. At least as defined by the Court in those cases, putatively mutually exclusive core functions of the legislature and the executive overlap.³⁵¹

The concepts of “legislative” and “executive” cannot be applied to the complexities of observed governance in ways that yield resolving clarity.³⁵² As Justice Stevens recognized in his *Bowsher* concurrence, “governmental power cannot always be readily characterized with only one of . . . three labels.”³⁵³ To be sure, there are other ways of reconciling *Bowsher* and *Chadha*. Both cases, the Court later noted, disapprove of congressional self-aggrandizement.³⁵⁴ But that reconciliation does not undermine the point here: Efforts by the Court to determine whether and how to separate government functions have dominated debates in constitutional theory since the Founding. Indeed, for all the weaknesses of his separation-of-powers theory, Madison must be credited with anticipating the pervasiveness of spillovers between branches. In a flash of gloomy candor, Madison in *The Federalist* No. 37 observed that “no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, [the] three great provinces—the legislative, executive, and judiciary.”³⁵⁵ Anti-Federalist opponents of ratification concurred, but took exception to the “vague and inexplicit” boundaries

350. 478 U.S. at 733.

351. This is not a new observation. See Magill, *Real Separation*, supra note 40, at 1141–42 (2000) (calling differences between executive, legislative, and judicial powers “elusive”); H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 *Duke L.J.* 1171, 1199 (1998) (demonstrating confusing nature of distinctions between legislative and executive powers).

352. See Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 *Wm. & Mary L. Rev.* 343, 343 (1989) (“[R]igid categories of branch power simplistically disregard the real complexities of government structure as we know it . . .”).

353. *Bowsher*, 478 U.S. at 749 (Stevens, J., concurring in the judgment); see also *id.* at 750 (“The powers delegated to the Comptroller General by § 251 of the Act . . . have a . . . chameleon-like quality.”).

354. As indeed the Court did. See *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (characterizing both cases as involving congressional self-aggrandizement); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221, 1238 (1995) (describing *Chadha* as repudiation of extension of congressional power).

355. *The Federalist* No. 37, supra note 20, at 244 (James Madison).

between branches.³⁵⁶ Absent some novel theoretical account of how to decompose the Constitution into clear and distinct elementary particles—an account that eluded the Founders—boundary disputes between branches and between governments recognized in the Constitution will remain pervasive.³⁵⁷

Spillover effects can arise even in the ostensible absence of definitional ambiguity. Consider the scope of the President's recess-appointment authority.³⁵⁸ One argument for limiting that executive authority turns on the potential for White House abuse of such appointment power to rob the Senate of effectual authority over the direction of important regulatory programs.³⁵⁹ As Professor Adrian Vermeule has argued, however, it may be instead that "toxic interaction between appointments and the Senate practice of the filibuster" indirectly engorge the power of a minority of Senators, who can act as spoilers of majoritarian rule.³⁶⁰ Congress and the executive hence stand in the same relation as Coase's doctor and confectioner:³⁶¹ It is far from clear which is "to blame" for the ensuing entangling and impeding spillovers. Constitutional entitlements, like real property, generate spillover prob-

356. Bernard Manin, Checks, Balances & Boundaries: The Separation of Powers in the Constitutional Debate of 1787, in *The Invention of the Modern Republic* 27, 41 (Biancamaria Fontana ed., 1994) (citation omitted); see id. at 42 ("The Anti-Federalists . . . insisted that the constitution should set in the clearest and most intelligible fashion the bounds circumscribing the jurisdiction of the various government bodies.").

357. Such novel accounts often rest, without discernable irony, on controversial claims about the original public meaning of Article II. See, e.g., Saikrishna Prakash, Regulating Presidential Powers, 91 *Cornell L. Rev.* 215, 216–17 (2005) ("Congress lacks a generic right to reallocate or tamper with presidential powers."). Without recapitulating the extensive debate about such claims, it suffices here to say that they are nonobvious, methodologically controversial, and hence hardly as crisp in their resolution as their proponents would like to think. For every originalist assertion in favor of Article I, the nonoriginalist reader might indeed posit a natural law demanding an equal opposition on behalf of Article II. Or, if one prefers, originalism largely works by bypassing the definitional enterprise of *Chadha* and *Bowsher* to raid the icebox of history for boundary lines that can be leveraged into contemporary service.

358. U.S. Const. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."); see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574–75 (2014) (ruling such power exists during both intra- and intersession recesses, except in short recesses punctuated by pro forma sessions).

359. See Michael Rappaport, Why Nonoriginalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause 13 (Univ. of San Diego Law Sch. Legal Studies Research Paper Series, Paper No. 14-140, 2014), available at <http://ssrn.com/abstract=2374563> (on file with the *Columbia Law Review*) (arguing inefficiencies of senatorial confirmation are worth accepting because "executive branch exercises tremendous power and thus it makes sense to ensure that are [sic] checks on presidential appointments").

360. Adrian Vermeule, *The Constitution of Risk* 59–60 (2013) [hereinafter Vermeule, *Constitution of Risk*].

361. See *supra* notes 332–334 and accompanying text.

lems in practical operation that can be characterized as either *A*'s interference with *B* or *B*'s interference with *A*. Perhaps this would have not surprised the Framers. James Madison, most famously, prophesied that the Constitution would be "more or less obscure and equivocal, until [its] meaning be liquidated and ascertained by a series of particular discussions and adjudications."³⁶² As Madison's dictum suggests, some mechanism for resolving boundary disputes is inevitable.

At least to date, the elected branches and the states have principally resorted to bargaining as an expeditious and inexpensive means to resolve disputes. An obvious alternative to intermural settlement is judicial review. Article III's "case" and "controversy" language precludes judicial pronouncement on questions of law absent a sufficiently concrete dispute.³⁶³ Since the Early Republic period, Justices have resisted elected actors' exhortations to resolve hard questions of constitutional law absent some concrete dispute.³⁶⁴ At least as long as abstract review remains verboten, judicial review cannot be a comprehensive solution to the problem of institutional spillovers: At a minimum, one branch or government has to make a unilateral claim to a disputed power before the federal courts can step in. Yet as Part II demonstrated, the prevalent pattern has not been such aggressive unilateralism, but rather a distinctly un-Madisonian cooperative spirit. Absent some reason to think that this tradition has always been wrong-headed or misguided, the persistence of spillover problems provides a threshold reason for accepting intermural bargaining as a legitimate constitutional practice.

2. *The Myth of Constitutional Homeostasis*. — Bargaining is practically useful for a second reason. Even if the Constitution perfectly specified institutional entitlements, bargaining at the boundaries would remain unavoidable due to institutional, social, and economic change over time. Bargaining is a logical, and historically tested, mechanism for dealing with the changes thereby wrought to institutional boundaries.

The Constitution, unlike the human body, is not homeostatic.³⁶⁵ Its internal shifts are invisible vectors that over generations thrust previously

362. The Federalist No. 37, *supra* note 20, at 245 (James Madison). As the debates raging over judicial review today attest, neither Madison nor other Framers were pellucid as to who would do this liquidating.

363. *Flast v. Cohen*, 392 U.S. 83, 94–96 (1968) (explaining bar to resolution of abstract questions of law); accord Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 52–56 (6th ed. 2009) (tracing relevant case law).

364. See Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* 134–48 (1997) (describing 1793 "Correspondence of the Justices," in which President Washington sought advice from Justices on question of neutrality in Anglo-French war). But see William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 *Ohio N.U. L. Rev.* 173, 192–95 (2002) (noting instances in which Chief Justice John Jay and other judges gave President Washington administration advice).

365. Cf. John E. Hall, *Guyton and Hall Textbook of Medical Physiology* 4, 9 (12th ed. 2011) ("Each functional structure contributes its share to the maintenance of homeostatic

isolated institutions into conflict. That “changed circumstances” might alter structural constitutional relations is, of course, a familiar idea.³⁶⁶ The national economy, for example, has transformed itself—dilating westward, congealing into new corporate forms, molting with each rise and fall of a new transportation or communication technology—belying the idea of a delimited Commerce Clause power.³⁶⁷ As the nation’s geopolitical aspirations have swelled with shifting ideologies and aspirations,³⁶⁸ and the United States has pivoted “from inwardness and isolation into the dominant world power,”³⁶⁹ the balance of power between the executive and Congress has evolved. New external pressures alter not just the interbranch balance, but also the national government’s relations with the states.³⁷⁰ Nor have the background assumptions of democracy remained constant. Rather, the (long-delayed) entrances of women and people of color into the polity have transformed the electorate beyond early republican recognition.³⁷¹ Even the background assumptions of constitutional order are subject to sub rosa transformations: Recent scholarship suggests that basic assumptions about federalism’s inherent logic were not immutable through even the Early Republic.³⁷²

All these changes impact the scope and operation of structural constitutional entitlements. It is standard to assume that subsequent constitutional interpreters should seek “to restore the status quo” out of

conditions Extreme dysfunction leads to death; moderate dysfunction leads to sickness.”).

366. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165, 1214 (1993) (justifying evolved constitutional interpretations as necessary translations to preserve constitutional meaning in changed context); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *Sup. Ct. Rev.* 125, 132 (explaining Supreme Court will translate prior constitutional rules to modern applications in reaction to “changed circumstances”); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395, 453–72 (1995) (arguing altered social, economic, and legal circumstances justified radical constitutional changes of New Deal).

367. See generally Michael Lind, *Land of Promise: An Economic History of the United States* (2012) (exploring history and growth of American economy from preindustrial times through Information Age).

368. See generally George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776* (2011) (tracking swelling of American geopolitical goals, from desire for protection from foreign interference to ambitions of global power).

369. G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order I* (2011).

370. See Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 *Vand. L. Rev.* 723, 778–93 (2013) (developing claim that external geopolitical forces are important determinant of structural constitutional outcomes).

371. See Alexander Keyser, *The Right to Vote: The Contested History of Democracy in the United States* (2000) (exploring legal and political history of suffrage in United States).

372. See, e.g., Campbell, *supra* note 14, at 1171–81 (describing oscillating understanding of federalism principles among Federalists and Anti-Federalists during Founding era).

fidelity to the original design.³⁷³ But it is not clear this is even possible. It may be that original institutional equilibria cannot be recreated without prohibitory social costs. For example, narrowing Congress's Commerce Power to antebellum dimensions might cripple the national economy. The national regulatory state cannot now be undone without prohibitive economic disruption. The task of resolving new institutional conflicts, in short, is not well described as an exercise in fidelity. Rather, as exogenous historical change presses into conflict institutional entitlements that previously stood apart, resolution of those conflicts must attend not only to historical warrants but also to present social goods. As Part II demonstrated, it has been intermural bargaining that has played the critical role in efforts to maintain the Constitution as a going concern.

Intermural bargaining is an especially salient channel for institutional dispute resolution given the preclusive difficulty of constitutional change through Article V.³⁷⁴ Unable to adjust the text through Article V without exorbitant transaction costs, institutional actors have strong incentives to bargain among themselves to reach stable outcomes. Entrenchment at the level of specific politicians and factions, as opposed to at the constitutional level, creates a motivation to fashion workable governance arrangements and to find adaptations to new circumstances. Paradoxically, negotiated change may stabilize the overall constitutional dispensation by staving off economic or social crisis. On this view, stability under conditions of social, economic, and geopolitical flux is not obtained by resisting new institutional arrangements. To the contrary, it is necessary to find some stable alternative source of compensating adjustments and clarifications, whether the political process or the exercise of judicial review.

IV. THE LIMITS OF INTERMURAL BARGAINING

A presumption in favor of intermural bargaining need not, however, be conclusive. Even if intra- or intergovernmental negotiation generates beneficial outcomes in the mine run of cases, it may nonetheless periodically yield socially undesirable results. Indeed, it would misread Coase to

373. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 *Harv. L. Rev.* 476, 492 (2011); accord Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 129 (1994) (suggesting government officials should adhere to Framers' original constitutional principles "to some degree"); Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 *Harv. L. Rev.* 4, 23 (2009) (explaining translation theory recommends "original meaning of the Constitution's structure might best be preserved by departures from the specific original understandings of the founding generation"). But see David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 *U. Chi. L. Rev.* 859, 860–61 (2009) (identifying doctrinal areas in which Court has tried to "moderniz[e]" doctrine in response to perceived public opinion).

374. See *supra* text accompanying notes 281–283.

ignore that “there are transaction costs and . . . they are large.”³⁷⁵ As in private law, so too in public law: Bargains exist—just look around—but just because bargains are observable does not mean that all socially beneficial bargains have been reached or that the observed bargains are all socially beneficial. Negotiated compromises of structural constitutional principles might, for example, undermine the Constitution’s central aims of fostering democratic accountability and producing national public goods.³⁷⁶

This Part analyzes the appropriate limitations to intermural bargaining. It identifies two normative constraints on the domain of institutional bargaining based on third-party effects and institutional internalities. The two criteria for determining whether a structural constitutional bargain should be prohibited are drawn from the private-law context: Third-party effects and “internalities” (i.e., systematic failures of institutional behavior) can, *mutatis mutandis*, serve as guides to the bounds of institutional bargaining. In the ordinary contracting context, both concepts are informed by models of individual behavior.³⁷⁷ These models do not mechanically translate into the institutional context, where psychological and decisional dynamics will be quite different. Rather, third-party effects and internalities furnish traction in the institutional context only when adjusted to reflect the nature of institutional decisionmaking. To illustrate this translation, this Part focuses largely on the separation of powers, where the courts have been more active in fashioning inalienability rules. Federalism, by contrast, is treated as a domain in which judicial intervention has been market-enabling and hence successful.³⁷⁸

375. Coase, *The Firm, the Market, and the Law*, *supra* note 67, at 26; see also Ellickson, *supra* note 62, at 616 (“Too many scholars have leapt from the observation that *some* sorts of transaction costs are low to the conclusion that *aggregate* transaction costs are low.”).

376. The Framers plainly thought structural constraints important and were at pains to suggest why the alternative strategy of a Bill of Rights was unlikely to work. See *The Federalist* No. 84, *supra* note 20, at 476 (Alexander Hamilton) (explaining bills of rights “would contain various exceptions to powers which are not granted; and . . . would afford a colorable pretext to claim more than were granted”).

377. See, e.g., Sunstein, *Behavioral Economics*, *supra* note 78, at 1838–42 (organizing discussion of paternalism to correct for market breakdown around models of cognitive failure in individuals).

378. Recall that in federalism cases, the Court has focused on defining property rights via the commandeering doctrine, the Eleventh Amendment, and the sovereign-immunity doctrine. See *supra* text accompanying notes 201–209 (describing Court’s anticommandeering and sovereign-immunity doctrines). This jurisprudence is largely in harmony with the logic advanced in this Article. For example, the Court’s commandeering doctrine might be understood as motivated by a preference for a property rule over a politically enforced liability rule. See Hills, *Cooperative Federalism*, *supra* note 205, at 817 (“[F]ederal government should not confiscate the property or conscript the services of nonfederal governments . . . [but] should purchase such services through a voluntary intergovernmental agreement.”). Nevertheless, there are arguments for even greater

A. Third-Party Effects from Institutional Deals

Institutional frameworks established in the Constitution, such as the separation of powers and federalism, are justified in terms of their beneficial effects for citizens.³⁷⁹ According to the Supreme Court, both structural principles prevent tyranny and engender individual liberty by minimizing the monopoly power of any one governmental entity.³⁸⁰ By dispersing power between plural institutional sites, it is said, the Constitution diminishes the risk of tyranny and promotes limited government.³⁸¹ Assuming this correlation between structural constitutionalism and liberty holds,³⁸² a first argument for limiting intermural bargaining would exploit the possibility that the ensuing deals compromised these positive externalities of the Constitution's architecture, instead inflicting negative spillover effects upon third parties. Public-law externalities, that is, provide an impetus for restraining bargaining as much as private-law externalities.

The argument here is not that any perceived third-party harm justifies a constraint on intermural bargaining. Sometimes, intermural deals can be struck precisely to assign economic harms in the most efficient manner possible. The LLRWPA may be a good example of this.³⁸³ The mere fact that some private parties are disadvantaged by a deal in some

deregulation of the federalism domain. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 *Harv. L. Rev.* 2180, 2183 (1998) (rejecting "assumption that the Constitution must be read to reserve areas for only the states to regulate . . . in favor of process-based, clear evidence requirements designed to demonstrate the source of federal power and the need for federal action").

379. See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies."); see also *New York v. United States*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

380. See, e.g., Linda D. Jellum, "Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers, 56 *UCLA L. Rev.* 837, 878–79 (2009) (arguing separation-of-powers jurisprudence aims to protect liberty by preventing "tyranny and legislative aggrandizement").

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

382. Other works have developed criticisms of the putative link between the separation of powers and the promotion of individual liberty. See Aziz Z. Huq, *Libertarian Separation of Powers*, 8 *N.Y.U. J.L. & Liberty* (forthcoming 2014) (manuscript at 7–19), available at <http://ssrn.com/abstract=2396581> (on file with the *Columbia Law Review*) (arguing there is no necessary linkage between separated powers and liberty); Huq, *Standing*, *supra* note 38, at 1484–90 (same).

383. See *supra* text accompanying notes 229–235 (describing federal regime regarding radioactive-waste disposal resulting from state bargaining).

way is not sufficient to warrant its close scrutiny. There must be reason to believe a *constitutional* value is compromised: When a value that the Constitution specifically seeks to promote (such as accountability or liberty) is compromised by an institutional innovation, the innovation producing such an effect should be treated with suspicion. An externalities-based justification for placing certain institutional deals beyond bounds might therefore start from the observation that some institutional deals redound to the detriment of the public as a result of elected representatives' misbegotten incentives. Agency slack leads faithless elected agents to endorse institutional deals with negative externalities. Those agents defect due to self-interest, divergent preferences, or a want of information or skill.³⁸⁴ But democratic politics at both federal and state levels employ regular elections to cabin agency slack.³⁸⁵ As a result, an externalities-based argument for limiting intermural bargaining must also explain why elections insufficiently discipline officials in dealmaking with other institutions.³⁸⁶

One possibility is that elected agents will be most likely to self-deal when there is unified rather than divided government. During unified government, there is less pressure on legislators to craft compromises that account for criticism from across the aisle. They have more freedom to entrench their own narrow interests. This would suggest that voters should look especially closely at deals struck by institutions controlled by the same political party. To be sure, it is also possible that deals between potential institutional competitors might be a way for incumbents of all stripes to reduce the risk that malfeasance, rent-seeking, or neglect will come to voters' attention through institutional conflict and competition.³⁸⁷ But bipartisan deals may be more likely to include some accommodation of the diversity of interests that exists among voters.

384. See Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 *Ann. Rev. Pol. Sci.* 203, 207, 209–10 (2005) (discussing defections of executive and Congress).

385. Nevertheless, elected officials have diverse strategies available to avoid blame and take inappropriate credit, including delegation. See, e.g., Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *Pub. Choice* 33, 46–52 (1982) (discussing accountability effects of delegation to agencies); see also Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 *Int'l Rev. L. & Econ.* 349, 361–66 (1993) (discussing delegation to courts).

386. Timothy Besley, *Principled Agents? The Political Economy of Good Government* 105–06 (2006) (explaining agency slack between voters and their representatives is typically addressed either through mechanism of ex ante electoral-selection effects or through retrospective voting).

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

B. Paternalism for Institutional Interests

The second ground for limiting bargaining in the private-law context turns on paternalist concern for the cognitive capacities of individual actors.³⁸⁸ It may seem that the second justification for limiting Coasean bargaining—paternalism-warranting internalities—does not translate well to the institutional context. Institutions, unlike individuals, do not deploy what Daniel Kahneman calls “System 1” heuristics as a shortcut for making demanding decisions.³⁸⁹ Institutions comprising plural natural persons instead employ a variety of decisionmaking processes involving multiple stages and many individuals. In doing so, however, they must identify ways to overcome paradoxes of aggregation that conduce to cycling problems³⁹⁰ and overcome collective-action hurdles. As previously noted, one way of thinking about the effect of collective-action problems on institutional capability is by analogy to the idea of a preference over preferences.³⁹¹ That is, collective-action pathologies may generate constraints on the ability of some institutions to translate the preferences of their components into revealed action—constraints that in turn could be used to underline a limit on intermural bargaining.

It is familiar fare that institutions can suffer from collective pathologies that impede rational pursuit of recognized self-interest.³⁹² Perhaps the most important cleft between institutional interest and institutional action here will emerge through failures of collective action. Institutions composed of plural members can reach decisions by aggregating individual members’ preferences. They can fail, in so doing, to reach outcomes that maximize collective welfare under certain conditions. The most important of these conditions is the tragedy of the commons,³⁹³ “in which what is best for each person individually leads to mutual defection, whereas everyone would have been better off with mutual cooperation.”³⁹⁴ A paternalism justification might apply if an institutional entitlement were held by a collective in common, for example a group of

388. See *supra* text accompanying notes 73–83.

389. Kahneman, *supra* note 79, at 20–21.

390. List & Pettit, *supra* note 82, at 42–47 (exploring how institutions achieve coherent aggregated outputs).

391. See *supra* text accompanying notes 83–84.

392. There are other institutional pathologies with no obvious relevance in this context, such as group polarization. See Irving L. Janis, *Victims of Groupthink: A Psychological Study of Foreign-Policy Decisions and Fiascoes* 10–13 (1972). Alternatively, “many minds might spin their wheels indefinitely, reaching no single answer or composite perspective at all.” Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 *J. Legal Analysis* 1, 20 (2009). This raises the intriguing possibility that the failure to reach an intermural deal might warrant an external corrective on paternalist grounds.

393. See Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 1244 (1968) (developing “tragedy of the commons” theory).

394. Robert Axelrod, *The Evolution of Cooperation* 9 (1980). Axelrod is describing the prisoners’ dilemma; the tragedy of the commons is a multiperson prisoners’ dilemma.

legislators or a group of states, and the collective were routinely unable to overcome its internal transaction costs to engage in desirable coordinated action. This might result in intermural trading in which the collective “sells” the entitlement cheaply due to its inability to cohere behind a single bargaining position. Worse, collective inaction might lead to anomie or wholesale atrophy of an entitlement.³⁹⁵

As a threshold matter, the argument from collective-action problems for constraints on intermural bargaining would appear to apply with special force to the several states in relation to the unitary federal government, and with less force to interbranch bargaining. But this superficial impression is misleading. The collective-action case for intervention on behalf of the states is weak, while the argument for solicitude on Congress’s behalf is relatively powerful.

The states are far more able to engage in collective action than their numerosity suggests.³⁹⁶ States’ collective voice in Congress will tend to be credible and effective for four reasons. First, state officials control access to electioneering and get-out-the-vote resources that are vital to federal politicians.³⁹⁷ Second, vocal public opposition of state officials may be politically costly for federal officials, making negotiation more desirable than confrontation. Third, states’ governance infrastructure—while immune from direct federal takeover as a consequence of the anticommandeering rule³⁹⁸—may be needed for operationalizing a law.³⁹⁹ There are also limits to what the federal government can practically compel, even when it does have legal authority to dictate state action. For example, the mandatory federal standards for state-issued identification required by the REAL ID Act of 2005⁴⁰⁰ sparked protests and ultimately states’ noncompliance, which compelled the Secretary of Homeland Security to defer final implementation.⁴⁰¹ Finally, states can spur federal

395. See Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 *Oxford J. Legal Stud.* 421, 423–25 (2012).

396. Huq, *Logic of Collective Action*, *supra* note 36, at 277–99 (critiquing claim that states are hobbled by collective-action costs).

397. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215, 279–84 (2000) (emphasizing role local and state parties have in national elections).

398. See sources cited *supra* note 201.

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

400. Pub. L. No. 109-13, § 202, 119 Stat. 302, 312 (codified at 49 U.S.C. § 30301 note (2012) (*Improved Security for Drivers’ Licenses and Personal Identification Cards*)).

401. See *The History of Federal Requirements for State Issued Driver’s Licenses and Identification Cards*, Nat’l Conference of State Legislatures, <http://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx> (on file with the *Columbia Law Review*) (last visited Sept. 7, 2014) (detailing history of deadline deferral for state compliance with REAL ID Act since passage in 2005).

legislative action by forging ahead in a new policy domain before the national government can act.⁴⁰² In these ways, states set the agenda and influence the contents of national law.

States also have shared institutional mechanisms to preserve such influence. An important channel for such bargaining is states' lobbying organizations.⁴⁰³ Since the turn of the twentieth century, states have cultivated a powerful "intergovernmental lobby" of organizations such as the National Conference of State Legislatures and the National Governors Association to represent their interests in Congress.⁴⁰⁴ This lobby ensures that states' interests are at least raised prior to a law's enactment.⁴⁰⁵ The states' lobby's many successes⁴⁰⁶ include aspects of the Affordable Care Act that were modified to account for states' concerns.⁴⁰⁷ There is, in short, little reason to think that states will be persistently unable to assert their shared interests against the federal government in the context of intermural bargaining and therefore little warrant for institutional paternalism.

The interbranch context, however, presents quite a different picture. Paternalistic concern is more plausibly thought to be a platform for judicial intervention in favor of Congress and against the executive branch in the separation-of-powers context. The legislature is a plural entity with higher decision costs than the relatively centralized and hierarchical executive. In contrast to the ceaseless churning of biennial and sextennial elections, the executive is able to maintain a cadre of long-term civil servants and bureaucrats who identify consistently with Article II aspirations, gather stocks of knowledge necessary to their defense, and develop strategic, long-term plans to further those goals.⁴⁰⁸ For example,

402. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 *J.L. Econ. & Org.* 313, 327, 330 (1985) (developing example of Motor Vehicle Air Pollution Control Act of 1965).

403. See John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* 70–74 (2009) (documenting various ways state officials participate in congressional lawmaking); Jane G. Gravelle & Jennifer Gravelle, *How Federal Policymakers Account for the Concerns of State and Local Governments in the Formulation of Federal Tax Policy*, 60 *Nat'l Tax J.* 631, 631 (2007) (detailing states' lobbying during passage of Tax Reform Act of 1986).

404. See Samuel H. Beer, *Political Overload and Federalism*, 10 *Polity* 5, 11 (1977) (describing diverse forms of state preenactment lobbying).

405. See John P. Pelissero & Robert E. England, *State and Local Governments' Washington "Reps"—Lobbying Strategies and President Reagan's New Federalism*, 19 *State & Local Gov't Rev.* 68, 68 (1987) (describing scope of intergovernmental lobby).

406. See Nugent, *supra* note 403, at 146–67 (cataloguing successes).

407. See John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 *Publius* 395, 407–13 (2011) (detailing states' successes in modifying Affordable Care Act).

408. Cross-branch partisan links also weaken congressional attachment to institutional interests, but might do the same for the executive. See Levinson & Pildes,

the Office of Legal Counsel (OLC), which furnishes legal opinions on questions of constitutional and statutory law raised by executive action, tends to hold a “robust conception[] of presidential power” regardless of party affiliation.⁴⁰⁹ It has also developed a system of *stare decisis* for its written work product.⁴¹⁰ In contrast, when constitutional interpretation occurs in Congress, it tends to be in the form of legislative debates that generate no fixed and settled conclusions of the sort that OLC can generate.⁴¹¹ The absence of any congressional analogue to OLC means that Congress is at a disadvantage when it comes to articulating and hewing to legal positions that embody a stable institutional interest. In effect, such positions must be recreated anew in each congressional debate. The result of this institutional asymmetry in collective-action costs is an imbalance in the branches’ willingness to vindicate their respective institutional interests.

The argument from institutional asymmetry has been applied recently by Professors Curtis Bradley and Trevor Morrison to justify limits on institutional renegotiation achieved via repeated exercises of unilateral executive prerogative.⁴¹² They powerfully criticize the longstanding view that the executive can claim authority based on a customary pattern or practice of behavior,⁴¹³ which is often labeled a “gloss” on interbranch relations.⁴¹⁴ Such glosses have been relied upon by both the courts⁴¹⁵ and

supra note 320, at 2324–25 (“[T]he political interests of elected officials generally correlate more strongly with party than with branch.”).

409. Jack Goldsmith, *The Terror Presidency* 34 (2007); accord Bruce Ackerman, *The Decline and Fall of the American Republic* 87–88 (2010) (arguing OLC often provides constitutional justifications for expansive views of executive authority).

410. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 *Colum. L. Rev.* 1448, 1457–58 (2010) (“The data suggest that OLC does not often overrule itself . . .”).

411. For a recent study of serious constitutional analysis within Congress drawing on unexpected sources, see Justin Driver, *Supremacies and the Southern Manifesto*, 92 *Tex. L. Rev.* 1053, 1060 (2014) (describing congressional debates in which “members of the Senate and the House of Representatives engaged in perhaps the most searching discussions of the judiciary’s role in constitutional interpretation that occurred among elected officials during the entire twentieth century”).

412. See Bradley & Morrison, supra note 35, at 414–15 (noting congressional acquiescence results from “collective action problems and veto limitations”).

413. See *id.* at 438–47 (criticizing Madisonian conception of separation of powers for failing to anticipate imbalance of power between legislative and executive branches).

414. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on ‘executive Power’ . . .”).

415. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 680–81 (1981) (emphasizing past practices in endorsing executive power to settle international claims); *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197, 212–14 (D.C. Cir. 2013) (relying on custom to invalidate statute touching on so-called presidential-recognition power with respect to

OLC.⁴¹⁶ Bradley and Morrison suggest that such historical patterns of executive action without congressional response cannot be assumed to reflect any interbranch consensus because “Congress as a body does not systematically seek to protect its prerogatives against presidential encroachment” due to “collective action problems and veto limitations.”⁴¹⁷ Recognition of historical glosses, they contend, therefore has the practical effect of systematically narrowing legislative and increasing presidential authority over time.⁴¹⁸ In the argot of this Article, Bradley and Morrison propose a parol-evidence rule⁴¹⁹ for interbranch bargaining.

The difficulty of such an approach, nevertheless, might also imply that courts are ill-positioned to referee disputes between Congress and the President at all. The difficulty is illustrated in the Court’s June 2014 ruling on recess appointments.⁴²⁰ In his majority opinion in *NLRB v. Noel Canning*, Justice Breyer candidly noted the Senate’s collective-action impediments to resisting presidential incursions on its confirmation authority.⁴²¹ Nevertheless, by ranging widely enough in history, Justice Breyer was able to assemble evidence of waxing legislative opposition, as well as a converse waning of legislative resistance.⁴²² It is far from clear how best to interpret such a variegated history of interbranch interactions. Perhaps observed instances of congressional acquiescence represent moments where partisanship overrides institutional interest; perhaps they are genuine interbranch accommodations. In *Noel Canning*, many of the incidents in question took place half a century or more in the past.⁴²³ The resulting historical gap should engender even more skepticism about courts’ ability to untangle different motivations and assess the bona fides of any given institutional action.

capital of foreign states), cert. granted sub nom. Zivotofsky ex rel. Zivotofsky v. Kerry, 134 S. Ct. 1873 (U.S. Apr. 21, 2014) (No. 13-628).

416. See, e.g., Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney Gen., OLC, to Eric Holder, Attorney Gen., Authority to Use Military Force in Libya 7, 14 (Apr. 1, 2011), available at <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> (on file with the *Columbia Law Review*) (relying on past presidential practice to authorize “anticipated military operations in Libya”).

417. Bradley & Morrison, *supra* note 35, at 414–15.

418. See *id.* at 448–52 (“[W]here acquiescence is the touchstone of the analysis, the standard for legislative acquiescence should be high.”).

419. See E. Allan Farnsworth, *Contracts* 413–35 (4th ed. 2004) (describing parol-evidence rule).

420. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

421. See *id.* at 2564 (“We recognize that the Senate cannot easily register opposition as a body to every governmental action that many, perhaps most, Senators oppose.”).

422. See *id.* at 2572 (discussing Pay Act of 1863, which prohibited payment of recess appointees, and Act’s subsequent amendment by Senate).

423. See *id.* (describing incidents of historical practice).

In sum, paternalism-warranting limitations on institutional actors that emerge from the latter's collective nature provide a separate ground for resisting certain intermural deals, particularly when those deals are reached through incremental and inattentive drift rather than formal negotiation. The idea that collective-action limitations would preclude an institutional actor from realizing not just its first-order preferences, but also its second-order preferences over preferences, has greater force in regard to Congress than with respect to the states. The latter, notwithstanding their numerosity, have lighted on durable vehicles for coordinated action in the context of legislative negotiations within the Beltway. As with third-party effects, it bears noting that courts are not necessarily well positioned to identify the limitations on Congress's ability to engage in effectual interbranch bargaining. The persistently poor performance of federal courts in this class of legal questions leads naturally to a final question: Even if there are normative limits to the desirable space of intermural bargaining, should those bounds be enforced by conscious political-branch actors or by the federal courts? That is the question addressed in the final Part of this Article.

V. THE NEGOTIATION-LITIGATION CHOICE: THE CASE AGAINST JUDICIAL ENFORCEMENT

The existence of justifications for limiting intermural bargaining raises the question of how such boundaries ought to be enforced. This Part suggests reasons, both in theory and in practice, to be skeptical that courts will identify accurately instances in which institutional bargains go too far. It argues that the framework developed so far for assessing institutional deals, which comprises a default rule and two exceptions, is better deployed by elected officials and their constituents in the course of departmentalist and popular judgments about new institutional arrangements. It is not a license for judicial review of such deals.

A. *The Weak Case for Judicial Supervision of Intermural Deals 1: Theory*

Consider first the positive case for judicial primacy in identifying limits to permissible intermural deals—a case that turns out to be surprisingly weak. That argument might start with the observation that federal courts sooner or later do confront and adjudicate the constitutionality of many, if not all, institutional-boundary questions that might otherwise be resolved by intermural bargaining.⁴²⁴ Why not then just cut to the chase? Prioritization of judicial action might be based on comparative institutional-competence grounds. Federal courts lack an institutional stake in many structural constitutional disputes. Courts' impartiality

424. See generally *supra* Part II (documenting instances of intermural bargaining and judicial review of such bargaining).

makes them especially well situated to act as arbiters in interbranch or intergovernmental conflicts.⁴²⁵ Further, judicial review does not suffer from a potential distortion manifested in intermural bargaining. Institutions trade over constitutional entitlements in the absence of the thick array of buyers and sellers commonly thought necessary to maintain well-functioning markets.⁴²⁶ As a result, bargaining failures and difficulties in valuing institutional assets might prevent socially desirable transfers from occurring. In brief, this section rejects this position. To that end, it develops four theoretical reasons for rejecting the primacy of judicial resolution. The following section then examines recent case law to suggest that experience cannot fill the gap left by theory.

As a threshold matter, Article III of the Constitution has been read to bar federal courts from acting in the absence of a concrete dispute.⁴²⁷ To obtain a judicial resolution in the absence of bargaining, therefore, one institution would have to infringe on another's putative prerogatives to precipitate a justiciable dispute. But despite Edward Corwin's famous dictum, the separation of powers is not in practice an "invitation to struggle."⁴²⁸ Instead, "[v]iolations of separation of powers principles tend to occur with the consent of two branches rather than unilateral incursion by one."⁴²⁹ No mechanism in the Constitution ensures that the transient, elected occupants of federal or state offices will be empire builders keen to extend their demesnes.⁴³⁰ Accordingly, a mechanism for resolving institutional ambiguities that relies on aggressive intramural incursions as a necessary predicate for clarification will founder on incentive-compatibility grounds. Further, requiring branches and states to instigate contentious border disputes may create litigation-related and frictional costs that bargaining obviates. There is no obvious reason why those costs should be incurred in every case, as opposed to solely those cases in which intermural bargaining breaks down.

425. A similar claim is made in *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 56, 76, 96, 103, 107 (D.D.C. 2008) (referring to judiciary as "ultimate arbiter" of executive-privilege claims).

426. Cf. Lee Anne Fennell, *Adjusting Alienability*, 122 Harv. L. Rev. 1403, 1438 (2009) (describing problem of "'thin market' in which transactions must occur, if at all, between specific parties").

427. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . [and] Controversies . . ."); *FEC v. Akins*, 524 U.S. 11, 20–21 (1998) ("[C]ourts will not 'pass upon . . . abstract, intellectual problems' . . ." (alteration in original) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting))).

428. Edward S. Corwin, *The President: Office and Powers, 1787–1984*, at 201 (Randall W. Bland et al. eds., 5th ed. 1984). Corwin was only talking about foreign policy. *Id.*

429. Gersen, *supra* note 119, at 356 n.147.

430. See Levinson, *Empire-Building*, *supra* note 23, at 920 (arguing officials often act based on personal and political incentives that do not entail defending institutional powers or prerogatives of branch that employs them).

Second, the tools courts employ to resolve institutional border disputes may be clumsy, costly, and prone to manipulation—and so not necessarily superior to institutional bargaining. Rather than conducing to certainty, their persistent deployment may destabilize expectations of institutional behavior. As this Part has demonstrated, many institutional-border disputes arise when neither constitutional text nor original understanding provides univocal answers. As a result, judicial resolution of intermural border disputes tends to pivot on contentious, highly controverted theories of constitutional interpretation. In *Inter Tribal Council*, for example, Justice Thomas suggested that an appropriate default rule could be deduced from the anticentripetal logic of the Founding moment.⁴³¹ On Justice Thomas's account, that resolving default rule arises not from the text but from a contested historical account of the federal government's formation and a highly controversial political theory of divided sovereignty. In an earlier case, Justice Stevens had set forth an alternative theory of the Constitution's implicit political theory (one that is perhaps no less contestable) that would yield different answers to the boundary question.⁴³²

It is by no means clear that recourse to grand constitutional theory is a superior decisional procedure to bargaining. Disputes that turn on historical evidence and constitutional theory will tend to be expensive to litigate. Ex ante, they produce uncertainty. There is also no guarantee that dueling grand theories of constitutional design yield anything other than a "draw."⁴³³ On the contrary, observed patterns of ideological voting on the Supreme Court may raise a concern that the wide array of historical, theoretical, and precedential material from which answers can be derived leaves large free rein for judges' priorities.⁴³⁴ As a result, reliance on grand theory to settle institutional-border disputes might undermine the predictability of dispute resolution. Judicial resolution, in short, is not necessarily a stabilizing force.

431. See 133 S. Ct. 2247, 2263–64 (2013) (Thomas, J., dissenting) (arguing Framers' intention in drafting Voter Qualifications Clause suggests power to set voter qualifications is "expressly reposed in the States"); accord *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 864–65 (1995) (Thomas, J., dissenting) (reading case law surrounding Voter Qualifications Clause to mean "States enjoy reserved powers over congressional elections").

432. See *U.S. Term Limits*, 514 U.S. at 798–805 (majority opinion) (explaining original powers reserved to states and Framers' intent indicate states do not have authority to create new qualifications for members of Congress).

433. See Kathleen M. Sullivan, *The Supreme Court, 1994 Term—Comment: Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78, 80 (1995) (suggesting text and drafting history alone did not determine outcome in *U.S. Term Limits*).

434. For empirical evidence of ideological voting, see generally Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (2006).

Third, if intermural settlements of institutional-boundary disputes are largely consensual (as appears to be the case), it may well be that those who challenge them in court are often disgruntled defectors⁴³⁵ or third parties with an ulterior agenda.⁴³⁶ At first blush, it might seem that the Article III standing rules would have a desirable selection effect. The demand for injury in fact, and not merely the “undifferentiated public interest”⁴³⁷ in compliance with the law, might select for only those plaintiffs who have been harmed by an intermural deal.⁴³⁸ Without spillovers from an intermural deal, it would appear, litigation will not entail. The problem with this optimistic view is twofold. To begin with, there is no reason to think that the adverse spillovers most likely to be generated by intermural deals will tend to count as injuries in fact under established doctrine. The Court’s understanding of injuries that are cognizable under Article III excludes the sort of democratic dysfunctions associated with agency slack and the failure of constitutional institutions to meet Madisonian standards of appropriate conduct.⁴³⁹ The absence of congruence between the injury-in-fact rule and the likely pattern of negative externalities from intermural bargaining undermines any prediction of a desirable selection effect in litigation.

Furthermore, the facts of litigation over the legislative veto, the Comptroller General’s budgeting authority, and federal commandeering⁴⁴⁰ suggest that intermural deals often have distributional effects: The legislative veto over immigration decisions likely benefited some immigrant groups over others; the exercise of constraints on the federal budget would disparately affect different constituencies depending on how they benefit from federal revenue flows; and commandeering may mitigate some harms (e.g., from firearms or radioactive waste) while exacerbating others. The frequency of distributive side effects from intermural deals suggests that it will almost always be possible to identify some actor with standing to challenge an intermural deal. Hence, Article III’s

435. Such as New York State in respect to the LLRWPA. See *supra* text accompanying notes 232–235 (discussing how New York’s successful challenge to LLRWPA allowed it to avoid internalizing states’ collective burden).

436. See Huq, *Standing*, *supra* note 38, at 1492–1502 (analyzing political economy of standing in structural constitutional cases to suggest individual litigants will often have ulterior agendas at odds with social welfare).

437. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

438. See Huq, *Standing*, *supra* note 38, at 1458–61 (reviewing application of standing rules to structural constitutional interests).

439. See *United States v. Richardson*, 418 U.S. 166, 174 (1974) (“[A] taxpayer may not ‘employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.’” (quoting *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring))) (internal quotation marks omitted).

440. For a brief summary of these cases, see *supra* notes 151–155, 185–187, 201–206 and accompanying text.

standing requirements are both overinclusive and underinclusive and so cannot screen well to select for court challenges to harmful deals but not beneficial deals.

The selection effect from litigation may instead be a pernicious one. Rather than selecting for cases in which an institutional settlement is most troubling, the ensuing pattern of challenges to intermural bargains will result in challenges against institutional fixes from defectors or rent-seeking private litigants. Litigation is least likely to be observed when an institutional fix has had negligible effects or it has had welfare-dampening effects and potential spoilers have already been bought off. This possibility is demonstrated by those instances in which an intermural bargain is an effort to extract rents, say from the general populace, for a favored interest group. In some cases, the extraction from each citizen may be small enough that no single citizen has an incentive to sue. Further, it will be possible to buy off all internal defectors and hostile interest groups (e.g., competitors of the rent-seeking group) with a portion of those rents. By contrast, consider an intermural settlement that is beneficial to the public at large, which is achieved by undoing a rent transfer to a favored interest group. In that case, there will likely not be resources freed up to pay for bribes to head off hostile lawsuits; indeed, the rent-seeking interest group has a strong incentive to use the courts to unravel the bargain. In this fashion, it is at least possible that the transaction costs of litigation will select for cases in which the welfare effect of an intermural deal is positive rather than negative. But if courts are most likely to pick off those institutional settlements that are most valuable, and less likely to deal with normatively troubling deals, we might fairly doubt that they are the optimal site for resolution of institutional-boundary disputes in constitutional law.

Fourth, the comparative epistemic-competence case in favor of judicial primacy is hard to sustain. On the one hand, judges' impartiality is easy to exaggerate. Federal courts do not stand in perfect equipoise between Congress and the executive. Of course, Congress has authority to recalibrate the scope of federal-court jurisdiction and judicial budgets. But this does not guarantee a level interbranch playing field.⁴⁴¹ Empirical studies confirm that the identity of the appointing President has an outsized influence on judges' subsequent voting behavior.⁴⁴² So great is the

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

442. Susan W. Johnson & Donald R. Songer, *The Influence of Presidential Versus Home State Senatorial Preferences on the Policy Output of Judges on the United States District Courts*, 36 *Law & Soc'y Rev.* 657, 666 (2002) (expecting to find “practice of senatorial courtesy might lead to judicial appointments consistent with the views of home state senators” but discovering “presidential preference is more than twice as influential as home state senatorial preferences”). This is hardly surprising. See Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional*

“predictive success of the presidential-appointment measure of [judicial] ideology” that many studies use it without detailed comment.⁴⁴³ Moreover, Presidents tend to appoint a disproportionate number of former executive-branch lawyers and prosecutors to important benches, including the Supreme Court.⁴⁴⁴ It seems unlikely that this asymmetrical distribution of prior experience will be congenial to neutral arbitration between branches.

In addition to this *ex ante* bias in favor of the appointing President, the executive has important *ex post* opportunities to influence judges. For example, federal courts rely on the President and his or her officials for enforcement of their orders.⁴⁴⁵ Judges may be cognizant too of the President’s powers to veto jurisdiction-stripping proposals and to protect the institutional and fiscal resources of the courts.⁴⁴⁶ Given that these *ex ante* and *ex post* pressures tilt toward the executive and away from other branches, it seems fair to ask why one would expect federal courts to be neutral as between Congress and the White House. The same point can be made more parsimoniously respecting federalism: As their name suggests, the federal courts are not situated in equipoise between the states and the national government. Even the Justices’ occasional federalism enthusiasms can be traced back to changes in the preferences of national political actors.⁴⁴⁷ Accordingly, there is no strong reason to anticipate consistent neutrality between levels of government on the part of Article III courts.

Constraints and Choices, 43 *Am. J. Pol. Sci.* 1069, 1071 (1999) (“Given the Court’s key role in setting public policy, the president will want a Court that shares his ideology and thus will nominate someone who will bring the Court closer to his preferences.”).

443. Barry Friedman, *The Politics of Judicial Review*, 84 *Tex. L. Rev.* 257, 278 (2005).

444. Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 *Calif. L. Rev.* 903, 920 (2003) (reporting one-third of Justices came directly from executive branch). Many federal judges have prior experience as prosecutors—a position that inevitably has a pro-executive perspective. Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* 103 (1997) (reporting large number of judges in study with prosecutorial experience).

445. *But see Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801–02 (1987) (holding courts can initiate contempt proceedings).

446. See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 *Colum. L. Rev.* 250, 274–290 (2012) (providing examples of cases from Eisenhower Administration onward in which Presidents opposed jurisdiction-stripping measures).

447. See J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 *Persp. on Pol.* 233, 240–43 (2004) (“[T]he Court’s revival of constitutional federalism has followed election returns in a general way”); see also Cornell W. Clayton & J. Mitchell Pickerill, *Guess What Happened on the Way to the Revolution? Precursors to the Supreme Court’s Federalism Revolution*, 34 *Publius* 85, 91 (2004) (finding Court’s rediscovery of federalism “trail[ed] developments in the elected branches” and “placed only modest restraints on the national governing coalition”).

Finally, the rule against advisory opinions means that there is always a political-branch settlement before courts intervene. Hence, it is likely often the case that political-branch actors have considered the pros and cons of an intermural deal.⁴⁴⁸ Given this sunk cost, judicial review is only warranted if its added marginal cost is dominated by the error costs it mitigates. As noted, however, it is hardly clear that this is the case. Further, in contrast to judicial resolution, intermural bargaining may function tolerably well in a significant proportion of cases. Though they are interested parties, legislators and executive-branch officials (whether at the state or the federal level) tend to be better informed than judges.⁴⁴⁹ To be sure, the absence of a thick market and price mechanism for institutional bargaining may mean that some socially desirable bargains do not occur.⁴⁵⁰ While this might justify reliance on judicial review as a *complement* to institutional bargaining, it does not undermine the utility of observed intermural resolutions.

B. *The Weak Case for Judicial Supervision of Intermural Deals 2: Practice*

Do these theoretical weaknesses of judicial review appear in practice? Examination of cases such as *Clinton*, *Bowsher*, and *Chadha* suggests that courts have considerable difficulty accurately identifying useful limits on bargaining.⁴⁵¹ In each of these cases, the Court invalidated negotiated arrangements that accommodated historical transformations in the regulatory state, that mitigated common-pool problems in the national fiscal sphere, and that dampened pathological dynamics between states.⁴⁵² It is not at all clear these goals were invalid or that thwarting them was at all warranted.

The limits on delegation announced in *Chadha*, *Bowsher*, and *Clinton* all echo a *numerus clausus* principle, i.e., a limit on the variety of forms property interests can take.⁴⁵³ In real-property law, the *numerus clausus* principle is justified on the ground that “[s]tandardization of property

448. Ryan’s evidence of federalism bargaining supports the hypothesis that actors do often take account of costs and benefits. See Ryan, *Negotiating Federalism*, *supra* note 219, at 38–74 (documenting considered negotiations extensively).

449. Vermeule, *Constitution of Risk*, *supra* note 360, at 117 (“In the theory of institutional design, a standard trade-off involves a conflict between the values of impartiality and expertise.”).

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

451. See *supra* text accompanying notes 148–187 (discussing efficacy of judicial review in *Clinton*, *Bowsher*, and *Chadha*).

452. See *supra* Part II (examining specific instances of institutional bargaining).

453. See *supra* text accompanying note 147.

rights reduces [the] measurement costs” of third parties by eliminating the prospect of idiosyncratically defined entitlements.⁴⁵⁴ By analogy, prohibitions on legislative vetoes, lockbox rules, and line-item vetoes might be justified in terms of negative epistemic spillover upon the electorate: Each institutional innovation tampers with the channels of democratic accountability. It thus raises the cost to voters of observing individual politicians. Just as the Court’s hostility to some campaign-finance regulation is explained by a wish to clear channels of political competition, so these separation-of-powers rules serve to promote accountability by cabining the costs of deriving a national policy’s etiology.⁴⁵⁵

Second, the results in these cases might be defended on the ground that each of these institutional innovations concentrates power. The Court, therefore, was promoting the Constitution’s scheme of fragmented governmental power when it demanded strict acoustic separations between distinct species of governmental power.⁴⁵⁶ On this view, these decisions lower the barriers to tyranny developing within the constitutional framework as a consequence of one branch seizing an inordinate share of power. Hence, *Chadha*, *Bowsher*, and *Clinton* might be read to impose inalienability rules when negative liberty-related externalities outweigh the benefits of intermural dealmaking.

Neither the democratic accountability nor the antityranny accounts of *Chadha*, *Bowsher*, and *Clinton* is persuasive though. First, a democratic-accountability defense of those cases necessarily rests upon some estimate of voter confusion, the availability of proxies for voters, and the offsetting benefits of institutional displacement. Such a defense would also need to account for the possibility that the challenged institutional modifications might in some instances lower the costs of democratic accountability. The line-item veto, for example, might ease democratic accountability by “improv[ing] the transparency of budget decisions to voters.”⁴⁵⁷ Yet the Court’s decisions are bereft of the empirical investigations necessary to justify its conclusion that the institutional innovations in *Chadha*, *Bowsher*, and *Clinton* in fact undermined democratic accountability.

454. Merrill & Smith, *Optimal Standardization*, *supra* note 147, at 8.

455. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 646 (1998) (“Only through an appropriately competitive partisan environment can . . . policy outcomes of the political process be responsive to the interests and views of citizens.”). A similar argument is offered in favor of the anticommandeering rule. See *Printz v. United States*, 521 U.S. 898, 929–30 (1997) (noting commandeering affects accountability of state and federal officials); *New York v. United States*, 505 U.S. 144, 168–69, 182–83 (1992) (same).

456. See Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 *B.C. L. Rev.* 433, 440 (2013) (“[T]he separation of powers might be thought of as a means to the division of power.”).

457. Garrett, *Accountability and Restraint*, *supra* note 159, at 875.

Furthermore, arguments against the legislative veto, sequester, and line-item veto based on liberty externalities also founder on profound conceptual difficulties and empirical uncertainty. It is very plausible to think that the correlation between liberty and mandated separations of institutional power is, in fact, very weak.⁴⁵⁸ The Court, moreover, simply lacked any reason in these cases for concluding that the institutional innovations it struck down diminished rather than augmented liberty. Indeed, even if interbranch consolidation of power enlarges government power, it might do so by reducing rent seeking and increasing the rationality and predictability of federal action.⁴⁵⁹ These liberty-promoting effects might dominate any loss in liberty from the concentration of government power. In the same way, election rules that “entrench one vision of democracy,”⁴⁶⁰ and so protect incumbents, also create the stability and predictability necessary for democracy. In both contexts, agency costs might be smaller than stability and predictability gains.⁴⁶¹ Further, even brief reflection on the history of federal interventions on civil-rights issues should reveal that centralizing power can sometimes *redistribute* liberty interests between different social groups so as to *expand* the net enjoyment of liberty under the Constitution—not to mention leaving that liberty allocated in more just arrangements.⁴⁶²

To the extent intermural dealmaking has adverse spillover effects, the case law does not give cause for optimism that judges will be able to identify them.⁴⁶³ In regard to paternalism-based worries about asymmetrical collective-action costs, the Court has tended to authorize implicit

458. See Huq, *Standing*, *supra* note 38, at 1484–89 (disputing assumption separated powers consistently produce positive externalities); Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 *Calif. L. Rev.* 887, 923–24 (2012) (developing this point for national-security policy); see also Posner & Vermeule, *Executive Unbound*, *supra* note 23, at 176–204 (offering empirical evidence that fears of institutional tyranny tend to be overstated). I doubt the threshold assumption that separated powers consistently produce positive externalities to begin with.

459. See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. Econ. & Org.* 81, 99 (1985) (“[D]elegation to experts [is] a form of consensus building that, far from taking decisions out of politics, seeks to give political choice a form in which potential collective agreement can be discovered and its benefits realized.”).

460. Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 *Sup. Ct. Rev.* 95, 135.

461. But see Waldron, *supra* note 456, at 456–59 (aligning separation of powers with rule of law). This analysis, by contrast, shows how violating a pure separation of powers can promote some rule-of-law values.

462. Congress employed its Commerce Clause authority to enact the landmark Civil Rights Act of 1964. See *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (upholding prohibition against discrimination by private restaurants on Commerce Clause grounds); *Heart of Atl. Motel v. United States*, 379 U.S. 241, 258 (1964) (upholding prohibition against discrimination by private hotels on Commerce Clause grounds).

463. See *supra* Part III.B.1 (discussing Court’s failure to identify spillover effects in *Bowsher* and *Chadha*).

bargains reached through historical gloss that are, in fact, not plausibly ranked as cogent expressions of bilateral consent.⁴⁶⁴ That is, the Court has exacerbated—not mitigated—the worries that motivate institutional paternalism. This record of highly imperfect judicial interventions, when contrasted with the crisis-free periods of judicial deference, lends support to the view that “acquiesced-in government practices . . . embody wisdom accumulated over time and are unlikely to threaten the basic balance of power between Congress and the Executive.”⁴⁶⁵

C. The Political Alternative to Judicial Settlement

A preference for political-branch bargaining over judicial settlement cannot rest on a critique of courts alone. It must also account for the strengths and weaknesses of nonjudicial settlement. That accounting might start with the simple observation that elected actors are believed to have better democratic credentials than judicial ones. Of course, it is tempting to think that allowing political-branch control over institutional arrangements is to invite self-dealing by elected officials. But such “fox guarding the henhouse” arguments in fact suffer from numerous difficulties. As in any domain that pits “competing political values central to democratic government” against one another, there is a strong case for leaving decisions “to the admittedly self-interested but more accountable political bodies that have found various ways of striking the balance.”⁴⁶⁶ To the extent that unmediated responsiveness to democratic polities is believed to be a constitutional good, the argument for disallowing popular control over the basic architecture of government is weak.⁴⁶⁷ The default rule should be nonjusticiability, even absent the concerns with courts adumbrated in Part V.A.

Democratic rule is attractive not merely in theory. The practice of serious constitutionalism within elected bodies in the United States has a long historical pedigree. The first Congresses took the task of constitutional interpretation seriously without being hamstrung by institutional

464. See *supra* text accompanying notes 139–146 (discussing historical gloss and its effect on Congress’s leverage).

465. Bradley & Morrison, *supra* note 35, at 414. For the link between comparative institutional-competence arguments and the Legal Process approach, see Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 696, 1009–10, 1111 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

466. Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 *Harv. L. Rev.* 649, 680–81 (2002). Further, legislative settlement “embodies a principle of respect for each person in the processes by which we settle on a view to be adopted as ours even in the face of disagreement,” Jeremy Waldron, *Law and Disagreement* 109 (1999), in a way that judicial review does not.

467. This argument is developed at greater length in Huq, *Removal*, *supra* note 38, at 76 (“Democratic accountability is best promoted . . . by leaving agency design to democratic choice.”).

or partisan bias.⁴⁶⁸ Today, this practice, which is known as departmentalism, has many academic defenders.⁴⁶⁹ Notwithstanding pervasive public skepticism about national elected institutions, both Congress and the executive branch seem to have the ability and the willingness to take constitutional questions seriously. Even if the President or a given legislator is not a lawyer, there is no shortage of legal advice in either the White House⁴⁷⁰ or Congress.⁴⁷¹ Recent empirical studies suggest that lawyers from both OLC within the executive branch⁴⁷² and from the committees and offices within Congress responsible for drafting legislation⁴⁷³ take seriously the constitutional limits on their respective institutional homes. Given this evidence, there is no strong reason for *categorical* skepticism of elected actors' incentives (as opposed to local concern about a specific politician, faction, or party).⁴⁷⁴

The robustness of that departmentalist tradition contrasts with the relatively recent vintage of claims to judicial supremacy.⁴⁷⁵ Setting these two histories alongside each other, it becomes clear that the role of courts as neutral arbiters of intermural disputes is historically contingent, dating back to the Civil War.⁴⁷⁶ The institutions originally vested with entitlements by the Constitution, in other words, managed to resolve intermural disputes for decades before the courts ever got involved. While the benefits of judicial involvement may be overstated, the costs of elected-branch resolution also seem smaller than might first appear. Without resolving all of the hard normative questions raised by depart-

468. See generally David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (1997) (demonstrating breadth of constitutional interpretation by early Congresses).

469. Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 Va. L. Rev. 1001, 1075–76 (2012) (collecting empirical evidence to that effect).

470. See Exec. Order No. 12,146, 3 C.F.R. § 409, 411 (1979) (establishing Federal Legal Council to coordinate legal activities within executive branch).

471. See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585, 588 (1975) (“The modern legislative committee, staffed by lawyers and others having expertise in particular areas of policy and law, is competent to consider the constitutional implications of pending measures.”).

472. Morrison, *supra* note 410, at 1470–88 (discussing effect of precedent within OLC).

473. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 948 (2013) (finding evidence “Congress tries to legislate within constitutional bounds”).

474. See *supra* note 328 and accompanying text (defending Congress's democratic credentials).

475. See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev. 1083, 1153–56 (2009) (noting recent vintage of claims to judicial supremacy).

476. See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 Calif. L. Rev. 579, 583–86 (2012) (documenting historical patterns in judicial willingness to invalidate federal statutes on constitutional grounds and showing large increase in such outcomes after Civil War).

mentalism, it is plausible to conclude that when there are multiple branches or governments bargaining over an entitlement, there is no a priori reason to think that courts should be necessary fora for constitutional resolution because of their putative impartiality.

Paternalism concerns related to the asymmetrical relationship of Congress to the White House,⁴⁷⁷ moreover, need not be addressed via judicial intervention. Instead, Congress may be better advised to seek an endogenous solution to its asymmetrical relation to the executive. Congress already has ample “hard” and “soft” tools to coerce and persuade other political branch actors.⁴⁷⁸ Congress, for example, might seek to create a repository of institutional legal opinions akin to OLC to serve as its standard-bearer in interbranch battles. Since 1978, the Senate has had an Office of the Senate Legal Counsel “to serve the institution of Congress rather than the partisan interest of one party or another,” the leader of which is appointed by the president pro tempore of the Senate on the recommendation of the majority and minority leaders.⁴⁷⁹ That office might be expanded, given a mandate to represent not only the Senate but also the House, and tasked with the production of legal opinions with durable intramural effect. It might also be given a mandate to respond to rulings issued by OLC, thereby correcting the asymmetry in public pronouncements about the Constitution between Congress and the executive. Alternatively, it might seek to impose more restraints on legal interpretation within the executive branch through its appropriations power, rather than using the ad hoc opportunities presented by contested nominations. The precise solution is less important here than the claim that a restoration of the interbranch equilibrium need not depend on the federal courts.

In sum, the limits of judicial capacity and the merits of intermural bargaining undermine the case for judicial superintendence of intermural bargains. At the very least, there is no reason to think that courts should *always* be preferred fora for the resolution of intermural boundary disputes: Courts should treat the outcomes of such negotiation with at least their traditional measure of deference in recognition of elected actors’ primacy—as they have done for much of American history. Read aggressively, the arguments presented in this Part suggest that it is elected actors who should bear primary and perhaps sole responsibility

477. See *supra* text accompanying notes 408–419 (describing asymmetries between Congress and White House).

478. Josh Chafetz, *Congress’s Constitution*, 160 U. Pa. L. Rev. 715, 721–22 (2012) (developing terminology and cataloguing tools as “hard” and “soft” congressional powers).

479. 2 U.S.C. § 288(a)(2)–(3)(A) (2012) (discussing appointment process for Senate Legal Counsel); see also Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 *Congress & Presidency* 131, 131–37 (1993) (describing history of Office of Senate Legal Counsel).

for determining when third-party effects or internality-like limitations on an institution's capabilities warrant withdrawal from the wide and pervasive sphere of intermural bargaining. The structural constitution should be negotiated—and not litigated.

CONCLUSION

Institutional bargains are a persistent aspect of the constitutional order. They are inevitable because of both the text's incomplete specification of initial entitlements and the tectonic pressures of exogenous economic, social, and geopolitical change. But this inevitability should not be bemoaned. Intermural deals are often (if not always) a desirable means of resolving constitutional ambiguities, adapting to changed conditions, and realizing new policy goods. Even if not always Pareto (or even Kaldor-Hicks) efficient, intermural deals will more often than not be likely to enhance public welfare within constitutional constraints.

Rather than resisting the inevitable tide of intermural dealmaking, this Article has aimed to develop a general framework for evaluating the ensuing deals. To that end, it has adapted, *mutatis mutandis*, the simple rule deployed in private-law analyses of bargaining. As a default matter, intermural deals reallocating institutional interests should be viewed as acceptable in the absence of concerns about either negative externalities or paternalism-warranting internalities. Without attempting any comprehensive accounting of those categories, this Article has started to sketch how such concerns might be operationalized. The existence of such limits, however, should not invite litigation. Courts are not well positioned to make judgments about the limits of intermural bargains and have historically exercised poor judgment in discerning the likely effects of intermural deals. Instead of inviting judicial review, the conditional embrace of institutional bargaining offered here stands as an invitation to departmentalist and popular judgments. Adoption of the proffered framework may not easily resolve all evaluative problems thrown up by intermural dealmaking. It should nevertheless bring into crisper focus the manifold and heterogeneous forms of institutional bargaining that contour, delimit, and enable the routine operation of our constitutional dispensation.