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Separation of Powers Metatheory

CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS.
By Josh Chafetz. New Haven: Yale University Press, 2017. Pp 449. \$45.00

Aziz Z. Huq*

Scholarship and jurisprudence concerning the Constitution's separation of powers today is characterized by sharp disagreement about general theory and specific outcomes. The leading theories diverge on how to model the motives of institutional actors; on how to weigh text, history, doctrine, and norms; and on whether to characterize the separation-of-powers system as abiding in a stable equilibrium or as enthralled in convulsively transformative paroxysms. Congress's Constitution—a major contribution to theorizing on the separation of powers—provides a platform to step back and isolate these important, if not always candidly recognized, disputes about the empirical and normative predicates of separation-of-powers theory—predicates that can be usefully grouped under the rubric of 'separation of powers metatheory.' Unlike much other work in the field, Congress's Constitution directly identifies and addresses the three important key metatheoretical questions in play when the separation of powers is theorized. This review analyzes how it grapples with those profound challenges, and tries to articulate a descriptively fit and normatively compelling account of our federal government. Considering Congress's Constitution from this perspective offers a valuable opportunity for considering the state and direction of academic theorizing on the separation of powers more broadly.

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INTRODUCTION

Scholarship and jurisprudence on the Constitution's separation of powers¹ today is characterized by sharp disagreement in respect to general theory well as to specific outcomes. One school of scholarly theories emphasizes the categorical separation and autonomous functioning of each branch.² Another celebrates instead a dynamic interaction within and between branches that is said to produce a beneficial checking and balancing.³ And a third approach analyzes the optimal assignment of institutional authority to a branch based on an extrinsic, non-legal criterion of social welfare maximization.⁴ Other, more retail, contributions on discrete, local questions of law abound.

The Supreme Court's treatment of legislative-executive relationships has also "cycled" among various theories since the 1920s, generating an unstable, unpredictable, and oft criticized jurisprudence.⁵ While these debates have mainly hinged on congressional-executive relationships, the other margins of the separation of powers have hardly wanted for controversy. The judicial construction of Article III boundaries, for

¹ The separation of powers comprises bilateral interactions between Congress, the executive, and the federal judiciary, in addition to more complex dynamics pairing two branches against one. References to the separation of powers are often vague in the sense of failing to specify which of these interactions is picked out. This review essay, consistent with the scope of the book under consideration, focuses upon the bilateral Congress-executive dynamic.

² See, e.g., Gary Lawson, *The Return of the King*, 93 *Tex. L. Rev.* 1521, 1538 (2015) ("The Constitution, however, vests '[t]he' executive power—meaning all of the executive power—in the President. There is no executive power remaining to be vested in anyone else." (citations and footnotes omitted)); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1165-68 (1992) ("Unitary executive theorists read [the Article II Vesting] clause, together with the Take Care Clause, as creating a hierarchical, unified executive department under the direct control of the President. They conclude that the President alone possesses all of the executive power and that he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power." (footnotes and citation omitted)); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 *Duke L.J.* 449, 454 (1991) ("[T]he Court's role in separation of powers cases should be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers—executive, legislative, or judicial.").

³ See, e.g., Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 *N.Y.U. L. Rev.* 227, 227 (2016) (underscoring "the multidimensional nature of administrative control in which the constitutional branches and the administrative rivals all compete with one another to influence administrative governance"); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 *Duke L.J.* 679, 779 (1997) (characterizing the separation of powers principle "less [as] a device for policing institutional boundaries and more like a standard for preserving in that debate the qualities of participation and accountability [It] marks the cadence for the People's argument among themselves over time.").

⁴ See, e.g., Eric Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 18 (2012) [hereinafter Posner & Vermeule, *Executive Unbound*] (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").

⁵ For a comprehensive account of the relevant jurisprudence that emphasizes the Court's movement between different theories of the separation of powers, see Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *Yale L.J.* 346 (2016).

example, still oscillates between a categorical approach that emphasizes separation and a more fluid approach that celebrates balance and checking effects.⁶

Competing theories of the separation of powers are explicit in the scholarship and implicit in the jurisprudence. Like theories in other constitutional domains,⁷ they purport to offer guidance across multiple doctrinal strands. At the same time, they can also seem continuous with a larger domain of ‘constitutional theory.’ As David Strauss has noted, constitutional theory writ large is typically framed as “an effort to justify a set of prescriptions about how certain controversial constitutional issues should be decided.”⁸ Strauss further observes that a constitutional theory will “dra[w] on the bases of agreement that exist within the legal culture and trying to extend those agreed-upon principles to decide the cases or issues on which people disagree.”⁹

But disagreement in the separation-of-powers context does not quite fit Strauss’s description. Theoretical disagreement in this domain remains lively—or perhaps hellishly Sisyphean—precisely because there is pervasive and deep disagreement about the “bases” and “principles” upon which any theoretical account with prescriptive force must necessarily rest. As a result, the immediate debate about specific separation-of-powers issues can be scraped away, like so many coats of thick-lathered varnish, to uncover a deeper layer of disagreement concerning the empirical and normative premises that support different theories. This more profound layer of disagreements is usefully labeled ‘metatheoretical’ by analogy to the philosophical field of metaethics. The latter “is the attempt to understand the metaphysical, epistemological, semantic, and psychological, presuppositions and commitments of moral thought, talk, and practice.”¹⁰ Correspondingly, a metatheoretical disagreement in the law turns on the meaning,

⁶ Compare *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (holding that assignment “counterclaims by the estate against persons filing claims against the estate” in an Article I bankruptcy proceeding violated to Article III), with *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954-55 (2015) (allowing litigant consent to cure an Article III defect in Article I bankruptcy adjudication); see also *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165, 2172-73 (2014) (holding that an Article III flaw is cured if the bankruptcy judge’s ruling is treated as proposed findings of facts and legal conclusions, to be evaluated de novo by a district court). For a comprehensive analysis of the Article III question in bankruptcy, see Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. Chi. L. Rev. 1155 (2015).

⁷ For an excellent, and self-conscious example, see Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L.J. 19, 21 & n.6 (1988) (cataloging “attempts to formulate a general theory of the fourth amendment in light of modern constitutional thought” before their own).

⁸ David A. Strauss, *What Is Constitutional Theory?*, 87 Cal. L. Rev. 581, 582 (1999). One might reasonably object that Strauss is far too optimistic about the extent and nature of disagreement in constitutional theory writ large, but that is orthogonal to my point here. There are other definitions of “constitutional theory,” many of which focus on the general question of how the Constitution as a whole should be glossed and applied by courts. See, e.g., Richard H. Fallon, Jr., *How to Choose A Constitutional Theory*, 87 Cal. L. Rev. 535, 537 (1999) (describing constitutional theories as concerning “the nature of the United States Constitution and how judges should interpret and apply it”); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 1 (1998) (“Constitutional theory, as I shall use the term, is the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the United States.”).

⁹ Strauss, *supra* note 8, at 592.

¹⁰ Geoff Sayre-McCord, *Metaethics*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/archives/sum2014/entries/metaethics/>.

analytic robustness, normative salience, or empirical validity of a term that appears in one or more theories of the separation of powers. Theory predicts or directs outcomes in specific cases. Metatheory, in contrast, does not directly specify the normative framework tendered for the analysis and resolution of specific legal disputes. It is instead concerned with the detailing of necessary and foundational terms used within, and shared across, one or more theories.¹¹

A central claim advanced in this review is that separation-of-powers metatheory is characterized by a number of predictable and persistent questions, and that these either do not arise in other domains of constitutional theory, or, if they do have more general analogs, arise in distinct forms in the horizontal governmental structure context. In the analysis of relations between Congress and the executive branch—the focus of the book under review here—three such questions reoccur and deserve close attention.¹² First, there is dispute about how the *motives* of relevant institutional actors should be modeled (if at all) for the purpose of defining horizontal relationships between the branches. Second, there is a question of what *sources of law*—text, pre-ratification history, post-ratification practice, judicial precedent, or first-order normative reasoning—exist, and also how they should be weighed and prioritized. Finally, a metatheory of the separation of powers will also need to articulate an idea about how institutions either remain at *equilibrium* over time, or how they change within constitutional contours. Attention to metatheory surfaces these distinct problems, which cut across diverse theories, as isolate objects of scholarly inquiry.

While each of these metatheoretical debates touches on wider hermeneutical debates in constitutional law, each also has a distinctive character in the separation-of-powers domain. Their unique profiles are worth briefly sketching. Consider first the question of official motive. The separation of powers concerns the threshold articulation of basic institutional building blocks of the state. Defining institutional boundaries often means making assumptions about the relative strength of legalistic, partisan, and institutional motives on the part of official actors. These questions do not arise in the same way in the definition and application of constitutional rights.¹³ The definition of

¹¹ A handful of scholars have employed the term “metatheory” in the constitutional context, albeit in a different sense from me. Michael Dorf describes questions about how to evaluate constitutional theories as metatheoretical. Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 Cal. L. Rev. 593, 597 (1999). Garrick Pursley, in addition, uses the term to refer rather vaguely to “the question of theory assessment in legal theory.” Garrick B. Pursley, *Metatheory*, 47 Loy. U. Chi. L. J. 1333, 1337 (2016); see also Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 16 (1984) (suggesting that metatheories are needed to “tell us where to draw the line” within legal theories). I use the term in a simpler fashion to capture debate about terms or ideas shared across different jurisprudential theories; unlike Dorf, I do not use it to refer to procedures or criteria for choosing between such theories.

¹² See *infra* Part I (setting forth these lines of debate in more detail).

¹³ Note the “somewhat.” I am cognizant that Akhil Amar, among others, has insisted on the structural quality of the Bill of Rights. But his account of the Bill of Rights does not accent the branches *per se*, but rather a host of distinct, extrinsic actors: “states’ rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate.” Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100

constitutional rights generally doesn't depend on how official motives are defined. Rather, it is more common to account for the motives of regulated official actors in an acoustically separate remedy stage. Moreover, to the extent that courts engage "remedial equilibration," whereby the costs and benefits of various remedies shape the contours of individual rights, it is with a measure of embarrassment and obfuscation.¹⁴

Similarly, debates on the sources of law for separation-of-powers disputes plainly overlap with more general debates on the appropriate hermeneutical approach to the Constitution more generally.¹⁵ But the identification of the sources of law in separation-of-powers cases also implicates distinctive problems not observed elsewhere. The hermeneutic heft of historical "gloss" comprising the past acts of officials wielding state power,¹⁶ for instance, is of a different magnitude in the separation-of-powers context from the weighing of prior state practice in, say, debates about whether *Brown v. Board of Education*¹⁷ was rightly decided.

Finally, questions of equilibrium versus change have a distinct complexion in the separation-of-powers context. In rights cases, there is often a question of how a general value such as privacy or free exercise will be applied to new, unanticipated context. The challenge of time to the separation of powers is different. Even in the first decades of the Republic, territorial expansion augmented the number of states and subtly shifted the dynamics of federalism.¹⁸ It also presented the national government with new legal difficulties, new geostrategic opportunities, and new internal governance challenges.¹⁹ How the national government was expected to grow, and yet at the same time remain

Yale L.J. 1131, 1132 (1991). If Amar is correct (and I think he is to some extent), it may be that some of the metatheoretical questions raised here deserve airing more broadly in constitutional theory.

¹⁴ Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 873 (1999) (defining "remedial equilibration" as a process in which "constitutional rights are inevitably shaped by, and incorporate, remedial concerns"). For reasons Richard Fallon has forcefully outlined, this view is "unduly reductionist" and inconsistent with "widely shared assumptions of the legal profession." Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1314 (2006).

¹⁵ For a synoptic and fair-minded view of the relevant approaches, see Sotirious A. Barber & James Fleming, Constitutional Interpretation: The Basic Questions 59-66 (2007).

¹⁶ For a definition of historical gloss, see Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 418-19 (2012) [hereinafter Bradley & Morrison, Historical Gloss] (discussing the use of "historical gloss" in the separation of powers context).

¹⁷ 347 U.S. 483 (1954).

¹⁸ Justifying Lewis and Clark's literal path-marking expedition west, Thomas Jefferson told Congress on January 18, 1803, that "[t]he interests of commerce place the principal object [of the expedition] within the constitutional powers and care of Congress . . . that it should incidentally advance the geographical knowledge of our own continent cannot but be an additional gratification." Thomas Jefferson, Message to Congress (Jan. 18, 1803), [http:// www.loc.gov/exhibits/lewisandclark/transcript56.html](http://www.loc.gov/exhibits/lewisandclark/transcript56.html).

¹⁹ For example, the Louisiana Purchase itself presented an early, and quite serious, constitutional question of the separation of powers—one that, in a striking harbinger, was never adjudicated by a federal court. Sanford Levinson & Bartholomew H. Sparrow, Introduction, in *The Louisiana Purchase and American Expansion 1803-1898* 1, 3 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005). On the internal political challenges created by conflicts over slavery's expansion, see Aziz Z. Huq, The Function of Article V, 162 U. Pa. L. Rev. 1165, 1185 (2014); Barry R. Weingast, Designing Constitutional Stability in Democratic Constitutional Design and Public Policy: Analysis and Evidence 343, 357-58 (Roger D. Congleton & Birgitta Swedenborg eds., 2006).

faithful to the original architecture, was thus a problem from the Republic's inception.²⁰ It was (and is) a problem of whether equilibrium should be preferred to change, in a way that is distinct from questions of time in other constitutional domains. Across the board, therefore, there is good cause to expect that separation of powers metatheory will be characterized by problems partly contiguous with, but also distinct from, the foundational problems of constitutional theory writ large.

The immediate platform for examining these problems is the publicity of Josh Chafetz's insightful monograph *Congress's Constitution: Legislative Authority and the Separation of Powers* [hereinafter *Congress's Constitution*]. Historically inclined, steeped in doctrine, and intimate with much of the relevant political science literature, Chafetz is a sophisticated guide to separation-of-powers dynamics. His book focuses on Congress-executive relations, which is the locus of current scholarly preoccupation.²¹ Yet *Congress's Constitution* warrants notice because it inverts the modal orientation of scholarly attention in this field. Chafetz's main topos is our federal legislature. With a handful of exceptions,²² scholars are preternaturally beguiled by the mysteries of the executive branch.²³ This asymmetry tracks a more general drift of effectual governance authority from Article I to Article II actors across the twentieth century.²⁴ Chafetz rows against the current by taking Congress seriously as a constitutional actor.

Yet this is perhaps not the most noteworthy element of the book. For *Congress's Constitution* also candidly engages not just with theory and application, but also with metatheory. Indeed, the first two chapters of *Congress's Constitution* present a general account of separation of powers metatheory that warrants close and careful scrutiny—both for the commendable ambition to explicate its metatheory systematically and also for its specific content. The rewards of a close reading of *Congress's Constitution*, I will

²⁰ For a recent revisionist account of the legal historiography, see Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 *Stan. L. Rev.* 397, 401 (2015) (identifying early nineteenth century concerns in terms of “state consent; distinctions among Congress's powers to appropriate funds for internal improvements, to execute the improvements itself, and to transfer the public lands to the states for the purposes of executing the improvements; and the role of the federal government as proprietor of the public lands”).

²¹ For an earlier generation of scholars who came of age in an era of relative détente between the president and Congress, the question of legislative ability to eliminate federal-court jurisdiction loomed larger. See Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 295-460 (7th ed. 2015) (summarizing (!) various permutations of the debate). A decade ago Congress's effort to eliminate federal-court jurisdiction over habeas corpus petitions filed by alleged enemy combatants intermittently rekindled the debate. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 *Va. L. Rev.* 1043, 1046-47 (2010) [hereinafter Fallon, *Jurisdiction-Stripping*].

²² See, e.g., the essays in *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Richard Bauman & Tzvi Kahana, eds., 2006); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 *Duke L.J.* 1277 (2001).

²³ Representative examples (without endeavoring to be exhaustive) include Posner & Vermeule, *Executive Unbound*, supra note 4, at *passim*; Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 *Colum. L. Rev.* 1097 (2013) [hereinafter Bradley & Morrison, *Presidential Power*]; Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245 (2001).

²⁴ I suspect it also has something to do with the fact that more legal scholars have experience in the executive branch rather than Congress. A less charitably reading might be that more legal scholars expect employment in the executive branch—or a nomination nod by someone in the executive branch.

argue, flow more from the successes and shortfalls of this deeply embedded element of Chafetz's project, and less from the extensive historical and doctrinal exegeses that the book also contains.

I should disavow up front any effort to use Chafetz's account as a stalking horse for my own theoretical claims. My aim here, indeed, is emphatically not to tender my own theory, or metatheory, of the separation of powers. More modestly, I hope that my reflection on *Congress's Constitution* works as a useful starting point for fleshing out the nature and extent of deep disagreement over the predicates of separation of powers theory. By airing these disagreements in a more precise fashion than the literature to date has managed, it may be that scholars and jurists of the separation of powers will gain better purchase on *how* they disagree, even if the disputes over specific cases continue to linger.

The review has three Parts. The first provides context by offering a simplified topography of current theoretical debates over the separation of powers into which Chafetz intervenes. It posits three axes of metatheoretical debate that striate the current literature. The second Part examines the theoretical and applied contribution of *Congress's Constitution*. The final Part trains upon Chafetz's metatheoretical premises: *Congress's Constitution* is deployed as a case-study to demonstrate the utility of a focus upon separation-of-powers metatheory as well as theory. The exercise also generates a series of insights into the strengths, weaknesses, and lacunae in Chafetz's work, as well as thoughts about the future of separation-of-powers theory.

I. THEORY (AND METATHEORY) FOR THE SEPARATION OF POWERS

It is a truth grudgingly acknowledged by all 1L Con Law students that judges and scholars disagree profoundly about what the phrase "separation of powers" means. A simplified cartography of those disagreements is useful here two reasons. First, by mapping the landscape of theoretical disagreement, it is possible to better understand its true springs. These concern the meaning of terms, the importance of certain empirical regularities, and the wellsprings of legal normativity—i.e., the pivotal questions of separation-of-powers metatheory. Second, with accounts of both theory and metatheory in hand, it is possible to position *Congress's Constitution* in the scholarly landscape, and thereby to ascertain the precise nature of its contribution by considering how it tracks, or deviates from, earlier accounts of the separation of powers. This Part thus begins by mapping the terrain of separation-of-powers theory, and then extracting three general, underlying metatheoretical springs. Readers interested in the claims advanced in *Congress's Constitution* and my analysis thereof will not find anything of interest here. The book's central claims—and its strengths and weaknesses—are the subject of Parts II and III, and are not addressed even in passing here.

A. Theories of the Separation of Powers

Scholars typically adopt one of three accounts of interaction between the three branches of the federal government.²⁵ These models, at least in ideal type, can be called the separation, balance, and exogenous models. Whereas these models also inflect the case law, I focus here on scholarly presentations of the relationship between the executive and Congress—which is the central axis of contention today, and which forms the nub of *Congress’s Constitution*.²⁶

1. Separation models

Separation models of the separation of powers understand each branch as a distinctive and stand-alone entity wielding a defined, delimited set of powers.²⁷ They furnish a Newtonian model of branches as separate zones of authority interacting much as a set of billiard balls on the blaze interact. In its simplest and most elegant exposition, the model holds that “Congress’ grants of legislative powers must enable it to legislate, the President’s grant of the executive power must enable him to execute all federal laws, and the federal judiciary’s grant of the judicial power must enable the federal courts to decide certain cases and controversies.”²⁸ Such models are often derived from textual exegesis of the original meaning or understand of the first three Articles of the Constitution and historical practice.²⁹ But they need not be so rooted.³⁰

Leading work in this field takes what political scientists once derisively termed a “literary” approach.³¹ One of its leading exponents, Saikrishna Prakash, hence begins with the eighteenth-century dictionary definitions of the powers vested by the first

²⁵ This summary focuses on U.S. constitutional scholars, and excludes constitutional scholarship. For a pathbreaking comparative piece that identifies “the model of constrained parliamentarianism as the most promising framework for future development of the separation of powers. Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633, 640 (2000).

²⁶ The first two of these models are sometimes labeled “formalist” and “functionalist.” See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *Cornell L. Rev.* 488 (1987). I avoid these labels because I want to juxtapose both with a third, even more functionalist, model. Further, as others have observed, the labels of formalism and functionalism are somewhat misleading insofar as so-called formalists often have a functional account of their separation principle. Victoria F. Nourse, *Toward a New Constitutional Anatomy*, 56 *Stan. L. Rev.* 835, 899 (2004).

²⁷ Readers should be aware that the first paragraph of each of the following sections comprises my own synthesis and summary of the three different positions. These opening paragraphs are light on citations because they are synthetic and generalizing. The following paragraphs then set out particular positions in more detail.

²⁸ Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541, 544 (1994).

²⁹ See, e.g., *id.* at 546 (starting with “the original meaning of the words of the constitutional text that the Framers actually wrote”); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 *Nw. U. L. Rev.* 1377, 1381 (1994) (similar analysis of the term “vest”).

³⁰ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 4 (1994) (defending a robust account of presidential authority based on “the best reading of the framers’ structure translated into the current, and radically transformed, context,” and explicitly considering and rejecting original meaning as a source).

³¹ Richard E. Neustadt, *Presidential Power and the Modern Presidents* 37 (1990).

Articles of the Constitution as the basis for specifying powers granted to each branch.³² The executive, he explains, possesses “all of those rights, powers, and privileges commonly associated with a chief executive vested with the executive power, subject to the many exceptions and limitations enumerated in Article II and elsewhere in the Constitution.”³³ Prakash extends the same approach to Congress. In an article on military powers, he thus categorizes the legislature’s war and emergency powers as “sweeping” through a close examination of the “basic structure” of the Constitution, the parallel between that structure and precursor models among the early American states, and the extensive textual specifications in Article I of “powers to declare war, raise an army and navy, and regulate ... [all of which] implied that Congress could continue to pass laws needed to defeat foreign enemies.”³⁴ Writing about the courts, Caleb Nelson strikes a kindred separationist chord when he proposes that “Article III ... strongly implies that neither Congress nor entities within the executive branch can exercise ‘[t]he judicial Power of the United States,’” but vests it “in true federal courts.”³⁵ At the logical limit of this approach is Dean John Manning’s textualist *reductio*, which saps substance from the conception of the separation of powers beyond the specific entailments of granulated morsels of constitutional text.³⁶

Another prominent strand of separationist reasoning, associated often with Steven Calabresi, focuses on the extent of hierarchical control over personnel decisions within the executive branch. Advancing a separation model of inter-branch relations, the so-

³² Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 714 (2003) [hereinafter Prakash, *Essential Meaning*] (quoting 1 Samuel Johnson, *A Dictionary of the English Language* 684 (4th ed. 1773)); see also Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive 1-11* (2015) [hereinafter Prakash, *The Constitution of the Original Executive*] (exploring the availability of a linguistically rooted approach to the exegesis of various government powers).

³³ Prakash, *Essential Meaning*, supra note 32, at 713. For a similar analysis of foreign affairs, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 253 (2001) (“Executive power, as commonly understood in the eighteenth century, included foreign affairs powers.”). But cf. John Hart Ely, *On Constitutional Ground* 149 (1996) (“The Constitution gives the president no general right to make foreign policy. Quite the contrary[:] virtually every substantive constitutional power touching on foreign affairs is vested in Congress.”).

³⁴ Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 Mich. L. Rev. 1337, 1367 (2015) [hereinafter Prakash, *Sweeping Domestic War Powers*]; cf. Prakash & Ramsey, supra note 33, at 241 (“Congress enjoys only certain specific foreign affairs powers outlined in Article I, Section 8.”).

³⁵ Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 565 (2007); id. at 571-72 (defining the “judicial Power” in terms of “the kinds of legal interests that were at stake,” and distinguishing public and private rights).

³⁶ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1948-49 (2011) (arguing for “a clause-centered approach” that rejects any “freestanding separation of powers doctrine”); accord John F. Manning, *Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 55 (2014) (“[T]o the extent one can discern the purposes underlying federalism and separation of powers, those purposes are vague, numerous, unranked, and often self-contradictory. Because neither doctrine provides firm answers in the abstract, the particulars of each almost invariably require the creation, rather than the excavation, of constitutional meaning.”). Manning styles his intervention as diverging from the approaches of both functionalists and formalists. Although he and the scholars he denominates as formalists may differ as to the level of generality, both he and the formalists work from a textual unit of a clause of an Article, rather than reasoning down from a systemic property such as balance. Hence, he is appropriately labeled a separation theorist for my purposes.

called “Unitary executive theorists claim that all federal officers exercising executive power must be subject to the direct control of the President”; they resist the countervailing argument that Congress can limit such direct control.³⁷ Their argument is supported by textual evidence that congressional impingement on executive control of administration is impermissible,³⁸ and also through a voluminous marshaling of historical evidence and a suite of functional arguments.³⁹

The analytic key to this approach is its identification of a specific branch’s powers, commonly based on text, pre-ratification interpretive conventions,⁴⁰ and post-ratification practice. Given the linguistic separation and variegation of Articles I, II, and III—each of which starts with a Vesting Clause referencing a distinct and different power—this approach will naturally tend to end in an account of the branches as separate and distinct entities.⁴¹ Overlap between branches, to be sure, is conceptually possible.⁴² But it does not often play a motivating role in the theory.⁴³

A separation model is in tension with observed practice in contemporary government in many ways. Congress exercises influence over the content of regulation and operation of administrative agencies through its oversight process. The agencies themselves blend together the specification of first-order conduct rules, the investigation of past violations, and (at times) adjudication of such acts. Faced with what must seem like wholesale defenestration of constitutional norms, advocates of the separation model frankly recognize the “huge” magnitude of the perceived problem and the sweeping nature of their preferred reforms.⁴⁴ Its advocates look to the courts as the opening artillery

³⁷ Calabresi & Rhodes, *supra* note 2, at 1158; see also Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 *Minn. L. Rev.* 1696, 1697 (2009) (defining unitary executive theory in terms of the “presidential power to remove all subordinates in the executive branch for policy reasons”).

³⁸ Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush 30-38* (2008) (summarizing textual arguments).

³⁹ *Id.* at 39-416 (recounting history at length and in detail). For functional arguments, see, e.g., Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 *Const. Comment.* 51, 52-53 (2001) (“The existence of presidentialism and of the separation of powers in our Constitution is a praiseworthy feature of the document that should be emulated abroad.”).

⁴⁰ See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. Chi. L. Rev.* 519, 549 (2003) [hereinafter Nelson, *Originalism*] (offering an account of the hermeneutical role of “the linguistic and legal principles that formed the background for the Constitution”).

⁴¹ “Checks and balances do not arise from separation theory, but are at odds with it. Checks and balances have to do with corrective invasion of the separated powers.” Gary Wills, *Explaining America: The Federalist* 119 (1981).

⁴² Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 *Tex. L. Rev.* 299, 308 (2008) (recognizing “the possibility of separation and overlap” but arguing that the latter should be analyzed “on a narrower basis—that is to say, clause by clause”).

⁴³ It is thus telling that Prakash begins his analysis of war powers by specifying “exclusive” executive and congressional powers, and only then considering the Constitution’s “system of concurrent powers.” *Id.* at 351; see also Saikrishna Prakash, *Removal and Tenure in Office*, 92 *Va. L. Rev.* 1779, 1785 (2006) (contending that “the Constitution establishes a system of shared removal powers”).

⁴⁴ Steven G. Calabresi, Mark E. Berghausen, and Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 *Nw. U. L. Rev.* 527, 545 (2012) (proposing dramatic reforms to the operation of all three branches).

barrage in a long war to restore appropriate separation through vigorous superintendence of institutional walls.⁴⁵ Indeed, it is possible to gloss the literature on the separation model as a sub rosa brief to the federal judiciary soliciting urgent and extensive intervention to change the shape of the federal government and vindicate a foregone fidelity.

2. *Balance models*

Balance models of the separation of powers reject the idea that it is possible to derive from either the constitution's text or history a delimited and determinate set of powers for assignment to each branch seriatim. To the contrary, the leading work in this vein finds the text inescapably ambivalent.⁴⁶ It instead situates the Constitution in what is described as a fluid, contested, and unstable eighteenth-century debate about the appropriate internal organization of government.⁴⁷ Rather than finding uniform evidence of a unitary executive that is acoustically separated from quotidian congressional control, for example, advocates of the balance model find more variation and ambiguity in late eighteenth-century state constitutional treatment of the same issue.⁴⁸ As a result, they decline to draw a strong conclusion from the Constitution's text, pre-ratification practice, or Founding-era interpretative conventions about the precise contours of each branch's authority.

Rather than starting with semantics, balance model proponents focus on the purposes of the Constitution's design. It can be usefully characterized as architectural rather than literary. Its focus is upon the net effect of interactions between the branches, rather than on matching specific powers to particular state entities. Hence, on Martin Flaherty's influential historical account, the Constitution's tripartite design of branches was intended to ensure that "both the basic division of powers, as well as their frequent mixture, merely served the *more fundamental* goals of ensuring that the branches of

⁴⁵ See, e.g., Martin H. Redish, *The Constitution as Political Structure* 99-134, 101 (1995) ("[T]he Court's role in separation-of-powers cases is to be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers. . . .").

⁴⁶ Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 603 (1984) (finding "imprecision inherent in the definition and separation of the three governmental powers"); see also Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *Mich. L. Rev.* 545, 553 (2004) ("[T]he textual arguments in support of the Vesting Clause Thesis are, at best, indeterminate."); accord Lessig & Sunstein, *supra* note 30, at 47-48 n.195 ("The [Article II] Vesting Clause does nothing more than show who . . . is to exercise the executive power, and not what that power is."). Separation theorists, however, acknowledge this difficulty. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1238 n.45 (1994) [hereinafter Lawson, *Rise and Rise*] ("The problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law.").

⁴⁷ Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1755 (1996) ("[T]he complex, messy, and at times contradictory ferment in constitutional thinking renders it unlikely at best that, by 1787, Americans had reached a consensus on the doctrine in anything like the precise, thoroughgoing manner that modern formalists prescribe.").

⁴⁸ See, e.g., Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 *U. Pa. J. Const. L.* 323, 363 (2016) (drawing on state constitutional text contemporaneous with the Constitution's ratification to suggest that "despite executive power vesting clauses, each of the sixteen constitutions . . . contemplates either a mandatory or permissive legislative role in the appointment of officials involved in public administration").

government would remain balanced, extending accountability throughout government, and making government more efficient than it had been in recent memory.⁴⁹ For him, “the goal of balance” was “the Founding’s most important separation of powers value.”⁵⁰ In a similar vein, Abner Greene argues the “checks and balances, rather than a system in which each branch exercises power on its own, ensures against the inflation of power in any one branch.”⁵¹ More recently, in a rich body of work (that includes an important article in these pages), Jon Michaels reads the Constitution to embody “an enduring, evolving commitment to separating and checking power.”⁵² Building on a literature about a so-called “internal separation of powers,”⁵³ Michaels looks not to inter-branch relations, but rather to “subconstitutional, rivalrous counterweights [as a means] constrain the political leadership atop administrative agencies in ways more reliable and immediate than anything the legislature or courts could regularly do.”⁵⁴

Balance models of this ilk focus on system-level qualities, such as the relative legal or political powers of one branch as against another. They insist not on crisply demarcated fences, but either excavate commodious common spaces⁵⁵ or explore the complexities of observed interbranch interactions.⁵⁶ They appeal not to the legalistic touchstone of the separation model—which is the alignment between textual allocation and institutional practice—but to the practical consequences of institutional design as a whole. Balance, most importantly, is thought to generate systemic legitimacy and to promote individual liberty interests.⁵⁷

⁴⁹ Flaherty, *supra* note 47, at 1784 (emphasis added).

⁵⁰ *Id.* at 1817; See also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 *Colum. L. Rev.* 452, 496 (1989) (describing the functionalist premise that “through the carefully orchestrated disposition and sharing of authority, restraint would be found in power counterbalancing power”).

⁵¹ Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 196 (1994).

⁵² Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 *Colum. L. Rev.* 515, 520 (2015) [hereinafter Michaels, *Enduring, Evolving*].

⁵³ For accounts of “internal” checks and balances, see Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Law*, 110 *Colum. L. Rev.* 479, 498 (2010) (arguing that they are ways of enhancing legality and rights); accord Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314 (2006).

⁵⁴ Michaels, *Enduring, Evolving*, *supra* note 52, at 534; see also Huq & Michaels, *supra* note 5, at 391 (positing a “thick political surround” as “a complex ecosystem of intrabranch and entirely external actors not traditionally accounted for in the separation-of-powers literature that do a lot of the work pushing and pulling, advancing prized values, and jockeying with one another”); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 *N.Y.U. L. Rev.* 227, 229 (2016) (describing, and finding normative significance in, “horizontal power dynamics between and among . . . administrative rivals” as a means of legitimating the administrative state).

⁵⁵ Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 *U. Pa. L. Rev.* 1513, 1527-28 (1991) (describing an approach to the separation of powers that stresses “the interdependence of the branches”).

⁵⁶ See, e.g., David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 4 (2014) (focusing on the “informal norms that determine how [institutional] authorities are wielded and disputes about them settled”). Pozen’s close study of information leaks also probes what in effect is another element of these informal norms. David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 *Harv. L. Rev.* 512, 624 (2013).

⁵⁷ See, e.g., David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 *Notre Dame L. Rev.* 1019, 1028 (2015) (positing that the

Like separation models, balance models need not make a descriptive as opposed to a prescriptive claim. While they tend to lack the end-of-days tone of some separationist accounts, balance theorists disagree as to whether observed institutional dynamics reflect a constitutionally desirable equilibrium. Flaherty, for instance, views the executive branch as excessive powerful, and urges for a recalibration of interbranch relations to cut it down to size.⁵⁸ Greene bemoans the welter of regulatory delegations, which in his view has left the balance of institutional powers quite lopsided.⁵⁹ In contrast, Michaels is optimistic about the current administrative state, which he sees as an institutional locus in which the checking and balancing dynamics that previously occurred exclusively among the branches now takes place could be “renew[ed]” and “update[ed].”⁶⁰ To Michaels, the impinging tide of privatization poses a fresh challenge to the post-New Deal reconstruction of the separation of powers—but one for which history provides adequate responsive tools.⁶¹ Despite these tonal differences, it bears noting, the kind of reforms that emerge from the balance model tend to be quite different from the recommendations that typically issue from the separation model. Whereas the separation model slides into a backward-looking Burkean *cri de coeur* about the follies of heedless institutional change, the balance model presses its spurs more deeply into the Constitution’s flanks. It presses for an even more headlong pursuit of institutional adaption and change in a rapidly evolving world.

One element of this transformative commission is a relative skepticism about the wisdom of judicial review of separation-of-powers questions. The idea of balance provides no reliable benchmark for judicial application, since judges are unlikely to be well-positioned to evaluate the effects of institutional change on the interbranch status quo.⁶² If balance is elusive, especially from the vantage point of the bench, then why make it judicial enforceable? Justiciability, after all, only raises the expected costs of any institutional recalibration. The absence of judicial review, by contrast, lowers the transaction costs of institutional change. With the balance model’s eye on the future, and its default model acceleration, judicial review of questions of the separation of powers hence comes to be seen as an otiose encumbrance of a bygone era. So it is no surprise that scholars such as Flaherty have dim views of the justiciability of separation-of-powers

“checks and balances” should be honored so as “better to preserve individual liberty”); Greene, *supra* note 51, at 176 (“[T]he framers’ core checks and balances value was to ensure a balance of power among the branches—to prevent the tyranny of any one branch (and thus help preserve individual liberty)”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *Harv. L. Rev.* 421, 443 (1987) (describing “the system of checks and balances as a necessary safeguard of private property and liberty against factionalism and self-interested representation”).

⁵⁸ Flaherty, *supra* note 47, at 1816-17 (discussing the “inexorable” increase in executive power).

⁵⁹ Greene, *supra* note 51, at 184 (complaining that “the nondelegation doctrine has been underenforced for the past fifty years”).

⁶⁰ Michaels, *Enduring*, *supra* note 52, at 522.

⁶¹ *Id.* at 522-23.

⁶² For an extended unpacking of arguments for this position, see Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 *Colum. L. Rev.* 1595, 1674-83 (2014) [hereinafter Huq, *Negotiated Structural Constitution*]. For a similar critique by an avowed formalist, see Stephen Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 *U. Chi. L. Rev.* 357, 375-76 (1990).

questions.⁶³ This dim view of judicial intervention, while not a consistent tenet of the balance model, is likely the most natural inference from its logic—and yields another sharp contrast to the separation model.

To this point, I have presented the balance and the separation models as crisply distinct. But these are only useful categories insofar as they help roughly slice up the jurisprudential territory. It is also possible to start from an assumption of separation, and to work in small steps toward an account of balanced, necessarily multivariate government action. Such accounts embarrass my crude attempt at categorization. But I think they are better thought of as filial derivatives of the balance model. These approaches link this idea of shared authorities to characterize government action that impinges on individual freedoms as necessarily requiring the involvement of diverse branches. They hence imagine legitimate government action as a composite in which each discrete branch's distinctive function works in graceful counterpoise to create a harmonious whole. Their emphasis on the necessity of a totality, and upon the finely calibrated tensile equilibrium between branches, aligns them with the balance rather than with the separation model.

Two prominent examples are associated with NYU Law School. Rachel Barkow has characterized the criminal justice system as demanding the input of all three branches prior to the deprivation of a person's liberty.⁶⁴ Her account hits a formalist note, but the service in a holistic chord. Jeremy Waldron has similarly suggested that the essence of the separation of powers lies in its demand for the "ordinary sequence" of legislative, executive, and judicial actions.⁶⁵ Although Waldron's account draws on logic familiar from the separation model insofar as it insists upon distinguishing the branches, it better aligns with the balance model insofar as he insists not on each power in isolation, but rather views them together as a "general articulated scheme of governance."⁶⁶ In Waldron's work in particular, formalism about institutional functions has as archaic

⁶³ Flaherty, *supra* note 47, at 1828 ("The Supreme Court should rarely intervene in separation of powers conflicts. When it does, it should do so principally when faced with a compelling violation of one of the basic values of balance, joint accountability, or sufficient energy."). Greene, in contrast, generally approves of the doctrine's outcomes. Greene, *supra* note 51, at 196. Michaels and I have coauthored a piece that offers a sympathetic reconstruction of the Court's jurisprudence in this field as an effort to adapt and respond to the complex institutional environment in which the branches operate. See Huq & Michaels, *supra* note 5, at 416-435. The article's conclusion carefully hedges any normative implication from the doctrinal reconstruction because the authors' views of the merits of the justiciability question diverged. *Id.* at 437.

⁶⁴ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1012 (2006) (making an "argument for strict separation of powers when the state uses its criminal powers").

⁶⁵ Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 *B.C. L. Rev.* 433, 434-35 (2013) ("The idea is . . . an insistence that anything we do to X or about X must be preceded by an exercise of legislative power that lays down a general rule applying to everyone, not just X, and a judicial proceeding that makes a determination that X's conduct in particular falls within the ambit of that rule, and so on.").

⁶⁶ *Id.* at 466. Rebecca Brown offers a somewhat similar claim that the separation of powers should be "understood as a concern for protecting individual rights against encroachment by a tyrannical majority." Brown, *supra* note 55, at 1516.

affect. It works as a stilted but necessary artifice for redeeming necessary institutional reticulation, which in turn enables meaningfully civil democratic self-government.⁶⁷

3. *Exogenous models*

Exogenous models of the separation of powers renounce both the task of allocating powers to distinct branches and also the task of discerning ways to maintain a balance or equilibrium across the federal government. Abandoning criteria either explicit in or immanent within the Constitution's design, such models find benchmarks for constitutional evaluation beyond the document.

The exogenous model starts from the proposition that it is not possible to identify *ex ante* a specific government action as legislative, executive, or judicial because there is commonly an observational equivalence between those forms of state action. Scholars working in this vein are skeptical of any approach that treats the "relevant constitutional language . . . as a set of descriptive labels, a set of terms like "executive," "state," or "judicial" (terms that seem ripe for definition or drawing boundaries), [such that] texts are then matched against the challenged practice under review."⁶⁸ They are skeptical that the "branch" is the truly relevant unit of analysis if one wishes to understand and predict the actions of official actors.⁶⁹

In a leading critical statement, Dean Elizabeth Magill argued that even if functional distinctions can be identified there is still "[n]o reason" to expect that "functional dispersal of power creates and maintains tension and competition among the departments."⁷⁰ Her former colleague at the University of Virginia School of Law,⁷¹ Daryl Levinson, has in similar terms challenged the implicit assumption that officials within a branch will pursue the latter's interests faithfully.⁷²

⁶⁷ This part of Waldron's argument is better developed in Jeremy Waldron, *Political Political Theory: Essays on Institutions* 111 (2016).

⁶⁸ Nourse, *supra* note 26, at 841; see also M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. Pa. L. Rev. 603, 604 (2001) [hereinafter Magill, *Beyond Powers and Branches*] ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers."); accord David Orentlicher, *Conflicts of Interest and the Constitution*, 59 Wash. & Lee L. Rev. 713, 726 (2002).

⁶⁹ Magill, *Beyond Powers and Branches*, *supra* note 68, at 606 (arguing that "government authority cannot be parceled neatly into three categories, and government actors cannot be understood solely as members of a branch of government"); accord Huq & Michaels, *supra* note 5, at 391-407..

⁷⁰ M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127, 1170 (2000) [hereinafter Magill, *Real Separation*].

⁷¹ The identification of institutional affiliations is not merely a heuristic for organizing the taxonomy here. Rather, the institutional context in which scholarship is produced matters in the sense that physical proximity makes the diffusion of intentions easier, and the alignment of ideas easier. Hence, it should not surprise that leading law schools, such as NYU and Virginia, should evince some elements of discrete, hard-edged intellectual formations.

⁷² Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 Harv. L. Rev. 657, 670 (2011) [hereinafter Levinson, *Parchment and Politics*] ("Madison never explained why the branches of government, or the state and federal governments, would reliably have political incentives at odds with one another—why they would tend to compete rather than cooperate or collude.").

The exogenous model also turns away from the aspiration of balance. Again, Magill’s work provides the building blocks for a skeptical turn. Not only is the idea of “power” in the analysis of interbranch relations ambiguous and underspecified,⁷³ Magill observes, but rarely is any explanation offered for how a balance between the branches is to be achieved.⁷⁴ Magill’s argument is not focused on judicial capacity to measure balance: It is rather a coruscating root-and-branch criticism of the concept. Hence, its implication is not simply that courts should decline to enforce constitutional common-law prohibitions founded on an assumption of balance. It is rather that the enterprise of identifying any kind of architectural equilibrium between the branches is a fools’ errand in the first instance.⁷⁵

An implication of these criticisms is that the separation of powers cannot be evaluated on the basis of intrinsic criteria—i.e., normative values implicit in the Constitution’s design. And if the literary and the architectural accounts of the separation of powers fail, the path is clear for a consideration of alternative explanations and arguments that look beyond the Constitution’s text to evaluate institutional arrangements.

Exogenous models that emerge from the critical ground-clearing in Magill’s and others’ work can take either a positive or a normative flavor. One largely positive pathway dispenses almost wholly with the ‘law’ of the separation of powers, and looks alternatively to its politics. If there is no firm functional contour to a branch’s action, and if there is no interbranch equilibrium to be maintained, then what is left is the raw force of partisan politics. On this account, associated now with Daryl Levinson and Richard Pildes, the development of a national political-party system, although unforeseen by the Constitution’s framers, has “tied the power and political fortunes of government officials to issues and elections,” and thereby fostered “a set of incentives that rendered these officials largely indifferent to the powers and interests of the branches per se.”⁷⁶ As a result, “When government is unified and the engine of party competition is removed from the internal structure of government, we should expect interbranch competition to dissipate.”⁷⁷ The result is a Beardian⁷⁸ account of constitutional law in which “the interests of the politically powerful” dominate.⁷⁹ The strength of these exogenous models

⁷³ Magill, *Real Separation*, supra note 70, at 1195-96 (developing ambiguities in the relevant conception of power).

⁷⁴ *Id.* at 1173 (criticizing the idea that the “dispersal of governmental functions mysteriously leads to balance, but the assumptions under which that balance occurs are obscure”). Magill is equally critical of the hybrid logic of the sort Barkow and Waldron develop, which blends separation and balance. *Id.* at 1174 (“[A]ttempting to merge the distinct conceptions into a coherent set of ideas is a fruitless enterprise.”).

⁷⁵ *Id.* at 1194 (“We do not know what “balance” means, and we do not know how it is achieved or maintained.”); see also Magill, *Beyond Powers and Branches*, supra note 68, at 605 (“We have not come close to articulating a vision of what an ideal balance would look like.”).

⁷⁶ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2323 (2006).

⁷⁷ *Id.* at 2329; accord Bradley & Morrison, *Historical Gloss*, supra note 16, at 443 (“[T]he Madisonian model of interbranch rivalry is especially inaccurate during times of unified government.”).

⁷⁸ Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (rev. ed. 2012) (contending that the 1787 Constitution was designed to facilitate the retention of wealth by, and the transfer of wealth to, a small minority of propertied men).

⁷⁹ Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 *Harv. L. Rev.* 1791, 1833 (2009) (“Constitutional law is pervasively shaped by the same political

is largely descriptive rather than normative. For it is hard to see the allure in a normative constitutional theory that directs the strong to take what they can, and the weak to bear what they must.⁸⁰

The other available pathway if one believes concepts of separation and balance are flawed beyond redemption is to appeal directly to social welfare as a desirable maximand. The leading scholarship on this point, by Eric Posner and Adrian Vermeule, identifies the executive branch as the optimal instrument of public policy. Posner and Vermeule assert that “major constraints on the executive . . . *do not arise* from law or from the separation-of-powers framework,” because legislators and courts are necessarily “reactive and marginal” in comparison to the presidency.⁸¹ They contend that this is a normatively desirable state of affairs. On their view, the executive will by dint of institutional specialization and better access to information typically select the better policy.⁸² A “rational and well informed” executive acting without constraints will always outperform the same body constrained by other branches or noisome rights.⁸³ Concerns about excessive concentrations of governmental authority in the executive’s hands are unwarranted because chief executives are necessarily subject to electoral checks.⁸⁴ Compliance with the “law and executive practice” are important not because of an intrinsic interest in legality but because they “allow a well-motivated executive to send a credible signal of his motivations, committing to use increased discretion in public-spirited ways.”⁸⁵ The result is a happy gloss on the modern dominance of the executive branch as a benign Leviathan, duly attentive to the interests of its citizenry thanks to elections and effortlessly selecting among available policies with Panglossian fortuity.

forces that it purports to regulate.”). Note that Goldsmith and Levinson’s account does not specify a definition of “power” or “political forces.” They point to federal actors, state governments, and social movements as examples of the forces shaping constitutional law, *id.* at 1811-12, suggesting an understanding of politics that is capacious and not limited to partisan forces.

⁸⁰ Writing in a more normative vein, Levinson and Pildes offer a set of recommendations “for preventing strongly unified party government from taking hold.” Levinson & Pildes, *supra* note 76, at 2380. (For a similar turn toward a “minimally functional democracy” as a normative objective, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915, 972 (2005).) To the extent that their reform agenda accepts and builds upon the institutional dominance of the two main political parties, it is not at all clear that its fundamentally quiescent orientation toward elite dominated constitutional law and politics is meaningfully inflected.

⁸¹ Posner & Vermeule, *Executive Unbound*, *supra* note 4, at 4-5.

⁸² Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 *U. Chi. L. Rev.* 1613, 1614 (2009) (“In the modern administrative state, it is practically inevitable that legislators, judges, and the public will entrust the executive branch with sweeping power to manage serious crises of this sort.”); accord Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *Yale L.J.* 1170, 1204 (2007) (arguing that the executive is best placed to resolve difficult foreign affairs questions requiring judgments of policy and principle, and that the judiciary should defer to the executive based on its foreign policy expertise).

⁸³ Eric A. Posner, Adrian Vermeule, *Emergencies and Democratic Failure*, 92 *Va. L. Rev.* 1091, 1099 (2006) (“There is no general reason to think that judges can do better than government at balancing security and liberty.”).

⁸⁴ Posner & Vermeule, *Executive Unbound*, *supra* note 4, at 5 (asserting that political checks will “block at least the most lurid forms of executive abuse”).

⁸⁵ Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 *U. Chi. L. Rev.* 865, 867 (2007); see also Posner & Vermeule, *Executive Unbound*, *supra* note 4, at 151 (asserting vaguely that credibility will lead “voters and legislatures . . . to confer authority”).

Given this relentless optimism, the Posner-Vermeule iteration of the separation-of-powers unsurprisingly leaves little space for a judicial role enforcing the structural constitution.

The theoretical and empirical premises of this latter exogenous model have been challenged.⁸⁶ It persists as a touchstone for analysis perhaps despite the fact that it does not accurately captures empirical regularities in the behavior of official actors or embodies a persuasive account of the relation of institutional design to social welfare. Nevertheless, it is admirably parsimonious, boldly stated, and provocative. In contrast, alternative exogenous approaches to the problem of interbranch interaction tend to be less compelling because, as Dean Magill explained, they “seek to understand the incentives of the actors who will exercise that power in a pointed enough way that it helps us comprehend how those powers will be exercised.”⁸⁷ Such granular analysis of situated and specific dynamics provides a less breathtakingly synoptic view of legal and constitutional institutions—that is, it yields less by way of high theory—but may provide more insight about how the separation of powers works in practice.⁸⁸

B. Metatheory for the Separation of Powers

The three schools of separation-of-power theory each offer different normative judgments about contemporary institutional dynamics, the extent of judicial review, and pathways for future reform. To adjudicate between theories of the separation of powers requires a vantage point from beyond any one individual theory from which more than one theory can be evaluated.

⁸⁶ For full-length criticisms of both the empirical and theoretical coordinates of the claims presented in the main text, see Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. Chi. L. Rev. 777 (2012); Richard H. Pildes, *Law and the President*, 125 Harv. L. Rev. 1381 (2012). A central problem in the Posner-Vermeule analysis is that it is commonly constructed on the basis of an apples-to-oranges comparison between the executive branch and other branches. Posner and Vermeule consistently model an ideal “rational and well informed” executive while looking at actual Congress and the courts. Attention to the actual construction and performance of executive branch institutions leads to very different conclusions. See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 Calif. L. Rev. 887, 908 (2012) (identifying path-dependent institutional development and institutional blind-spots as significant drags on the efficiency of executive-branch action).

⁸⁷ Magill, *Beyond Powers and Branches*, *supra* note 68, at 659.

⁸⁸ It is appropriate and perhaps necessary here to disclose where to locate in this typology my own contributions to this field. In addition to criticisms of the Posner-Vermeule account, I have advanced two main points. First, arguing from an exogenous perspective, I have argued on welfarist grounds for a narrow view of the justiciability of separation-of-powers questions in favor of broader latitude among political officials to negotiate new institutional arrangements. See Huq, *Negotiated Structural Constitution*, *supra* note 62, at 1674-83; Aziz Z. Huq, *Standing for the Structural Constitution*, 99 Va. L. Rev. 1435 (2013) [hereinafter Huq, *Standing*]. Second, in harmony with Magill’s endorsement of more granular studies, I have developed more fine-grained, multi-method accounts of specific separation of powers dynamics concerning detainee policy and remedies. On detainees, see Aziz Z. Huq, *The President and the Detainees*, 165 U. Pa. L. Rev. 499 (2017) [hereinafter Huq, *President and Detainees*]; Aziz Z. Huq, *The Predicates of Military Detention at Guantánamo: The Role of Individual Acts and Affiliations*, 13 J. Empirical L. Stud. 567 (2016). On constitutional remedies, see Aziz Huq & Genevieve Lakier, *The Triumph of Fault in Public Law*, – Harv. L. Rev. – (forthcoming 2018); Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 Duke L.J. 1 (2015).

This sort of ‘metatheoretical’ evaluative exercise—“meta” in the sense that it is an exercise in theorizing about theories—might be pursued from one of two perspectives, one more rewarding than the other. First, metatheory might proceed by establishing an independent vantage point from which various theories could be compared and contracted.⁸⁹ In the separation-of-powers context, however, it is not at all clear there is shared ground of this kind. The second, more modest form of metatheoretical inquiry asks instead if there are empirical or normative concepts that are common to one or more thought. Rather than attempting a synoptic judgment of the validity of any given theory of the separation of powers, this kind of metatheory focuses on the more granular and manageable task of adjudicating between the different ways in which a given empirical or normative question is resolved across the different theories.

As noted, there is an analogy to the field of metaethics in philosophy, which “is concerned to answer second-order non-moral questions, including (but not restricted to) questions about the semantics, metaphysics, and epistemology of moral thought and discourse.”⁹⁰ Exemplary questions in metaethics, for example, would include whether there are such things as moral facts, or whether knowledge of such facts is possible. Thankfully, the metatheoretical questions raised by the separation of powers debate are more tractable than these. Indeed, isolating these cross-cutting concepts—and considering the different ways in which they are specified—provides new purchase on the evaluation of different theoretical claims and a means of evaluating *Congress’s Constitution* in particular. Even if it is not possible to reach a conclusive judgment on which theory is superior given the persistence of larger normative debates in respect to constitutional law, a focus on metatheory has the potential to at least narrow the scope of disagreement about the separation of powers.

Three distinct metatheoretical questions can be teased out from the thicket of separation-of-powers theories canvassed above. These concern the model’s assumptions about the motives of official actors; the relevant sources of law; and the model’s assumptions about dynamics of equilibrium or change. The first of these is an empirical dispute (albeit one not always perceived as such). The second is profoundly normative. The final metatheoretical question rests on an empirical prediction about the way a complex governmental system will behave. I discuss each in turn.

⁸⁹ For the use of metatheory in this sense, see Dorf, *supra* note 11, at 597; Pursley, *supra* note 11 at 1337. A 1990 student note uses the framing device of “metatheor[ies] of separation of powers,” but does so to refer to what I have called theories of the separation of powers. Edward Susolik, Note, Separation of Powers and Liberty: The Appointments Clause, *Morrison v. Olson*, and Rule of Law, 63 S. Cal. L. Rev. 1515, 1527 (1990). The sense of “metatheory” here is also somewhat distinct from what Brian Leiter calls “theoretical disagreement,” which involves “disagreeing about what most legal philosophers call the criteria of legal validity.” Brian Leiter, Explaining Theoretical Disagreement, 76 U. Chi. L. Rev. 1215, 1216 (2009). The second species of metatheoretical disagreement I adumbrate below, concerning the sources of law, has this character. But my sense of the term “metatheory” is broader.

⁹⁰ Terry Horgan and Mark Timmons, Introduction, *in* *Metaethics after Moore* 1 (Terry Horgan and Mark Timmons, eds., 2006).

1. *Questions of Motive*

Any theory of the separation of powers requires an account of official motives. Not all the theories canvassed above explicitly recognize this, but it is true all the same. All agree that theories of separation of powers set out to describe, or to offer prescriptions for, a set of ongoing institutions staffed by individuals. They are hence constitutive, in the sense that they “create or define new forms of behavior”; they are only secondarily regulative in the sense of “regulat[ing] a pre-existing activity, an activity whose existence is logically independent of the rules.”⁹¹ The centrality of the task of delineating actual, formal institutions aligns the separation of powers with federalism. It also distinguishes the separation of powers from many other domains of constitutional law. Unlike the separation of powers, many other constitutional doctrines are plainly not *constitutive* of legal institutions in the first instance. The First Amendment’s speech and religion clauses, for example, presuppose the existence of an institutional press and organized churches.⁹² Similarly, whereas the Fourth Amendment’s prohibition on unreasonable searches and seizures may primarily regulate the police, it does not create the police. (Indeed, the urban police force postdates the Bill of Rights in the United States by some four decades.⁹³) By sketching the contours of institutional role and authority, the separation of power necessarily rests on assumptions about motive—and in turn influences the substance of those motives.⁹⁴

Motive is a basic building block in the design of government institutions. The Constitution’s first three Articles hence articulate a series of roles into which specific individuals slot. The efficacy of that institutional articulation depends on the behavioral fact that specific individuals indeed do assume the roles limned in those Articles, and then assert attendant powers. The Constitution, in other words, is akin to a play: It provides official actors with a bare script. It does not compel a particular interpretation of that script. Moreover, like any great performance text, the Constitution makes room for many interpretations. As a result, motive is a central term for understanding the separation of powers because it is the motives of specific individuals that will determine how he or she responds to the role and powers constituted by one of the first three Articles in Constitution. It figures in questions about how powers will be deployed to combat or cooperate with other branches. And it informs predictions as to whether institutional role constraints will be embraced or resisted.

⁹¹ John R. Searle, *Speech Acts* 33-34 (1969); accord Christopher Cherry, *Regulative Rules and Constitutive Rules*, 23 *Phil. Q.* 301 (1973).

⁹² For an analysis of the role of institutions in First Amendment law, see Frederick Schauer, *Towards an Institutional First Amendment*, 89 *Minn. L. Rev.* 1256, 1268-69 (2005) (criticizing framing of the First Amendment as an individual entitlement); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 *U. Colo. L. Rev.* 907, 925 (2006) (“An institutional understanding of the First Amendment is structured around the principle that certain institutions play special roles in serving the kinds of values that the First Amendment is most plausibly understood to protect.”).

⁹³ See David A. Sklansky, *The Private Police*, 46 *UCLA L. Rev.* 1165, 1202-08 (1999) (discussing historical origins of the police).

⁹⁴ One way in which institutional design shapes motives is through “selection effects,” whereby qualification rules alter the pool of anticipated applications for a position. Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 *Va. L. Rev.* 953, 961-62 (2005) (defining and discussing such selection effects).

Rough generalizations can be offered to describe the assumptions about official motive animating the separation, balance, and exogenous models. Hence, separation models implicitly assume that the law permits and limits official behavior within each branch. The implication is not crisply spelled out, but it would make no sense to offer propositions about the extent of congressional war powers⁹⁵ or the directive authority of the president in relation to principal officers⁹⁶ in the absence of an expectation that the specific individuals were motivated by the law, i.e., motivated to exercise their duties and fulfill their roles as specified by the relevant legal material. The balance model, by contrast, often rests on the Madisonian assumption that “[t]he interests of the man must be connected with the constitutional rights of the place,”⁹⁷ such that individuals staffing each branch should be expected to act on the basis of the interests of their home institution. Finally, the exogenous models discussed above⁹⁸ take the view that officials act on political or partisan motives, which is framed as distinct and different from legal motives. The precise quality of a ‘political’ motive can be rendered in different ways. For example, Jack Goldsmith and Daryl Levinson predict the exploitation of the weak by the strong.⁹⁹ Others seem to gesture at a more conventional, but more optimistic account of electoral responsiveness consistent with the canonical accounts of political representation in the political science literature.¹⁰⁰

The role of motive in separation-of-powers jurisprudence, moreover, is distinct from its function in other domains of constitutional law. Consider the prohibitions found in the Bill of Rights and Fourteenth Amendment. Several provisions in that part of the Constitution make motive, or intent, a touchstone of constitutional infirmity.¹⁰¹ In effect, such prohibitions pick out a species of motivation familiar from the world and treat it as a fatal taint to state action. Such rules exclude some actions on the basis of motive, but otherwise have no implications for the range of legitimate official motivations. In other regulative contexts, motive does not bear on the validity of government action, but pertains to the availability of a judicial remedy. For example, Elena Kagan famously argued that First Amendment doctrine “comprises a series of tools to flush out illicit motives and to invalidate actions infected with them.”¹⁰² In contrast, in Fourth Amendment jurisprudence, the motivation of a state agent is not relevant to the constitutionality of their action.¹⁰³ Rather, questions of intentionality become relevant

⁹⁵ Prakash, *Sweeping Domestic War Powers*, supra note 34, at 1367.

⁹⁶ Calabresi & Prakash, supra note 28, at 544.

⁹⁷ *The Federalist* No. 51, at 319-20 (James Madison) (Isaac Kramnick, ed., 1987) (advocating “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others”).

⁹⁸ See supra text accompanying notes 69 to 88.

⁹⁹ Goldsmith & Levinson, supra note 79, at 1833.

¹⁰⁰ For a classic model of electoral responsiveness, see David R. Mayhew, *Congress: The Electoral Connection* 13 (1974).

¹⁰¹ See Aziz Z. Huq, *Judging Discriminatory Intent*, 103 *Cornell L. Rev.* -- (forthcoming 2018) (analyzing the role of intent in the context of the Religion Clauses and the Fourteenth Amendment).

¹⁰² Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 *U. Chi. L. Rev.* 413, 414 (1996).

¹⁰³ *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014) (stating that a court “do[es] not examine the subjective understanding of the particular officer involved” in a challenged policing action).

when the Court turns to the question whether a remedy such as the exclusion of evidence or damages for a constitutional tort notwithstanding qualified immunity.¹⁰⁴ It is only in the separation of powers context that the law plays the role of a careful and diligent gardener of souls, seeding and cultivating the springs of official action with the ambition of realizing a healthful and vigorous institutional ecosystem. It is only in the separation of powers, that is, where the causal effects of legal design upon official motives is central rather than incidental to the enterprise.¹⁰⁵

2. *The Sources of Law*

The three schools of theory described above diverge dramatically in respect to the relevant range of sources from which claims about the law can be derived, as well as the hierarchical scale along which such claims should be ordered. All draw on Philip Bobbitt's quasi-canonical list of six "modalities" of argument in constitutional law; these operate as "the grammar of law, that system of logical constraints that the practices of legal activities have developed in our particular culture."¹⁰⁶ Each modality turns on different sorts of evidence. Some are controversial.¹⁰⁷ Separation of powers jurisprudence is hardly quarantined from these disputes. The tides, undercurrents, and squalls that afflict the wider scholarship and jurisprudence of constitutional interpretation hence upset the stability of separation-of-powers theory and law too. Still, debate over the sources of law in the separation-of-powers context has some bespoke qualities.

To see this, consider the official assigned a novel role and new powers, whether as a result of an election or an appointment. The nature of those new roles and powers necessary depends in part on the existence of a shared understanding of the constituting force of the first three Articles. A person with a wholly idiosyncratic understanding of their role—e.g., a president who believed that he or she had authority to exile or execute political opponents—would not be cognizable (at least for now) as a constitutionally legible actor.¹⁰⁸ Even if there is a repertoire of shared understandings about what a legislator or a president or a judge can or should do, the ensuing bundles of rules and

¹⁰⁴ See Huq, *Judicial Independence*, supra note 88, at 20-40 (documenting the pervasive use of a "fault" standard of objective culpability across constitutional remedies).

¹⁰⁵ Federalism, in contrast, generally takes the states as they are, and considers how the federal government then acts upon them.

¹⁰⁶ Philip Bobbitt, *A Constitutional Interpretation* 12-13, 24 (1991).

¹⁰⁷ Consider, for example, the status of precedent. Compare Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 748 (1988) ("Precedent is, of course, part of our understanding of what law is.") with Gary Lawson, *The Constitutional Case Against Precedent*, 17 *Harv. J.L. & Pub. Pol'y* 23, 24 (1994) ("In [some] circumstances . . . the practice of following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution.").

¹⁰⁸ This is not to say that all claims of legal authority or prohibition that fall beyond shared understanding of a constitutional rule-set are illegible within the constitutional system, or irrelevant to its operation. To the contrary, claim-making and behavior at the boundary of the legal system can shape subsequent understandings of the law's context. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 *U. Chi. L. Rev.* 1743 (2013).

powers is also likely to be alternatively incomplete, ambiguous in scope, or overtly contested in places.¹⁰⁹

A key question is how that repertoire is expanded or contracted. On the account of law associated with H.L.A. Hart (which I think largely correct), the litmus test to ascertain whether a norm is a rule of law as opposed to say, a convention, a norm of political life, or coincidental empirical regularity, is whether it is a social norm for a relevant group of legal officials.¹¹⁰ It is, therefore, a matter of social practice whether the official can appeal to one or another source of law.¹¹¹ But social practice is neither static nor absolutely constraining. Accordingly, an official newly invested in one of the three branches has a degree of freedom about whether to hew closely to the already-inscribed contours of a role based on extant and uncontroversial sources of law, or whether to kick against the pricks of convention by asserting new-fangled interpretations of novel sources of law.¹¹² Here, the question of motive intersects with the selection of sources of law.

There are a specific number of ways in which disputes about the sources of law in the separation-of-powers context diverge from such debates more generally. To begin with, consider the range of sources that validly inform a constitutional determination.¹¹³ It is quite possible (even probable) that separation-of-powers decisions are systematically decided by different actors from other constitutional questions—say, because separation-of-powers are, all else being equal, less likely to be justiciable than an analog question of constitutional law. It is further likely that relevant actors systematically differ in the sources of law they deploy, and the manner in which they prioritize them. As a result of these variances, separation-of-powers jurisprudence will likely be characterized by a different distribution of source materials than other domains of constitutional law.

More generally, there is a wide margin of disagreement about the extent to which the text (perhaps situated within its original Founding era context) can provide

¹⁰⁹ There is a useful analogy to the sociological concept of “habitus,” which is the “system of dispositions which acts as a mediation between structures and practices,” Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, in *Culture: Critical Concepts in Sociology* 63–94, 56 (Chris Jenks ed., 2003), or the related ideas of “culture” as a “toolkit” for certain “strategies of action” and that “both the influence and the fate of cultural meanings depend on the strategies of action they support. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 *Am. Soc. Rev.* 273, 273, 284 (1986). In the separation of powers context, where discretionary powers dominate specific ministerial obligations, these notions provide useful guides for thinking about the relation of law to observed behavior.

¹¹⁰ Cf. Jules L. Coleman, *Rules and Social Facts*, 14 *Harv. J.L. & Pub. Pol’y* 703, 722 (1991) (“[That] a particular rule of recognition that is the rule of recognition in a particular community is a social fact about that community.”). I take no position here on Raz’s more demanding “sources thesis,” which pertains to the permissible content of a rule of recognition. See Joseph Raz, *The Authority of Law: Essays on Law and Morality* 212 (1979).

¹¹¹ This is a controversial proposition. Scholars who offer strong, narrowing claims about the appropriate sources of law are likely to resist the claim that the validity of their claims is not a matter of objection facts but of coherence with a social practice that they are actively trying to shift or curate. Their view is a legitimate internal perspective on the law, and not a matter of false consciousness.

¹¹² Cf. Acts 26:14, King James Version.

¹¹³ Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 *Mich. L. Rev.* 885, 886 (2003).

determinative answers.¹¹⁴ Such disagreements, to be sure, exist in other domains of law. There are exceptionally creative scholars and judges who dicker with the original understanding of “free speech” as a prohibition on prior restraints, and instead brocade a magnificent, extensive lattice of limits on both *ex ante* and *ex post* speech regulations out of the thin warp of original text and practice.¹¹¹ But disagreement is especially profound in the separation of powers domain. To scholars working within the separation tradition, the resolving power of the first three Articles’ fine-spun and careful arrangement is crystal clear; to those in the balance tradition, it speaks in more muffled tones.¹¹² To my mind, there is a qualitative difference between this dispute about the resolving power of text and its original meaning and parallel disputes in other fields. By and large, my reading of the scholarship leaves me with the view that Free Speech, Fourth Amendment, and Equal Protection jurisprudences are by comparison far less preoccupied by the meaning of words in their eighteenth-century context than the literature on the separation of powers, although it is worth underscoring that this is a difference in degree and not in kind.

In addition, relevant historical practice takes a different form and has a different valence in the separation of powers context. Historical practice can be a probative instantiation (and hence affirmance) of sound constitutional meaning, which at the limit, works as a definitive, even immobile “fixation” of that meaning.¹¹⁵ Alternatively, historical practice operates as an aversive precedent, a dark mirror from which current constitutional practice properly recoils.¹¹⁶ Other axes of variation include timing (e.g., pre- or post-ratification); institutional location (e.g., executive-branch practice, versus sequential legislative action, versus judicial precedent), and stability (i.e., whether a practice was contested, and whether that contestation, in the courts or otherwise, proved successful).

¹¹⁴ Adam M. Samaha, *Levels of Generality, Constitutional Comedy, and Legal Design*, 2013 U. Ill. L. Rev. 1733, 1739 (2013) (noting that “the list of relevant constitutional sources is not fully settled. Agreement is solid for many source categories (such as clauses, history, and cases), but thoughtful people disagree over what else should be on the list (such as contemporary understandings, foreign law, and acquiescence)” (internal footnotes omitted)).

¹¹¹ See, e.g., Akhil Reed Amar, *Foreward: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 55 (2000) (rejecting the “honest reading of the Constitution [that] leaves us with a First Amendment preventing prior restraint but providing no other protection of free expression”).

¹¹² See, e.g., Calabresi & Rhodes, *supra* note 2, at 1167 (advancing textual case for a unitary executive at length), with Lessig & Sunstein, *supra* note 30, at 2 (describing that case as “just plain myth”).

¹¹⁵ Nelson, *Originalism*, *supra* note 40, at 535 (“Although Madison conceded that the words used in the Constitution might well fall out of favor or acquire new shades of meaning in later usage, he was suggesting that their meaning in the Constitution would not change; once that meaning was ‘fixed,’ it should endure.” (emphasis omitted)); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 Sup. Ct. Rev. 1, 41 (discussing “[t]he idea of fixation through long-standing acceptance of a practice”).

¹¹⁶ Cf. Kim Lane Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 Int’l J. Const. L. 296 (2003) (describing how totalitarian, fascist, or Nazi governments functioned as aversive precedent for the U.S. Supreme Court in developing the modern constitutional law of criminal procedure).

Current constitutional law is replete with aversive historical precedent that providing a definitional point of contrast that orients current law.¹¹⁷ Aversive precedent logically fits more closely with the prohibitive force of many regulative constitutional provisions. In contrast, they are less useful for glossing the constitutive rules that make up the bulk of the separation of powers. Instead, as a recent flurry of academic interest attests, the idea of historical practice of some sort, or “gloss,” plays a particularly important role in the separation of powers context.¹¹⁸ As Alison LaCroix has pointed out, the term “historical gloss” is imprecise insofar as it might refer to “custom, tradition, prescription, or something else.”¹¹⁹ Even acknowledging that imprecision and consequent uncertainty, it remains the case that historical practice plays a larger role in determining the distribution of powers between branches than in other constitutional domains.

Again, different theories have different metatheoretical predicates. Separation theorists tend to find more meaning embedded in the text’s seams, and so are more inclined to find in the early Republic’s bright white light some settling fixation of an ambiguous constitutional term. In contrast, balance theorists are less willing to find a dispositive textual settlement. Accordingly, they are more concerned with later practice. They are also more likely to embrace more recent policy innovations as appropriate responses to long-term trends. In contrast, exogenous models that hinge on politics of various forms generally attribute relatively little effect to law, hence sapping the sources-of-law question of motivating force. Yet law implicitly remains central to their accounts insofar as they model officials as occupying, and acting on the basis, of legally defined roles. What sources illuminate the relevant constitutive law is a question not squarely answered in their work.

Along other metrics, it bears noting, the use of historical practice in separation of powers law is not distinctive from what is observed in other parts of constitutional law. For instance, practice-based claims across the constitutional waterfront are made by drawing on both pre-ratification state, colonial, or English practice.¹²⁰ Arguments are also often grounded in the behavior of officials in the early republic.¹²¹ And just as practice-based settlements—or their judicial analog, written precedents—can prove of variable endurance in the separation of powers context,¹²² so, too, can legal settlements by judicial precedent or practice outside that domain be of varying quality and robustness. These cross-cutting continuities in debates about the sources of law unite most of constitutional law, and should not be ignored.

¹¹⁷ For a discussion of the aversive precedent in the criminal procedure context, see William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *Yale L. J.* 393, 396-403 (1995).

¹¹⁸ See, e.g. Bradley & Morrison, *Historical Gloss*, *supra* note 16, at 418-19 .

¹¹⁹ Alison L. LaCroix, *Historical Gloss: A Primer*, 126 *Harv. L. Rev. F.* 75, 77 (2013); see also Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 *Geo. L.J.* 255, 262 (2017) (noting problems of threshold categorization, level of generality, and the sufficiency of interbranch acquiescence in the use of historical gloss).

¹²⁰ Prakash & Ramsey, *supra* note 33, at 265-79 (examining pre-ratification materials).

¹²¹ Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *Cornell L. Rev.* 1021, 1022 (2006) (describing Congress’s decisions about how to structure departments under the president in 1789 for the first time as one of “the most significant yet less-well-known constitutional law decisions”).

¹²² Huq & Michaels, *supra* note 5, at 357-77 (describing doctrinal instability in the separation-of-powers domain).

3. *The Choice Between Equilibrium and Change Models*

An account of the separation of powers demands a theory of change or a theory of equilibrium. Although the resolution of constitutional questions outside the domain of separation of powers also necessarily raises some questions of chronological situation and interrelation, the role of time—and change over time—in the separation-of-powers context is distinctive when contrasted to other fields of constitutional law.

The central temporal question in many fields of constitutional law concerns the level of generality at which a constitutional principle is understood.¹²³ The Constitution can be interpreted as a relatively specific settlement of contestable institutional design questions. Alternatively, it could be viewed as “an initial framework for governance that sets politics in motion and must be filled out over time.”¹²⁴ Temporality has little role if a relevant legal concept is defined in a low level of generality: Specific rules stand fast against the relentless current of time. In contrast, when the Constitution is understood as a relatively general settlement picking out relatively abstract values, pressing questions arise as to how best to evince “fidelity” to those principles over time.¹²⁵ To give just one example, some scholars have argued that the fundamental rights protected under the Equal Protection Clause should be defined in relatively abstract terms, which will tend to result in new and perhaps unanticipated applications of the right over time.¹²⁶ Others, predictably, disagree.¹²⁷

In one respect, the same question of levels of generality arises in the context of the separation of powers. For instance, Dean Manning has characterized the central question of all separation of powers jurisprudence as simply a matter of which level of generality is appropriate in reading the Constitution’s text.¹²⁸ Consistent with Manning’s framing, many (but hardly all) separation-of-powers disputes implicate the question whether to understand an issue at a specific or an abstract level of generality. Opting for abstraction forces the question of how to translate an eighteenth-century idea two-plus centuries forward in time.¹²⁹ In defining a fundamental right under the Equal Protection

¹²³ Cf. Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* 40-42 (1996) (introducing the idea of levels of generality as a variable in constitutional interpretation); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 *U. Chi. L. Rev.* 1057, 1058 (1990) (making this claim in the fundamental rights context). That is not to say that the idea of levels of generality is a simple one. Cf. Samaha, *supra* note 114, at 1743 (flagging three ways in which the level of generality can be calibrated: “abstractness, breadth, and dynamism”).

¹²⁴ Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *Nw. U. L. Rev.* 549, 550 (2009).

¹²⁵ For the canonical account of “fidelity” as a concept that requires changing application over time, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *Stan. L. Rev.* 395 (1995).

¹²⁶ Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 *U. Chi. L. Rev.* 1057, 1058 (1990) (“The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection.”).

¹²⁷ John Safranek & Stephen Safranek, *Finding Rights Specifically*, 111 *Penn St. L. Rev.* 945, 979 (2007) (“The Supreme Court must eschew general rights and seek refuge in principled specification.”).

¹²⁸ Manning, *supra* note 36, at 2006-07

¹²⁹ See Lessig & Sunstein, *supra* note 30, at 4-5.

Clause or defining one of the rights in the 1791 Amendments, therefore, an interpreter might opt for a specific or an abstract understanding of the relevant interest. Having done so, the relevant legal interest remains stable, even if it must be translated forward into new contexts using new applications. That is, one is always applying the same conception of (say) equal protection, or privacy, or the right to marry, in light of new social or technological circumstances.

But the separation of powers implicates the choice between equilibrium and change in another, distinct, and bespoke way. For the separation of powers compels the following question: How (if at all) does the arrangement of institutions created by the Constitution's first three Articles maintain its stability over time? All agree that the separation of powers constitutes a series of formal institutions inhabited by specific individuals acting on diverse motives over time. Given that, there is inevitably a question whether those individuals' cumulative actions will push institutional arrangements out of their initial roles, or out of alignment, over time. Further, there is a question whether that prospect of such disequilibrium should provoke consternation or alternatively should be embraced.

A simple model of the separation of powers shows how the question of equilibrium over time arises. A person vested with a role or powers by dint of the Constitution's first three Articles must decide how to deploy new-found authority. Depending on their motives, and their understanding of valid source of law, this person will either hew to past understandings of roles and the appropriate deployment of powers, or alternatively innovate in their conception of the role and their deployments of official authority. Their choice might create the risk of changing, and hence durably destabilizing, existing institutional arrangements. Predicating the effects of such choice, moreover, is complicated by the fact that background social, economic, and political conditions are themselves unstable. Hewing to a historical model of appropriate behavior against a changing external context might be itself be destabilizing. Forgetting Heraclitus's river, one might be accidentally oust the old in favor of an unknown new via an obdurate fidelity to obsolete behaviors.¹³⁰

The question whether the separation of powers should be understood as a stable equilibrium or as a dynamic system is squarely acknowledged and confronted in the political science literature, but largely ignored in the theoretically inclined legal scholarship canvassed above. As I shall discuss in more detail in Part III,¹³¹ political scientists and historians have explicitly diverged over whether the constitutional system should be characterized as a stable equilibrium that persists over time, or whether it should be seen as an evolving composite of institutional formation moving at different

¹³⁰ Flaherty makes such an argument to support the legislative veto. Flaherty, *supra* note 47, at 1834 (“Given that balance was a primary purpose for dividing government authority, and given further that the executive has supplanted the legislature as the branch posing the greatest threat to this balance, it follows that any jurist faithful to the past should applaud, not deride, legislative attempts to maintain that balance, especially when those attempts appear in part of a package delegating still more power to the executive.”).

¹³¹ See *infra* text accompanying notes 218 to 226.

temporal registers.¹³² No parallel formulation can be located in the legal scholarship. Nevertheless, to offer once more a rough generalization, separation theorists tend to assert that the stability of legal forms in the separation-of-powers is desirable, and despairing when that stability is perceived not only as abandoned but also beyond plausible grasp.¹³³ In contrast, balance theorists perceive a need for shifting specific institutional arrangements as a means to preserve the systemic, architectural qualities they value. Finally, exogenous theorists such as Posner and Vermeule tend to embrace change—and in particular the metastatic growth of the executive branch—as a welcome adaption to the complexity of governance in the contemporary United States.

Varying judgments over the extent of separation-of-powers stability, finally, are likely to correlate with differences in judgments about relevant sources of law. The latter can be “characterized as relatively dynamic or relatively static,” depending on whether they “require or forbid rethinking [the] proper specification or application.”¹³⁴ In this fashion, different metatheoretical questions are again entangled with each other.

C. Tying Theory and Metatheory Together

This Part has aimed to provide a minimum level of baseline clarity for a consideration of *Congress’s Constitution* by charting a topology of contemporary debates on the separation of powers. To begin with, this entails a mapping of theories of the separation of powers. I proposed three categories—separation, balance, and exogenous models. Further clarity on these debates is gained by slicing across the various theories to shuck out certain common questions of empirical fact or normative theory with respect to which the theories vary. I have proposed again three metatheoretical categories of interest—on matters of motive, sources of law, and equilibrium versus change.

In contrast, my account of the metatheoretical foundations of the separation-of-powers does not focus on the doctrine’s ‘purpose’ in the sense of identifying a specific normative value immanent in the constitutional scheme as a touchstone of analysis. The possible “purposes” of the separation of powers include efficiency, the prevention of tyranny, democratic accountability, and deliberation. Purpose-based arguments claims are common.¹³⁵ But they are singularly unfruitful as starting coordinates for mapping

¹³² Compare Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability In America’s First Century*, 29 *J. L. Econ. & Org.* 278, 278-79 (2011) [hereinafter Mittal & Weingast, *Self-Enforcing Constitutions*] (modeling the constitutional system as a stable “self-enforcing” system); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *Am. Pol. Sci. Rev.* 245 (1997) (same), with Karen Orren & Stephen Skowronek, *The Search for American Political Development* 108-18 (2004) [hereinafter Orren & Skowronek, *Search for American*] (describing the “intercurrence” of varying political regimes). Equilibrium models are also suited to describe single institutions such as legislatures. See Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 *Am. J. Pol. Sci.* 27, 27 (1979) (offering a model of legislative behavior that results in “equilibrium”).

¹³³ See, e.g., Lawson, *Rise and Rise*, supra note **Error! Bookmark not defined.**, at 1254 (concluding, morosely, that “one must choose between the Constitution and the administrative state”).

¹³⁴ Samaha, supra note 114, at 1753.

¹³⁵ See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045, 1059 (2001) (observing “[t]hat the separation of powers . . . may have the specific purpose of

theoretical disagreement about the separation of powers. This is because a theory of the separation of powers will rarely be bottomed on the claim that there is one, and only one, value that explains all separation-of-powers controversies. Rather, plausible theories of the separation of powers tend to acknowledge the fact that the design of national government institutions reflects many normative ends pursued simultaneously.¹³⁶ The multiplicity of ends, and the absence of any obvious way to make trade-offs between them, means that merely invoking the ‘purposes’ of the separation of powers rarely does much meaningful analytic work.

In contrast, separation, balance and exogenous models are all better understood as analytic devices for working through the necessary trade-offs between the normative ends implicated in separation-of-powers law. That is, the normative trade-offs involved in a purpose-focused analysis can only be executed by calibrating the metatheoretical elements of the separation of powers.

To be clear, an analytic quarantining of metatheoretical claims is no panacea for the interminable disputes over the proper specification of the separation of powers. Certainly, it yields no immediate resolution of intractable first-order issues. One reason for this is that the three metatheoretical questions identified here differ importantly in tractability. There is a fact of the matter, however difficult to extract, about the motives of discrete government officials. Those motives, importantly, might also change over time.¹³⁷

It is less clear whether this is a fact of the matter about the sources of law at a given historical moment. If one follows H.L.A. Hart in positing that the ultimate “rule of recognition,” a rule that picks out valid sources of law, is a convergent social practice among officials,¹³⁸ then careful empirical inquiry might unpack the precise criteria used to identify the law. Nevertheless, at least in the American context, it seems tolerably clear that there is a high degree of scholarly and juristic disagreement about both the potentially relevant sources of constitutional law and also the appropriate rule of priority when evaluating competing pieces of evidence. Legal scholars often participate in that disagreement even as they purport to objectively describe it. Finally, the descriptive claim that a constitutional system is in equilibrium implicates a mix of both empirical and normative judgments. At minimum, it entails a normative specification of the relevant

promoting a dialogue among different voices even with regard to foreign policy issues”); Jessica Korn, *The Power of Separation* 14-26 (1996) (emphasizing effective governance, as well as preventing tyranny, as goals of separation of powers); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *Harv. L. Rev.* 421, 432-33 (1987) (describing efficiency and prevention of tyranny as two chief purposes of separation of powers).

¹³⁶ See Huq & Michaels, *supra* note 5, at 382-91 (describing “normative pluralism” of the separation of power).

¹³⁷ See *infra* text accompanying notes 171 to 178.

¹³⁸ H.L.A. Hart, *The Concept of Law* 116 (1994) (characterizing the “rule of recognition as specifying the criteria of legal validity and its rules of change within a system of laws”); Kenneth Einar Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 *Okla. City U. L. Rev.* 41, 68-69 (2002) (glossing Hart to hold that “the behavioral element that gives rise to the rule of recognition is convergent behavior on the part of the officials in making, changing, and adjudicating law”).

criteria along which stability is defined, and the bounds of permissible fluctuation within homeostasis. That is, one must say what kind of change counts—and why.

Complicating analysis further, these three metatheoretical questions collide in practice. For instance, the quality of officials' motives is likely to inform their attitude toward the law. As a result, it will likely inflect their judgment of what constitutes a valid source of law. Motive and the sources of law are hence endogenous. Moreover, the extent of constitutional equilibrium will influence mold officials' incentives and the plausible sources of law. Where institutional change as a consequence of exogenous partisan or social pressures is perceived as proceeding at a rapid rather than a gentle clip, for example, officials may be disinclined to invest deeply in legal knowledge. Older sources of law become less plainly trenchant. Motives hence change, and perhaps with them the relevant sources of law.

Nevertheless, attention to these metatheoretical questions is a way of gaining better purchase on precisely why and how scholars disagree about the separation of powers. It is also a pathway to better understanding and appreciation of new contributions to the scholarly literature—such as *Congress's Constitution*.

II. THEORY AND THE APPLICATION OF THEORY IN *CONGRESS'S CONSTITUTION*

After that rather length excursus into somewhat abstract theory, this Part turns to *Congress's Constitution*. It begins by characterizing the theoretical premises of the book in terms of the tripartite schema elaborated in Part I, before then examining the book's selection and elaboration of case studies. The subsequent Part then turns to metatheory.

I begin by flagging the book's weighty merits—merits I shall inevitably short-change in the effort to press upon the book's core analytic claims. *Congress's Constitution* is a sophisticated and carefully documented account of elements of constitutional law that receive insufficient attention. Beyond its rich theorizing, it advances six insightful historical case studies. In a sequence of chapters each focused on a distinct legislative power, Chafetz provides rich portrayals of those powers' development. Each is a terrific read. Of particular interest is the manner in which he explores the English parliamentary forbearers to legislative powers such as Speech and Debate immunity (pp. 203-25), authority over internal disciplinary matters (pp. 235-59), and the legislative power of contempt (pp.158-71).¹³⁹ Chafetz is adept at covering decades, even centuries, of institutional ground in a narrow compass of pages, and few readers will read the book without profiting from his synoptic vision and detailed knowledge. As a book designed for a reasonably informed professional audience, on an important but oft-neglected element of constitutional law, *Congress's Constitution* is a clear success.¹³⁸ Disagreement with its theoretical premises and metatheoretical

¹³⁹ The latter is extensively discussed in an insightful precursor article, Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chi. L. Rev. 1083 (2009).

¹³⁸ Chafetz states that his goal, inter alia, is to ensure that “for each of the congressional powers discussed, the reader should end the chapter with a sense of how it has developed over time, [and] why it has developed as it has.” (p. 6). In these respects, he succeeds admirably.

implications, which is perhaps inevitable, should thus not be confused for a more general indictment of the high quality of Chafetz's historical and analytic work.

A. The Theory of Constitutional Politics

Congress's Constitution comprises two main contributions. The first is a theory of the separation of powers with special attention to the legislature's role. The second is the series of case studies of three "hard" and three "soft" congressional powers: appropriations, executive-branch personnel control; contempt; speech and debate immunities; internal disciplinary devices; and intracameral rules. This review focuses on the first contribution, although I will analyze elements of the case studies that are relevant to, or in tension with, the theoretical part of the book.

That theoretical contribution of *Congress's Constitution* has three core components.¹⁴⁰ Isolating them facilitates the comparison of Chafetz's theoretical armature—call it the *constitutional politics account* of the separation of powers—with the antecedent versions charted in Part I. The three elements provide answers to the three basic metatheoretical questions of the separation of powers outlined in Part II—motive, the sources of law, and the question of equilibrium.

First, the constitutional politics account traces a causal vector from "politics," which comprises "political behaviors and interactions," forward to "political power" and from thence to the resolution of legal questions to do with "the distributional governmental authority within a political community" (pp.16-17). A negative implication of this assertion is that questions about interbranch relations are "*not* answerable by the reference to the normal tools of constitutional interpretation" such as "[t]ext, history, structure, and precedent" (p. 16).¹⁴¹ Chafetz's causal account also entails that the settlement of interbranch disputes is "nonhierarchical" and indeterminate in duration in the sense that there is no entity with power to issue dispositive settlements (pp.18-19). This is, to be clear, a bold and striking response to what I have called the 'sources of law' question.

The second element of the constitutional politics account concerns the nature of the "political behavior and interactions" that are at the root of the causal chain that ultimately yields outcomes to separation-of-powers disputes. In brief, Chafetz characterizes the law of separation-of-powers as an epiphenomenal residue from battles over power in the shape of freedom from the binding constraints of diffuse public judgment. This second claim, as just formulated, is opaque, and needs some unpacking.

According to Chafetz, interbranch disputes are resolved "locally and contingently as they arise, often via compromise or negotiation, and without binding implications for

¹⁴⁰ Chafetz offers a different four-part breakdown of his claim (pp. 18-19). This account, focuses on the implications, rather than the causal core of the claim.

¹⁴¹ For a discussion of whether the case studies follow through on this approach, see *infra* text accompanying notes 196 to 197.

the future” (p. 20).¹⁴² Such settlements are reached in the “public sphere”; they are part of a complex, mechanistically variegated, and perhaps evolving domain in which “dialogic and highly mediated” processes of “public political interaction” occurs (p. 21).¹⁴³ The net result of this public process is “trust,” manifested in persistent public support for an individual official that can survive observed decisions by that official inconsistent with the first-order policy preferences of members of the public (pp. 21-22). The more trust an institution accrues, the more leeway the public will give that institution and hence “the more power that institution has” (p.23). A notoriously slippery concept,¹⁴⁴ power is implicitly defined here in *Congress’s Constitution* as the extent of relational discretion obtaining between a political institution and a diffuse democratic public. As such, it seemingly provides Chafetz’s answer to the metatheoretical question of motive that striates separation-of-powers scholarship: Officials are motivated by the desire to win the trust of the public insofar as the latter enlarges their discretionary policy-making authority.

The third element of the constitutional politics account is an optimistic toleration for nondisputive and democratically credentialed change hardwired into Chafetz’s theory. Given institutional actors’ dependence upon public trust, their strategies for claiming institutional prerogative and for making counter-moves are necessarily bounded. They must be “judicious” and not “maximal” (p. 24; see also p. 308). The system as a whole is “dependent on the will of the people,” (p. 34), which in the final analysis determines its actions.

This can fairly be characterized as embodying an optimistic judgment on Chafetz’s part for two reasons. First, it fosters a reassuringly normatively pedigreed pedigree for the ensuing structural arrangements and the concrete policy outcomes flowing from them. The absence of legitimation from an original constitutional source is offset by the public-facing character of internet contestation and its outcomes. Second, even as the constitutional politics model explicitly recognizes and embraces the inevitability of institutional evolution (for examples of this recognition, see pp. 25, 42, 312-13), there is no suggestion that this process will get out of hand.¹⁴⁵ To be sure, the envisaged process of institutional change has “no logical stopping point” (p. 18). Certainly, it did not calcify into a ‘fixed’ pose circa 1791. But there is no hint here of what Thoreau called “the unhand-sold globe” in its raw and bloody glory; there is rather an eminently habitable, if

¹⁴² This is parallel to a central claim in Huq, *Negotiated Structural Constitution*, supra note 62, at 1600 (“Both states and branches engage in such bargaining routinely, notwithstanding scholarly inattention to the practice.”).

¹⁴³ See also p. 22 (“Political trust—and with it political power—arises out of . . . conversations between political elites and the public.”).

¹⁴⁴ For competing approaches to understanding the term, compare Jean Bethke Elshtain, *Power Trips and Other Journeys: Essays in Feminism as Civic Discourse* 136 (1990) (“Power is a form of compulsion exerted by the already (relatively) powerful upon one another within official political institutions designed to promote the aims and interests of competing groups. It is of, by, and for elites.”), with Michel Foucault, *Afterword: The Subject and Power*, in Hubert L. Dreyfus & Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* 208, 217 (2d ed., 1983) (“[P]ower as such does not exist.”).

¹⁴⁵ Chafetz also endorses specific instances of institutional transformation, such as the move from fees and bounties to salaries in the eighteenth century federal bureaucracy (p. 73).

somewhat chaotic, “garden.”¹⁴⁶ More prosaically stated, the constitutional politics account imagines institutional change as bounded by a sensible and sensitizing popular will.¹⁴⁷ It treats each branch as vocalizing a different element of the polity in ways that “enhance the quality of deliberation” (pp. 309-10). Even if beset by “conflict, noise, and clamor” (p. 314), therefore, the resulting cacophony is liable to generate a stable, representative, and non-tyrannical form of government (p.303).

This element of the theory hence responds to the deeper metatheoretical question of equilibrium versus change: The constitutional politics account favors change, but only such change as can be titrated through a reassuringly democratic and hence “judicious” apparatus. It is this model of change, I think, that implicitly sustains Chafetz’s conclusion that the American separation of powers system is “more fully representative, more deliberation promoting, and more resistant to tyrannical or autocratic power” than other common constitutional systems (p. 303). It is a model of change that is, moreover, founded on the legitimating assumption that the forces that determine institutional outcome are public facing and in some fashion reflective of public sentiment.

There is, however, an internal tension torquing this third plank of the constitutional politics account. Simply put, the mechanism of institutional change Chafetz posits is not self-stabilizing. In the constitutional politics accounts, interbranch conflict persists over time, and “the branch that successfully engages the public will accrete power over time” (p.14). But this descriptive claim appears to undermine two other key elements of Chafetz’s argument. First, if one branch accretes asymmetrically high levels of power in relation to the other, at some point interbranch conflict will end because the powerful branch will always or almost always win. Chafetz, however, seems to assume that conflict itself is a stable-state equilibrium in which all branches continue to play a meaningful role.¹⁴⁸ Second, and relatedly, the bulk of the book is devoted to the proposition that Congress has the capacity to be a player equal to the executive (see, e.g., p. 42). But the theory implies that, if the executive has gained the upper hand today, this is because it has played its cards better than Congress. The theory then provides no reason to disturb this result—as Chafetz explicitly seeks to do.

Both puzzles can be solved only by bringing into a normative notion of balance—and an agent that does the balancing. Indeed, Chafetz does precisely this when he predicts that “any actor attempting to aggrandize her powers beyond tolerable limits can expect to find herself opposed by other actors” (p. 312). By focus on the ambiguity of the adjective “tolerable” in this formulation, it quickly becomes clear this dictum bears more than a passing resemblance to a familiar strand of balance theory.¹⁴⁹ That is, public conceptions

¹⁴⁶ Henry David Thoreau, *The Maine Woods: A Fully Annotated Edition* 63 (Jeffrey S Cramer, ed., 2009).

¹⁴⁷ For instance, the “feasibility and success” of constitutional innovation at an institutional level are said to “depend on how successful [officials] are at engaging in the public sphere” (p. 38).

¹⁴⁸ It is otherwise hard to know why he insists that there is “no a priori determinable rule” for resolving interbranch conflicts (p. 305). If one branch kept accreting power until it was hegemonic, the rule of decision for such conflicts would, in fact, be quite simple.

¹⁴⁹ To be clear, Chafetz does not disavow the balance label, but he also does not align himself with past theoretical claims.

of “tolerable” conflict are assumed to have a stabilizing, balancing effect upon interbranch dynamics—even though the constitutional politics account itself provides no a priori reason for thinking that the public will hold or act upon such preferences. Hence, the theory silently smuggles in a set of quite controversial assumptions about the preferences of the democratic public about the nature of interbranch conflict.¹⁵⁰

To summarize then, how is the theory animating *Congress’s Constitution* new and distinct from the three general approaches sketched in Part I? In brief, the constitutional politics account might well be characterized as an ambitious hybrid of the balance and exogenous models. Its greatest distance, in intellectual terms, is from separation models. The constitutional politics account is at odds with the methodological premises of most separation theorists insofar as Chafetz, while conceding that some parts of the written text are “static” irrespective of politics (p.17), emphasizes the endogeneity of constitutional rules to transient partisan contestation (e.g., 20, 25-26).

In contrast, the constitutional politics account intertwines elements of both the balance and the exogenous models into a patterning that bodes to be novel. A central theme of the book is that “there is nothing inherent in Congress’s constitutional place that dooms it to play second (or third) fiddle” (p.42). Moreover, as noted above, the constitutional politics account assumes a stable state of interbranch conflict in which no one branch becomes hegemonic (p. 305) and implies a kind of self-stabilizing mechanism that kicks into gear whenever one branch gets too big for its britches (p. 312). It seems that public opinion of a certain sort must fuel that mechanism. At the same time, the theory does not rest on any claim that officials within each branch will always or often act upon the basis of institutional loyalties (cf. pp. 30-31, 311). Rather, it locates official actors within an explicitly political field in the sense of rooting power in the context of their relations with the public.

One rather glib way of summarizing Chafetz’s theory—surely an excessively reductionist one that does not do justice to its ambition or sophistication—is to say that it is a retooling of the balance model (in which dynamic interactions between the branches yield healthful sparring over policy, and collaterally prevent any one branch over-reaching) with the exogenous model’s insights into the motives and operative context of government bolted uneasily to its side.

I should also add that this account of Chafetz’s theory slights certain parts of *Congress’s Constitution*. For example, I have highlighted Chafetz’s assertion that his theoretical account is distinctive insofar as it is “multiplicity based” because it “aims to highlight the ways in which claims of authority multiply and overlap in a nonhierarchical constitutional order” (p.18). See also Josh Chafetz, *A Fourth Way? Bringing Politics Back into Recess Appointments (and the Rest of the Separation of Powers, Too)*, 64 *Duke L.J. Online* 161, 162-63 (2015); Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 *Yale L.J.* 1084, 1112-28 (2011). But the propositions that (1) the separation of powers comprises a plurality of actors, and (2) those actors all make constitutional claims that overlap and sometimes conflict, are both commonplace in theoretical work on the separation of powers. Hence, it is not its basis in multiplicity that renders the constitutional politics account a distinctive and a new contribution to the literature. I have chosen to accent what is truly new in the theory.

¹⁵⁰ See *infra* text accompanying notes 185 to 186.

B. From Theory to Application?

Before turning to the heart of my critical analysis—drilling down on the metatheoretical predicates of *Congress's Constitution*—some preliminary scaffolding concerning the six exhaustive and rich historical case studies is warranted. In particular, some attention is merited to the question why these particular cases should be isolated, and how their analysis unfolds in rough parallel.

Readers familiar with conventional debates about Congress's powers will be immediately struck by the fact that Chafetz's particular choice of case studies deliberately omits Congress's authority to promulgate substantive rules pursuant to various provisions of Article I, Article III, and Article IV.¹⁵¹ At first blush, this selection of topics raises obvious questions. There is a close relation between the powers he discusses and the ones he omits. Appropriations, for example, might be a close substitute for pure regulation, in particular when conditions are attached to an expenditure.¹⁵² The internal disciplinary choices of Congress interact with its power to promulgate ethics and lobbying rules without running afoul of the First Amendment.¹⁵³ And it is hard to see how the power to appropriate can be disentangled from Congress's authority under the first two clauses of Article I, Section 8, to tax and borrow money.¹⁵⁴ Even if their borders were crisper, these heterogeneous powers would perhaps not snap into immediate focus as a logical and obvious whole that invites a singular analytic lens.¹⁵⁵ Readers hence may be saddled with a nagging concern that other relevant congressional authorities are playing out at the periphery of the book's vision.

¹⁵¹ See U.S. Const. art. I, § 4 (Congress's power to alter state electoral rules); § 8, cls. 3-18 (enumerated powers); § 10, cl. 2 (regulation of state taxation); Art III, §§ 1 & 2 (regulation of lower federal courts and Supreme Court appellate jurisdiction); Art IV, § 1 (full faith and credit regulation); § 3 (territorial regulation).

¹⁵² Todd D. Peterson, Controlling the Federal Courts Through the Appropriations Process, 1998 Wis. L. Rev. 993, 1008 (1998) ("Through the use of explicitly targeted restrictions on appropriations, Congress can regulate the conduct of the other branches and frequently can impose its will in spite of executive or judicial opposition."). The scope of Congress's power to use conditions on federal spending to achieve policy ends arises most often when states are recipients of those funds. Samuel R. Bagenstos, The Anti-Leveraging Principle and the Spending Clause after NFIB, 101 Geo. L.J. 861, 862-63 (2013).

¹⁵³ For an argument that the current structure of lobbying is in violation of the Petition Clause of the First Amendment, see Maggie Mckinley, Lobbying and the Petition Clause, 68 Stan. L. Rev. 1131, 1132-42 (2016).

¹⁵⁴ U.S. Const. art. I, § 8, cls. 1 & 2. On the interaction of these clauses, see Neil H. Buchanan & Michael C. Dorf, How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff, 112 Colum. L. Rev. 1175, 1197-1202 (2012) (analyzing the relationship between the powers to tax, spend, and borrow).

¹⁵⁵ Chafetz asserts that he is considering only "specific constitutional tools that Congress has at its disposal in its interactions with the other branches." (p. 3). But this is not quite right. Certainly, he begins with an example of interbranch conflict involving the judiciary (p. 9). But as a whole, his book has rather little to say about "Congress's power to withdraw jurisdiction from the federal courts as a means of shielding questions about the legality of official conduct from judicial review." Fallon, Jurisdiction-Stripping, *supra* note 21, at 1047. Where the courts do enter the picture, it is to criticize their meddling in Congress-executive relations (e.g., pp. 182-90).

The justification for Chafetz's selection, I think, flows from his larger normative project rather than a functional homology among the chosen topics. Perhaps the best way to understand his subject-matter is in simply terms of Chafetz's wish to offer an account of "congressional Power (p. 26) not simply in the abstract, *but in relation to the executive branch*, which dominates contemporary commentary. The six case studies of congressional power concern those instruments most relevant to Congress's interactions with its Article II counterpart.¹⁵⁶ The case studies on this view are instrumental to, and hence subordinate to, Chafetz's claim that the "separation-of-powers system privileges judicious, rather than maximal, combativeness" between the political branches (p. 311).¹⁵⁷

Correlatively, to the extent a theory emerges from his analysis, it is best understood as being nested in, and potentially reflective of, an abiding concern with interactions between Congress and the executive. It is by no means clear, however, that general propositions that hold as between that political-branch binary would be descriptively accurate or predictively valid as applied to other interbranch dyads.¹⁵⁸

When viewed in that light, the case studies are united by a series of coordinates that traverse all six—shared points of analytic framing that help orient the subsequent exploration of metatheoretical themes. In that regard, four points of analytic commonality across the case studies are worth flagging here because they set the stage for a more detailed analysis.

First, each of the six case studies is organized as a brisk historical narrative, each of which "begin[s] in earnest in England around the turn of the seventeenth century" (p. 4). This history matters, but not because it is consciously recalled by contemporary political actors. (Today most can separate their Wolseys from their Mores only if they have perused their Mantels.¹⁵⁹) So why does history matter? Although the justification for the particular historical frame is not extensively developed, it seems fair to say that Chafetz envisages a "developmental" process in which later iterations of institutions are in some fashion "deeply rooted" in earlier versions beginning in the Tudor period (pp. 4-5). Both the historical frame and the specific language employed to explain that frame

¹⁵⁶ In contrast, the difficult question of how and when the states can influence congressional behavior, and thus when congressional actions raise federalism concerns, is outside the book's scope. For a skeptical view of the leading general theories, see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 *Stan. L. Rev.* 217 (2014).

¹⁵⁷ This is in accord with recent findings that (for example) "investigations offer Congress a check on presidential aggrandizement that is often more effective than that provided by its legislating function." Douglas L. Kriner & Eric Schickler, *Investigating the President: Congressional Checks on Presidential Power* 9 (2017).

¹⁵⁸ For instance, in other contexts, the influence of one branch (say, Congress) on another (say, the courts), could be mediated by the independent actions of the third branch. For an account along these lines, see Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 *Colum. L. Rev.* 250, 252 (2012) (arguing that "the executive branch has a strong incentive to use this constitutional authority to oppose efforts to curb federal jurisdiction").

¹⁵⁹ If this seems obscure, that's the point. Cf. Hillary Mantel, *Wolf Hall* (2009); Hillary Mantel, *Bring Up the Bodies* (2012). No richer, or more delightfully sordid and brutal an account of the Tudor politics can be imagined.

suggest that historical experience here are posited as implicitly relevant to the resolution of subsequent and contemporary disputes.¹⁶⁰ This is in tension, obviously, with Chafetz's claim that specific institutional settlements are "without binding implications for the future" (p. 20).

Second, with some important exceptions addressed below, the case studies have a teleological flavor. Thus, while Chafetz acknowledges some back-and-forth in institutional development, there is nevertheless an overall impression of positive evolution toward more and more desirable institutional forms. For example, Chafetz tells of the struggle between the King and Parliament over the latter's procedural workings, and then portrays state constitutions as embodying learning from that history (p. 278) and the U.S. Constitution as "evinc[ing] a similar desire" (p. 279). That is, British history holds lessons—and those lessons were absorbed and successfully acted upon in the new world. More generally, the tenor of his accounts is consistent with a gradual unfolding of an immanent rationality of institutional design—a story with more than a trace of a Hegelian, teleological rationality. This in turn operates as a predicate to a generally optimistic orientation of institutional development implicitly adopted by the constitutional politics account.

Third—and in some tension with the previous observation—in the course of the historical narratives Chafetz does not limit himself to describing the positions reached in the context of specific, "local[]" disputes (p. 20). Rather, he repeatedly demurs to the manner in which specific disputes have been resolved (see, e.g., pp. 120, 182, 255). Hence, in discussing Congress's decisions in the late twentieth century to seek the support of the federal judiciary in extracting information from the executive notwithstanding claims of executive privilege, he notes critically that "Congress thus simultaneously diminish[es] its own standing in the public sphere and enhance[s] the courts' standing." (p. 195). When discussing judicial precedent respecting the scope of the President's necessary Article II authority to terminate officials, Chafetz criticizes formalist decisions by the Supreme Court limiting Congress's power to structure the federal bureaucracy on the ground that they "rob Congress of central elements of its ability to structure and monitor government offices" (p.147).¹⁶¹ An implication of these

¹⁶⁰ I am not a historian, but should flag a methodological concern here likely to resonate most among historians. I think it is fair to say that Chafetz's accounts are framed as fairly convention narratives of political conflict in which one side wins, the other loses, and as a result some fairly clear understanding of institutional power arises. Much as I was taught Tudor English as a schoolboy in London, historical battles come to seem to be a sequence of soccer matches with crisp scores ("Wolsey—one, More—nil"). But are understandings of institutional settlement, or the lessons drawn from institutional conflicts, really so ambiguous? Reviewing a spate of historical books on executive power as it was understood at the time of Founding, John Fabian Witt flags that such matters were "rarely settled and almost always hotly contested." John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 *Harv. L. Rev.* 754, 766 (2007). While the schoolboy in me appreciated the limber narrative, the historian manqué wondered about its dearth of depth. In particular, the very different nature of parliamentary democracy before the Great Reform Act of 1832 receives insufficient attention. For a detailed study of the period at the center of Chafetz's narrative, see David L. Smith & Graham E. Seel, *Crown and Parliaments, 1558-1689* (2001).

¹⁶¹ An example of such a formalist decision is *Myers v. United States*, 272 U.S. 52, 116 (1926); see also *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (invalidating budgeting lock-box mechanisms designed to

passages is that the theory being brought to bear to generate the case studies does not hold that “political behavior and interactions” are the sole determinants of lawful or desirable outcomes in separation-of-powers conflicts (pp.16-17).¹⁶² Some outcomes, even if sought by Congress, are normatively unmoored. An implication of this is that there must be an exogenously given normative benchmark against which local and contingent outcomes are measured—a benchmark that does not emerge immediately on superficial examination of the constitutional politics account.

Fourth, notice that both of the aforementioned examples of institution teleology gone awry hinge on the inapt interventions by the federal courts. So when should judges intervene, consistent with the constitutional politics account? It is hard to say. There is ambiguity in *Congress’s Constitution* as to how, and indeed whether, courts should resolve separation-of-powers disputes. At times, Chafetz is fiercely critical of the judicial role, and presses against justiciability (see, e.g., p. 182). At other times, he seems to recognize that some legal questions inevitably come before a judge. For instance, he concedes that courts have a “perhaps greater” role in respect to Speech and Debate Clause questions because “members are most likely to be ‘questioned’ in a courtroom” (p. 226).¹⁶¹ And he contends that Congress “should consider leaning more heavily” on its power to directly enforce its contempt power through arrest and imprisonment (p. 198). Presumably, the ensuing imprisonments would be amenable to a court’s review via a habeas corpus action of the kind used to challenge earlier imprisonments by the sergeant-in-arms (see, e.g., p. 178).

Aside from such ad hoc judgments, however, there is no general account of when separation-of-power questions should be justifiable before an Article III bench. To be sure, Chafetz does suggest that no judicial opinion is ever final because “there is no separation-of-power equivalent of the Supremacy Clause” such that “massively iterated” conflict over a legal question can continue even if there has been a putatively legal settlement (p.19). But I do not find this a compelling answer. Today, most decisions by the Supreme Court—except those that track abiding and emotional fractures of public opinion—are treated by most participants in American politics as legally dispositive. Even if these opinions are undermined by resistance from other branches, or even lower court judges) they are not typically “massively iterated” through continuing conflict in the public sphere except for the occasional effort to reopen an issue before the Supreme Court.¹⁶⁴ There is, for example, far less contestation now over recess appointments now the Supreme Court has addressed the question.¹⁶³ In practice, that is, I take judicial

control budgetary excesses). Consistent with Barkow and Waldron, see *supra* notes 64 and 65, it is worth asking whether formalism on behalf of some other branch’s power (e.g., the judiciary’s) merits a different result. It is not clear from Chafetz’s analysis what he would say on this score.

¹⁶² Nether of the aforementioned condemnations, moreover, can be explained by labeling the relevant branch’s behavior ‘injudicious.’

¹⁶¹ See also pp. 258-59 (writing with approval of the manner in which a judicial challenge to the exclusion of Rep. Adam Clayton Powell was handled).

¹⁶⁴ For a case study of a Supreme Court opinion that was largely negated in practice—but through lower-court defiance and executive foot-dragging—and yet remains a binding rule of law, see Huq, *President and the Detainees*, *supra* note 88, at 501-11.

¹⁶³ *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

supremacy to be more established than Chafetz suggests.¹⁶⁴ Hence, I think there is far more settlement of separation-of-powers questions that he allows.¹⁶⁵ Perhaps this is unwise. But without a systematic challenge to the glacial hold of judicial supremacy on the American constitutional imagination, Chafetz's shrugging off of Article III settlement is not descriptively compelling.

Congress's Constitution also skirts the Article III standing question raised when an individual files suit on the ground that a government action causing a cognizable harm should be enjoined *not* because the harm cannot lawfully be inflicted on her, but rather because the action violates some separation-of-powers protocol. The Court has answered this question in the affirmative.¹⁶⁶ An eccentric minority of scholars has objected.¹⁶⁷ Because it offers no account of when courts should intervene in this crucial swathe of cases, the constitutional politics account leaves ambiguous the question of which of the legal issues at stake would be resolved through the give-and-take of informal political tussling and which would be resolved through the more formal canalizing instrument of judicial review.

The 'when' of judicial review matters in part because it helps clarify thinking about the 'how' of judicial review. The constitutional politics account offers some recommendations as to when courts should step aside (p. 182). But it is framed as a description, albeit a normatively freighted one, of how separation-of-powers disputes are resolved from what Hart called the "external . . . point of view," of "an observer who does not himself accept them."¹⁶⁸ But judges do not decide cases from an external point of view. They rather understand themselves as "member[s] of the group which accepts and uses [legal rules] as guides to conduct."¹⁶⁹ It is not clear whether Chafetz thinks that judges should be using the same analytic approach to separation-of-powers questions as he endorses. It is far from clear that they could or should. More generally, there are

¹⁶⁴ There is no generally accepted metric of judicial supremacy, and anecdotal evidence of judicial supremacy (or its absence) would not be decisive. Rather, I suspect that Chafetz and I simply have a reasonable disagreement about the normative heft and rootedness of judicial supremacy today. Although I agree with Chafetz that judicial supremacy is on balance less desirable than many think, I recognize that my view is a minority position.

¹⁶⁵ This position is consistent with the now increasingly common claim that the Court's "constitutional decision-making is inextricably intertwined with the will of the people, channeling the views of political and popular majorities in numerous ways." Corinna Barrett Lain, *Soft Supremacy*, 58 *Wm. & Mary L. Rev.* 1609, 1612 (2017). Indeed, the interaction of judicial and popular preferences helps explain the durability of judicial settlement in the first instance.

¹⁶⁶ See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (stating that "individuals . . . are protected by the operations of separation of powers").

¹⁶⁷ See, e.g., Huq, *Standing*, supra note 88, at 1514-23 (recommending reforms to Article III standing doctrine).

¹⁶⁸ Hart, supra note 136, at 89. More precisely, Chafetz takes a "hermeneutic" point of view, which "seeks to describe the law . . . by reference to the insider's point of view," in particular by "attending to the attitudes of the members of the group." Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *Fordham L. Rev.* 1157, 1159 (2006).

¹⁶⁹ Hart, supra note 136, at 89.

powerful reasons why the operation of constitutional canons and analytic methods would vary by institutional context that *Congress's Constitution* does not address.¹⁷⁰

This absence of systematic answers to the “when” and “how” questions of judicial review puzzles. The constitutional politics account, that is, explains how “nonhierarchical interbranch contestation,” when handled “judiciously,” leads to desirable outcomes (pp. 18-19), but says little about when “judicious” also means “judicial.” So long as courts deploy different sources of law from the ones Chafetz endorses, the theory will be off-kilter. Thus, even if courts rely on interbranch practice in resolving disputes, they additionally turn to “[t]ext, history, structure, and precedent” (p.16) in ways that the constitutional politics account declines to endorse. In consequence, where judicial review begins (wherever that may be), the theory falls silent, or at least sings with a muted tongue.

In sum, there are continuities—both in terms of shared methodological moves and also common gaps—aligning the six case studies. Picking out these commonalities illuminates the relationship of the case studies to the theory (as well as their divergences). It hence sets the stage for a consideration of the metatheoretical foundations of the account.

III. SEPARATION OF POWERS METATHEORY IN *CONGRESS'S CONSTITUTION*

Is the constitutional politics account founded upon a set of consistent and defensible presuppositions in respect to the empirical facts of institutional behavior and the normative questions raised by observed regularities in official conduct? This Part applies the tripartite framework of metatheoretical inquiry to the constitutional politics account. Its ancillary ambition is to demonstrate the utility of an analysis that focuses upon the predicate assumptions of separation-of-powers theory. This task is aided by the fact that Chafetz, unlike the other leading theorists of the separation of powers, is admirably candid and clear about his methodological presuppositions. The very fact of such candor is a contribution to the quality of jurisprudential debates in this domain.

Although Part II's exposition of the constitutional politics theory began with sources of law, before moving to motives, it makes more sense here to begin with the question of what motivates official actors, before turning to questions of sources of law, and then the choice between equilibrium and change as a baseline assumption.

A. Motive

The question of official motive in the theorization of the separation of powers is a difficult and subtle one for two reasons. First, the motives of specific actors invested with

¹⁷⁰ See, e.g., Aziz Huq, Enforcing (But Not Defending) “Unconstitutional” Laws, 98 Va. L. Rev. 1001, 1001-05 (2012) (distinguishing between executive-branch obligations in respect to individual rights and structural constitutional questions); Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1239-58 (2006) (suggesting different treatment of the avoidance canon in the executive-branch context).

official authority are likely to vary substantially by time and by institutional locus. Second, official motives are endogenous to the choice of institutional design. Judgments about the permissible range of institutional design options therefore alter the quality of official motives. I first develop these points in more detail, and then consider motive's role in the constitutional politics account before finally turning to a related question of what counts as 'power' in Chafetz's account.

It is helpful to begin with a simple, if destabilizing, observation: The motives and preferences of official actors in a branch of government do not remain static over time. Nor can it be assumed that those motives are constant between branches. Consider for example the narrow question whether members of Congress are likely to engage debate about, and be influenced by, legal and especially constitutional matters. On the one hand, David Currie's sedulous historical work has demonstrated that early congresses seriously debated a "breathtaking variety of constitutional issues great and small."¹⁷¹ More recently, a former representative and federal judge concluded that legislative debate does not explore the constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts.¹⁷² The leading work in political science also suggests that legislators pursue a variety of ends simultaneously, sometimes trading ends off against each other.¹⁷³ Constitutional concerns do not take consistent priority, and the strength of transient, nonlegal concerns will ebb and flow over time.

The manner and extent to which members of Congress attend to various legal and non-legal ends, moreover, changes over time because the institution itself develops.¹⁷⁴ As Michael Gerhardt has explained, the range of opportunities that members of Congress have for exercising judgments in respect to constitutional questions depends on the institutional structures of congressional deliberation. Gerhardt underscores the role of not just committees but also "informal practices, norms, and traditions."¹⁷⁵ These are all these channels for deliberation on legal and constitutional issues that have shifted over time. To the contrary, as Chafetz explores in some detail, "committees were an important part of cameral ordering from the beginning" but have undergone dramatic changes since 1789

¹⁷¹ David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 239 (1997).

¹⁷² Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. Rev. 587, 587-88, 610 (1983).

¹⁷³ The classic work is Richard F. Fenno, Jr., *Congressmen in Committees 1* (1973). For a rare example of legal scholars that consciously adopts Fenno's insights, see Elizabeth Garrett & Adrian Vermeule, *Institutional Design of A Thayerian Congress*, 50 Duke L.J. 1277, 1288 (2001) (treating "legislators as maximizing a complex utility function, in which constitutional considerations are one argument").

¹⁷⁴ Changes to the external electoral environment—in the form of different forms of campaigning, campaign financing, the varying effect of partisanship with the choice of primary structure—all add further complications to an effort to predict legislators' motives. See R. Douglas Arnold, *The Electoral Connection, Age 40*, in *Governing in a Polarized Age: Elections, Parties and Political Representation in America 29* (Alan S. Gerber & Eric Schickler, eds., 2017) ("What has changed—and what will continue to change—is the turbulence of the political waters through which legislators navigate their careers [and noting several new forms of complexity in the electoral environment]."). Given the complexity already identified, I bracket these considerations henceforth.

¹⁷⁵ Michael J. Gerhardt, *Non-Judicial Precedent*, 61 Vand. L. Rev. 713, 738 (2008).

(p. 282).¹⁷⁶ More generally, the “industrial organization of Congress” reflects a dynamic “constructed environment within which legislators bargain with one another in order to facilitate their individual and collective goals.”¹⁷⁷ This environment does not stay still. In the words of David Mayhew, examining “two and a quarter centuries” of congressional operation, what “impress[s]” is “the system’s flexibility, its variety, its capacity to turn on a dime.”¹⁷⁸

Substantially parallel points could be made about the judiciary and the executive. Neither has remained static over time. Changes in their internal operation modulate the strength of legalistic compulsions in comparison to other motivational drives. This is obviously true with respect to the executive, but also true of the judiciary. Hence, even in the absence of a “separation-of-powers equivalent to the Supremacy Clause,” (p. 19) the Supreme Court has ebbed and flowed in the extent to which it has asserted a final authority to settle disputed questions of constitutional law.¹⁷⁹ The institutional apparatus, in terms of administrative operations, lobbying power, and sheer, on-the-ground infrastructure available to the judiciary has dramatically changed over time.¹⁸⁰ This has changed its capacity to take the Constitution seriously, as well as altering the range of voices that can influence its decision-making process.

A theory of the separation of powers that seeks to move from a descriptive account of how the branches *do* behave to a prescriptive vision about how they *should* behave needs to come to terms with the mutability and endogeneity of official motives. To his credit, Chafetz does not claim that there is one single kind of motive that explains official action across time and between branches. Nevertheless, he does not offer a general statement on what motivates members of Congress (or, for that matter, officials within the executive and judicial branches) most of the time, or in the instances with which he is concerned. Nor does he address the question of motivational change in a dynamic perspective.¹⁸¹

At the same time, a dissonance emerges within what he does say with respect to official motivation in the book’s theory section. On the one hand, the central thrust of

¹⁷⁶ See also Fenno, *supra* note 173, at 94-114 (exploring historical importance of congressional committees).

¹⁷⁷ Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. Pa. L. Rev. 1417, 1431–32 (2003); see also Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. Pol. Econ. 132, 132-37 (1988) (providing a theory of legislators based on the theory of firms and contractual institutions).

¹⁷⁸ David R. Mayhew, *The Imprint of Congress* 99 (2017).

¹⁷⁹ On the historical genealogy of these claims, and their frequency within the Court’s docket, see Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 Calif. L. Rev. 579, 584-86 (2012) (summarizing path of judicial review from 1800 to 2000).

¹⁸⁰ For a synoptic historical account, see Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Constitutional Development* (2012).

¹⁸¹ But it is worth noting that some of the historical narratives bespeak not “constitutional politics” at work, but a relatively narrow-gauge version of individual self-interest. For example, when Member of Parliament Richard Strode persuaded his colleagues to enact Strode’s Act, annulling several money judgments against him and barring actions that “vexed or troubled” a member, we can be fairly confident mere public-spiritedness was not at work (p. 203).

Chafetz's theoretical chapter is to posit political actors engaged in a dialogic process of building and expending public trust, leading and being led, by their constituents (e.g., p. 22). This suggests that legislative motives—perhaps more so than executive incentives—will be shaped by their public-facing interactions with constituents and their parleys with other branches. But a somewhat different, and more nuanced, account of legislative motives surfaces as Chafetz responds in the subsequent chapter to the claim tendered by Daryl Levinson and Richard Pildes that partisanship dominates the calculations of members of Congress (p. 28-35). Addressing this position, Chafetz asserts that “members of Congress do, on some occasions, care about their chambers power, per se” (pp. 30-31), and further recognizes “the motivating power of partisanship” (p.35). Although the latter claim can be fitted within Chafetz's dialogic account of constitutional politics, the former claim sits more uneasily therein. At the same time, there is reasonable evidence to suggest that institutional loyalties do occasionally bite, and moreover that, while they are at a nadir within the legislative branch, they are more apparent within both the executive branch and the judiciary.¹⁸² It is unclear from the constitutional politics account how, when, or why such motives would arise.

One possible response to these critiques is that Chafetz's account of dialogic interaction between officials and the public accounts for and includes many kinds of motives, including partisan and institutional ones (p. 42). But this leaves the theory with such a vague and open-ended account of official motives that it could be used to justify any prediction, and hence any normative prescription, concerning legislative behavior. Stated another way, the claim that there is “public focused” and “nonhierarchical” interbranch contestation, coupled to a sufficiently vague and indeterminate understanding of institutional motives, can support a wide range of predictions about how branch-against-branch conflict will play out, and thus a wide range of normative recommendations. ‘Political stuff happens’ is simply not much of a theory.

In addition, the theory's reliance on public “opinion” (p.22) presents two considerable difficulties. The first difficulty is that is not at all clear how often, or how powerfully, public opinion shapes official action in practice. *Congress's Constitution* presents no empirical data on this point. It relies on anecdote. Chafetz employs the Senate hearings on the nomination of Robert Bork to a seat on the Supreme Court as an example of dynamic interactions between the public and officials over institutional roles (pp. 22-23). But it is telling that the subsequent case studies are not overflowing with parallel examples of overt public contestation over institutional power. Nor does he provide evidence that absolute levels of public opinion decisively influence official behavior. This is a point of some importance given recent work that suggests that it is *changes* in levels of public support, and not their absolute levels, that influence official decisions.¹⁸³ If these studies hold true, there is some cause for skepticism of the claim that free-floating public opinion will operate as a stabilizing ballast to institutional behavior. If

¹⁸² See David Fontana & Aziz Z. Huq, Institutional Loyalties in Constitutional Law, 84 U. Chi. L. Rev. – (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940769.

¹⁸³ See James A. Stimson, Tides of Consent: How Public Opinion Shapes American Politics, xvi-xvii (2004) (“It is movement that matters. Politicians ask, ‘How will the public respond?’” (emphasis in original omitted)).

legislators simply care about avoid downticks in public opinion, they gain considerable leeway in separation-of-powers interactions simply by supporting popular taxation or spending measures to offset such variation.¹⁸⁴

A second difficulty abides in the assertion that “separation-of-powers system privileges judicious, rather than maximal, combativeness” (p.311). There is nothing in *Congress’s Constitution* that explains why the public should demand sensible forms of contestation and condemn hazardous ones (however defined). As noted previous,¹⁸⁵ Chafetz implies that the public has some kind of innate sense of what counts as appropriate interbranch conduct. This requires that pivotal members of the public never value “maximal” partisanship over forms of institutional hardball that do enduring damage to institutions. The available empirical evidence, however, suggests that the public may value outcomes over institutional process.¹⁸⁶ Today, more than most instants in recent political history, claims that moderation will inevitably triumph over extremism ring very hollow. No “invisible hand,” it instead seems, guarantees the wisdom or judiciousness of official action guided by public sentiment—at least unless one think that the public is made up of reasonably minded law professors.¹⁸⁷

Finally, it is worth noting another element of the constitutional politics account that bears on the question of motivation, albeit perhaps in a way that compounds rather than dilutes the aforementioned concern of insufficient theoretical specification. The notion of political power that is central to Chafetz’s analysis is, to say the least, an unorthodox one. Power is commonly understood as the capacity to exercise influence over another so that he or she take actions that would not otherwise be undertaken.¹⁸⁸ As I understand him, Chafetz conceptualizes power as a sort of license to exercise discretion

¹⁸⁴ In addition, one might here draw attention to the large volume of political-science scholarship that problematizes the idea of a “public” to which Congress is faithful, substituting in its place a critical portrait of a distinctively regressive pattern of democratic responsiveness. See, e.g., Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (2008); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer--and Turned Its Back on the Middle Class* (2010); Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (2012). Were I to credit Chafetz’s theory of public facing contestation more, this would be the basis of a distinct objection.

¹⁸⁵ See supra text accompanying note 138.

¹⁸⁶ See David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from A National Experiment*, 112 *Colum. L. Rev.* 731, 734 (2012) (concluding, based on national experimental evidence, that variance in normative judgments “can be explained by whether a given citizen views the Court’s decision or Congress’s legislation as threatening or privileging her core worldview”).

¹⁸⁷ For a definition of invisible-hand arguments, see Adrian Vermeule, *The System of the Constitution* 70, 73-80 (2011) (defining an invisible-hand argument as one in which an “overall system . . . produces a good that none of its components can individually produce, and that none of its components may even intend to produce,” and critiquing their use in legal scholarship). I hasten to add that I make no claim that law professors are all reasonable, let alone wise or judicious. This is, after all, not a work of fiction.

¹⁸⁸ Cf. Elstain, supra note 152, at 136; see also Steven Lukes, Introduction, in *Power: Readings in Social and Political Theory 2* (Steven Lukes, ed., 1996) (citing Max Weber’s definition of power as “the probability that an actor in a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which that probability rests” (citation omitted)); id. (citing Robert Dahl’s definition of power: “A has power over B to the extent that he can get B to do something that B would not otherwise do.” (citation omitted)).

in relation to a baseline state of compulsory compliance with popular opinion. That is, power is conceptualized as freedom *from* public opinion, even as Chafetz acknowledges that political leaders also shape public opinion.

At the very least, this definition of power is orthogonal to—and thus ignores—the extent to which the institutional design of a branch either enables or inhibits actions. For example, on this definition of power, the growth in federal infrastructure—in the sheer number of officers, personnel, and funds—over the twentieth century is not itself a *source* of power, but a *result* of power. Likewise, the Supreme Court’s authority to define its own certiorari docket¹⁸⁹—and hence to exercise control over the range of issues the Justices resolve or avoid—is apparently not a source of ‘power.’¹⁹⁰ This seems rather implausible to me.¹⁹¹

Contra Chafetz, therefore, not all ‘power’ (as that term is commonly understood) flows from a relationship with the democratic public. There are many elements of institutional design, including sheer institutional size, and subtle agenda-control tools, that meaningfully change power-relationships. One implication of such an analysis is this: If Chafetz is correct that official actors take decisions that reflect in important part a wish to accrue power, and if power is not exclusively pursued in the public sphere, then it follows that their strategies and behaviors cannot be understood in a way that is wholly “public focused” (p. 20). Rather, it would be necessary to attend to a far more complex “thick political surround”¹⁹² within and outside government to understand the ways in which institutional actors seek, acquire, and expend power. And if the sources of official power are not exhausted by public-facing dynamics, then the outcomes of institutional conflict cannot be legitimated by appeal to their popular pedigree. The moderating assumption of the constitutional politics account instead must fail.

B. Sources of Law

As detailed in Part II.A, the constitutional politics account rests upon a clear and explicit account of the relative importance of various sources of law. Chafetz decisively rejects the separation model’s focus upon text and original meaning, instead accentuating practice and the local solutions reached in respect to specific interbranch disputes. Building on the discussion in Part II.B, I begin the analysis here by pressing upon an internal contradiction within constitutional politics account’s working. I then draw back to ask whether Chafetz has offered an account of something cognizable as ‘law’ (rather than sheer politics). Finally, I turn to consider the relation between the constitutional politics model and recent explorations of the role of ‘convention’ in American law.

¹⁸⁹ See Evarts Act, Act of Mar. 3, 1891, ch. 517, §6, 26 Stat. 826, 828; see also Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936. That authority, moreover, is but one element in a long series of institutional transformations that have augmented the federal judiciary’s freedom of maneuver since the late eighteenth-century. See Huq, *Judicial Independence*, *supra* note 88, at 53-55 (summarizing that history in terms of comparative institutional power).

¹⁹⁰ See Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 *Calif. L. Rev.* 1401, 1433-38 (2016) (discussing the effect of the judiciary’s agenda-control powers).

¹⁹¹ Cf. p. 41 (“[T]he American judiciary is undeniably powerful.”); *id.* at 333 n.88 (same).

¹⁹² Huq & Michaels, *supra* note 5, at 391.

As a threshold matter, there is a potentially unraveling tension between the role motives play in the theory section of *Congress's Constitution* and their place in the case studies. This tension hinges on the role of “historical gloss,” or past institutional practice, as a source of legal rules.¹⁹³ Theory and case studies of constitutional politics point in different directions as to whether historical gloss counts as ‘law,’ leaving a murky ambiguity on what has become a cynosure of separation-of-powers theorizing of late.

This needs to be unpacked. Recall first that Chafetz’s theory suggests that separation-of-powers law is a seething and unstable broth of volatile compounds (pp. 18-19). The field of strategic action is in “constant flux” (p. 25). “[U]ncertainty, instability, and unpredictability” are the order of the day (pp. 312-14). Solutions, to the extent they are realized, exist only “locally and contingently” and “without binding implications for the future” (p. 20). This is the separation of powers as a quantum universe, where perceptions collapse institutional wave-functions into instantaneously fixed particulars, where spooky (public) action at a distance takes the place of the smooth, Cartesian action of a Newtonian atomic universe.¹⁹⁴

But a famous property of quantum theory is that its rather uncanny effects—its instabilities, its paradoxes, and its inversion of intuitive causation—all vanish as one moves from the subatomic to the world of discernable clumps of atoms and molecules.¹⁹⁵ So it is too with a constitutional politics approach as one moves from theory to observable studies. For the case studies are solidly upholstered, Victorian manses in comparison to the churning mire predicted by the theory. To begin with, contra the posited theory, the case studies imply that history does matter, over and over again. If the theoretical assertion of history’s irrelevance did in fact hold, three-quarters of Chafetz’s own text would be a nullity. Settlements that he embraces, and ones he abjures, instead prove enduring across decades or even centuries.¹⁹⁶ Theory and case studies, therefore, are at odds.

¹⁹³ For definitions, see Bradley & Morrison, *Historical Gloss*, supra note 16, at 418-19; LaCroix, supra note 119, at 77.

¹⁹⁴ For a strikingly different view of Congress that emphasizes “stability,” see David R. Mayhew, *America’s Congress: Actions in the Public Sphere James Madison through Newt Gingrich* 216-17 (2000).

¹⁹⁵ For an elegant explanation, see Brian Cox & Jeff Forshaw, *The Quantum Universe: (And Why Anything that Can Happen, Does)* 4-13 (2012).

¹⁹⁶ For example, Chafetz canvasses a familiar history of the initial creation of government departments and Tenure in Office Acts of 1820 and 1867 (pp. 100-22), as a basis to draw a general conclusion about Congress’s power to “structure and monitor government offices” (p. 147). History thus is treated as evidence of the existence of a lawful authority pursuant to Article I. In discussing the contempt power, the historical proposition that “[almost from the beginning, the houses of Congress have punished non-members,” (p. 172) segues by imperceptible steps into the normative proposition that such power is “at least as essential for the houses of Congress” as for the courts (p. 180). It is hard to read this passage as doing anything other than deriving normativity from history. And talk of how the English Bill of Rights “enshrined a strong conception of the speech and debate privilege” a conception “picked up” by American constitutional designers (p. 210) is superficially a claim about constitutional backdrops, but in substance is a claim that history’s lessons have normative force today by dint of their role in motivating specific constitutional texts.

More puzzling, his case studies are trimmed with all the accoutrements of standard-form argumentation familiar to all constitutional scholars in a fashion that is quite at odds with Chafetz's avowed abjuration of such sources of law (p.16). On one page of *Congress's Constitution*, for example, a reader finds in quick succession excerpts not only from the Constitution but also from the Articles of Confederation, James Wilson's lectures, and Thomas Jefferson's missives (p. 211; see also p. 241). The Federalist Papers, of course, play a comfortably familiar supporting role (see e.g., pp. 57, 66, 99-100, 145, 279)—the Statler and Waldorf of constitutional analysis. Select judicial precedent, when it fits Chafetz's purposes, is described as resting on "forcible" ground (p. 215), even as other rulings are distinguished and dickered away (p. 120).¹⁹⁷ This invests history with a ballasting gravity, escapable when the theorist deems necessary, but constraining nonetheless.

It is difficult to square this aspect of the case studies with Chafetz's theory. Rather than trying to do so, perhaps it is better to ask whether the assumptions of the theory or the case studies fare better when studied closely. In fact, neither reflects a fully satisfying approach to the sources-of-law question.

To begin with, it is not at all clear that Chafetz's theoretical account is really an account of law as that term is conventionally understood. That is, if historically antecedent settlements of institutional conflict are "without binding implications for the future," (p. 20), are they in any sense sources of law? Would not constitutional history simply comprise a meaningless drizzle of spot trades, or alternatively a pattern of interbranch defalcations, each reflecting only the momentary relations of an ongoing war of position between the branches? All sound and fury signifying naught, history would have no binding, no guiding, and no moral force today. This seems a denial of law—whether formulated as rule or standard—in favor of something I think most would label raw politics. In this regard, Chafetz might be glossed as migrating, widdershins, to the position held by Dean Manning—to the effect that there is no law once one proceeds beyond the strict and narrow confines of specific text.¹⁹⁸

On the other hand, if we judge the constitutional politics account by what it does (case studies) rather than what it says (theory),¹⁹⁹ two important questions snap into focus: How does fact become law? And should we understand such sources as law, or instead as species of 'convention' as that term has come to be used in constitutional scholarship?

¹⁹⁷ See also supra Part II.B. (noting the force of history, and the selection between endorsed and disfavored precedent).

¹⁹⁸ Compare p. 12 (stating that "no doubt there are a number of . . . relatively stable separation-of-powers provisions . . . [b]ut a lot more is up for grabs than we commonly realize"), with Manning, supra note 36, at 1948-49 (contending for "a clause-centered approach" that rejects any "freestanding separation of powers doctrine").

¹⁹⁹ Another reason to prefer this interpretation is that it improves the fit between Chafetz's views and currently existing practice: In a legal system such as ours wherein the normative gravity of the past is immediately and extensively evident, this lacuna means constitutional politics does not provide an accurate description (or even an approximate description) of current practice.

First, Chafetz provides no account of how the fact of institutional clashes and institutional settlements precipitate into law. That is, he does not explain the relationship between “Faktizität und Geltung,” or facticity and validity.²⁰⁰ A theory that takes subsequent institutional practice as salient must offer some account of how the ‘fact’ of an institutional settlement or stalemate is transformed into a normative postulate within the system of constitutional law that exercises a binding force on intertemporally distant actors. It must answer the question of how “the realms of ‘real’ and ‘right’ interact in a social or political order over time.”²⁰¹

This is a question that arises and must be answered separately for judicial precedent,²⁰² for historical gloss,²⁰³ and even for the normative force of ‘tradition’ (where the latter is defined as a pattern of historical behavior by governmental and nongovernmental actors).²⁰⁴ Adding to the complexity of the problem, the question can be framed in one of two, albeit somewhat overlapping, senses. On the one hand, the fact-law problem can be pondered from an internal perspective of normative justification: When *should* an institution’s decisions or judgment be entitled to a normative complexion? Why *should* court’s decisions be viewed as normatively freighted in a way that, say, the decisions of many executive branch agents are not?²⁰⁵ On the other hand, inquiry might instead turn on the “sociological” question of when specific institution’s decisions are accorded wider normative significance as evidence of how constitutional questions should be settled.²⁰⁶ The latter, sociological inquiry necessarily turns on

²⁰⁰ This is the German title of Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William H. Rehg trans., 1996). Habermas draws attention to multiple ways in which the factual order and the juridical normative one relate or come apart. See, e.g., id. at 38 (identifying an “external relation between facticity and validity” as the problem of “the facticity of legally uncontrolled social power that penetrates law from the outside”); see also id. at 82 (identifying the “external tension between the normative claims of constitutional democracies and the facticity of their actual functioning”). Habermas’s second specification is closest the relevant sense of the distinction here.

²⁰¹ Peter J. Lindseth, *Between the ‘Real’ and the ‘Right’: Explorations along the Institutional-Constitutional Frontier*, in *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* 60 (Maurice Adams et al. eds., 2017).

²⁰² See, e.g., Randy J. Kozel, *Precedent and Speech*, 115 *Mich. L. Rev.* 439, 443-45 (2017) (summarizing justifications for precedent’s force).

²⁰³ See, e.g., Bradley & Morrison, *supra* note 16, at 424-25 (exploring justifications for relying on gloss).

²⁰⁴ See, e.g., Kim Forde-Mazrui, *Tradition As Justification: The Case of Opposite-Sex Marriage*, 78 *U. Chi. L. Rev.* 281 (2011) (exploring the question in the Equal Protection context).

²⁰⁵ A domain in which this sort of question is encountered and grappled with directly concerns the boundaries of judicial deference to administrative agency decisions taken to have the force of law. See, e.g., *United States v. Mead*, 533 U.S. 218, 230-32 (2001). A recently contested salient in the question of fact-norm mediation concerns the scope of *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which concern agency interpretations of their own regulations. See, e.g., *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (finding *Auer* deference inappropriate “when the agency’s interpretation is plainly erroneous or inconsistent with the regulation” or “when there is reason to suspect that the agency’s interpretation does not reflect the agency’s fair and considered judgment” (internal quotation marks omitted)); accord *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 n.4 (2015). But the problem is quite general in character.

²⁰⁶ Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787, 1795 (2005) (“[A] constitutional regime, governmental institution, or official decision possesses [sociological] legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.”).

judgments about the normative dispositions and attitudes of participants in the legal system. But it is easily entangled in (or confused with) the first purely normative version of the inquiry.

To the extent that judicial settlement is a scarcer commodity in the separation-of-powers context than in other domains of constitutional law, this question of fact/norm translation assumes greater importance. Questions of when and how *stare decisis* effect is denied to an otherwise valid precedent have familiar solutions in the judicial context.²⁰⁷ Not so when judicial precedent is wanting.²⁰⁸ There, the question is how to sort through the accumulating detritus of history and identify valuable exemplars from the chaff of misleading or disreputable examples. There is no generally accepted answer. To the extent that the more conventional strand of Chafetz's case studies rests implicitly on the exercise of such a sorting protocol, it is necessarily incomplete. More generally, questions of how to traverse the transition from historical fact to legal normativity in a constitutional system in which textual sources play a relatively modest role²⁰⁹ will tend to be crucial in delimiting the bounds of legitimate sources of law.²¹⁰

Second, the constitutional politics account raises a question as to how best to conceptualize the boundaries of law. It is intuitive to frame the matter of sources of law as a binary one: Either something counts or it does not. But there is no a priori reason such an impermeable boundary should be taken as given. British constitutional theorists have long employed a concept of "convention" to capture a more fluid idea of law's boundaries. Hence, A.V. Dicey identified "conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power . . . are not in reality laws at all since they are not enforced by the Courts."²¹¹ Conventions, as matters of "constitutional morality," nevertheless played a central structural role in the British constitution system by determining "the way in which the prerogative powers of the Crown (and therefore of ministers) were exercised in practice."²¹² American legal scholars have begun of late to consider the role that such an analogous conception might play in U.S. constitutional law, albeit without the structural

²⁰⁷ For a seminal discussion, see Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 757-58 (1988).

²⁰⁸ Bradley and Morrison, however, recognize and explore the question in relation to historical gloss. See Bradley & Morrison, *supra* note 16, at 424 ("Any practice- or precedent-based approach naturally must confront questions about how to specify the scope of the past practice or precedent.").

²⁰⁹ Cf. David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 *Harv. L. Rev.* 1, 3 (2015) ("If we read the text of the Constitution in a straightforward way, American constitutional law 'contradicts' the text of the Constitution more often than one might think.").

²¹⁰ A related question that has not received as much attention as I think it deserves is whether and how the protocol for determining when historical facts about one branch's behavior should be presumed to be identical to, or different from, the protocol for a different branch. One might, for example, ask whether the reception conditions for historical gloss and judicial precedent should systematically diverge. Cf. Bradley & Morrison, *supra* note 16, at 427-28.

²¹¹ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 22-23 (8th ed. 1915).

²¹² Geoffrey Marshall, *What are Constitutional Conventions?*, 38 *Parliamentary Aff.* 33, 33 (1985).

functionality of conventions in the British context.²¹³

One way of parsing the ambiguity of the constitutional politics account as to the status of past institutional settlements—and perhaps also a way to navigate the path from facticity to normativity—is to view the outcomes of past institutional conflicts as conventions that are capable of supporting a normative inference under the right conditions. Lacking the binding force of law but distinct from the epiphenomenal spume of daily partisan conflict, such conventions reflect a shallow, primitive judgment about the valence of some, but not all, historical facts based on the practical morality of daily practice. Navigating the transition from historical fact to conventionality presents similar, but easier, questions as the passage from fact to law. The questions are similar because in both instances the theorist seeks to derive an ‘ought’ from an ‘is.’ The questions diverge insofar as the weaker, peripheral nature of conventions arguably lowers the burden of justification needful to making that transition. Appeal to consequentialist justifications for lending precedential effect to past practice on the basis of their ability to operate as coordinating focal points may be more appealing than they would be in a strictly legal context.²¹⁴

C. Equilibrium and Change

In the constitutional politics account, is the separation of powers in equilibrium, or is it an unstable and dynamic system? More colloquially, is it a theory of institutional change over time, or one of institutional stability? Separation and balance theories most clearly diverge over this question. Whereas separation theories tend to favor stability and the preservation of long-standing understandings of law, balance theories are more tolerant of institutional transformation with an eye toward the vindication of more abstract, systemic values.

Again, the position of the constitutional politics account is ambiguous depending on whether theory or case study is prioritized. As noted, the theory underscores and even celebrates “uncertainty, instability, and unpredictability” (pp. 312-14).²¹⁵ At the same time, the case studies, to a noteworthy extent, are fairly legible by the interpretive lights

²¹³ Adrian Vermeule, *Conventions of Agency Independence*, 113 *Colum. L. Rev.* 1163, 1184 (2013) [hereinafter Vermeule, *Conventions*] (noting, in the context of a more wide-ranging discussion, that “conventions may supply crucial context for the interpretation of written laws, and should thus be incorporated into that interpretation); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 *U. Ill. L. Rev.* 1847, 1855 (2013) (“Constitutional conventions are one mode of construction.”).

²¹⁴ Cf. Vermeule, *Conventions*, supra note 213, at 1192 (“In game-theoretic terms, judicial recognition of a convention may provide a focal point on which politicians may converge in an ongoing game with a coordination component, including sequential or iterated Prisoners' Dilemma games.”).

²¹⁵ At its inception, the account also invokes the idea of “intercurrence” associated with Karen Orren and Stephen Skowronek (p. 4). But the critical element of that theory is the existence of institutional orders created at different historical moments that overlap each other, leading to a complex accretion of institutional forms at any one given model. Karen Orren & Stephen Skowronek, *Institutions and Intercurrence: Theory Building in the Fullness of Time*, 39 *Nomos* 111, 138 (1996) [hereinafter Orren & Skowronek, *Institutions*]. Ideas of overlap and intermingling, however, do not figure prominently in the theoretical account offered in *Congress's Constitution*.

of ordinary constitutional jurisprudence as rather conventional accounts of structural constitutional law, replete with traditional trimming in terms of both sources and attendant normative judgments of a reassuringly democratic ilk.²¹⁶ To my sublunary lawyer's ear, the case studies provide the more compelling descriptive account. For it would be quite surprising if official actors were observed constantly renegotiating the rules of institutional engagement, rather than relying on historical precedent to supply rules of the road. While imperfect, even considering the effects in medium term, the latter are inevitably cheaper than constant renegotiation.²¹⁷

To reconcile these themes by saying that constitutional history is a mixture of stability and change would be to oust theory with unenlightening platitude. One needs to say more about what remains constant, what mutates over time, and what forces drive the selection of institutional margins into one of these two categories.

An account of equilibrium versus change in the separation of powers context might therefore profitably be with specifying the sense in which, and level of generality at which, the term "equilibrium" is deployed. The term is, in operation, ambiguous and requires a measure of clarification. Political scientists and political historians have engaged in useful polemics over appropriate role of equilibrium concepts in theorizing the separation of powers, and legal scholars have much to learn from the distinctions that have emerged from this work.²¹⁸ A brief summary of equilibrium concepts as deployed in respect to institutional questions suggests that the dominant approaches might provide clues, but are not well suited to direct transplantation into the structural constitutional context.

Within the political economy literature, two concepts of equilibrium are common: "preference-induced equilibrium" and "structure-induced equilibrium."²¹⁹ The former arises when "[a]n outcome, x, is [stable] if there existed no y preferred to it by a decisive coalition of agents."²²⁰ By contrast, the latter is an arrangement "that is invulnerable in the sense that no other alternative, allowed by the rules of procedure, is preferred by all the individuals, structural units, and coalitions, that possess distinctive veto or voting power."²²¹ At its core, the first focuses directly on preferences; the second analyzes preferences within a given institutional context. In both theories, change to the institutional circumstances of choice is modeled as "episodic and homeostatic—a momentary transition between states."²²² In this fashion, they "effectively remove time"

²¹⁶ See *supra* text accompanying notes 195 to 196.

²¹⁷ For a similar point, see Levinson, *Parchment and Politics*, *supra* note 72, at 695 (2011) ("The coordination advantages of bundling multiple (probabilistic) policy decisions into a single institutional decisionmaking process are obvious.")

²¹⁸ For a useful account of the disputes, see Orren & Skowronek, *Institutions*, *supra* note 215, at 124-39.

²¹⁹ Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in *Political Science: The Science of Politics* 51 (Herbert F. Weisberg ed., 1986).

²²⁰ Kenneth A. Shepsle, *Studying Institutions: Some Lessons from the Rational Choice Approach*, 1 *J. Theo. Pol.* 131, 136 (1989).

²²¹ *Id.* at 137.

²²² Orren & Skowronek, *Institutions*, *supra* note 215, at 124.

from the analysis.²²³ For the kind of separation-of-powers theory that constitutional scholars are interested in developing, which is aimed, *inter alia*, at specifying the terms and limits of acceptable change, this is an unhelpful, even debilitating, limit on the analysis.²²⁴

Historians of institutional evolution, most notably in the American Political Development (“APD”) stream that Chafetz briefly invokes (p. 4), repudiate static models of institutional interaction. Time, in their view, is instead, “a construct of the intercourse of institutions” in which “collisions and combinations, the changes and cycles, of institutions in their various external relations” must be situated.²²⁵ Institutions, on APD’s account, have a purpose or mandate, establish norms and rules, assign roles, operate within boundaries, and develop “norms and values [that] affect their members,” even as the institution itself remains “subject to innovation, redirection, disruption, and to all manner of personal motives of individuals.”²²⁶

An acute, and accurate, implication of such models is the futility of strictly static equilibrium analysis of the several branches. But it is hard to see how this strand of theorizing can provide a firm foundation for normative theorizing about whether a given status quo is desirable in comparison to imaginable alternatives. Nor is it clear how the theory can be used to sort among different historical conceptions of institutional form, labeling some as licit, and others as undesirable. Absent any guidance on when a status quo is desirable, such theories merely predict change without attaching positive or negative valence to its various forms. As I have suggested in reference to the constitutional politics account, APD supplies no basis for judgment about the present or potential futures.²²⁷ To the contrary, one might worry that any judgment about the practical entailments of an institutional change could be made only in the *longue durée*, one in which we still await a final reckoning on the French Revolution as well as its sister revolt on the other side of the Atlantic.

²²³ *Id.* at 125.

²²⁴ One exception is Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 132. Squarely confronting the intertemporal question, Mittal and Weingast argue that a constitution will be self-enforcing if “at a given moment, all actors find it in their interests to adhere to the constitutional rules, and as circumstances change, they must be able to adapt policies and institutions to maintain that system over time.” *Id.* at 282. Constitutions create “focal procedural and substantive limits” in order to enable popular enforcement, but also create “incentives [for officials] to search for and create solutions to new and pressing problems.” *Id.* at 286. Whereas these conditions might be understood as plausible enough general and abstract statements of the circumstances of democratic constitutional stability, it is hard to see how they facilitate the specification of particular structural design margins. Rather, I read Mittal and Weingast to instruct constitution-makers to create some provisions that don’t change, which are acceptable to enough people, and also to enable other provisions to change if and when needed. All well and good—but also easier said than done.

²²⁵ Orren & Skowronek, *Institutions*, *supra* note 215, at 141, 143.

²²⁶ Orren & Skowronek, *Search for American*, *supra* note 132, at 82. For a helpful gloss on this passage, see Pamela Brandwein, *Law and American Political Development*, 7 *Ann. Rev. L. & Soc. Sci.* 187, 188 (2011).

²²⁷ Since historians do not aspire to such normative judgments as outputs from their work, this cannot be taken as a criticism.

Legal scholars have successfully deployed APD's account of institutions as a means of understanding historical periods of institutional conflict. It is less clear how a normative theory of the separation of powers can be articulated on its basis. Some exogenous criterion must be invoked as support for normative judgments about which historical settlements are legitimate, and which should be abandoned—as *Congress's Constitution*, perhaps inadvertently, demonstrates. The theoretical compass that can draw a “circle just”²²⁸ to draw together the arcs of needful stability and healthy institutional remains to be found.

CONCLUSION

Theorizing the separation of powers entails an effort to reason from observed facts and accepted norms to prescriptions about how state power should be parceled out across the federal government. Attention to metatheoretical questions in separation-of-powers law—i.e., the theoretical assumptions about empirical regularities and normative judgments that serve as needful scaffolding to the theory—helps flush out questions of lingering difficulty in this enterprise. If the constitutional politics account offered by Chafetz does not fully surmount those difficulties, it is not for want of sophistication or ambition. To the contrary, the fact that his account grapples explicitly with the core difficulties of theorizing the separation of powers is to its large credit.

The first metatheoretical problem to pose a difficulty in separation-of-powers theory generally is the question of motives. How ‘branches’ as composites behave depends on the motives of institutionally pivotal actors.²²⁹ Yet motives are mutative over time and across branches, as well as being endogenous to institutional design decisions. Assumptions that one particular kind of motivation (e.g., ideological or re-election focused) dominates are implausible as a ground for prescription. But—as the limits of Chafetz's account demonstrates—it is quite difficult to build a theory on the shifting sands of motivational agnosticism. If, for example, congressional behavior is best characterized by “its flexibility, its variety, its capacity to turn on a dime,”²³⁰ the challenge of normative theorization seeking to identify optimal institutional bounds, stable interbranch equilibria, or welfare-maximizing arrangements only grows.²³¹

The second metatheoretical inquiry implicates the choice of sources of law in a domain in which text is (perhaps as usual) indeterminate while evidence of historical practice overflows. I have suggested that a theory of the separation of powers must engage with several questions, beginning with a clarification of the extent to which the label of ‘law’ as opposed to ‘conventions’ or ‘politics’ is appropriate. To the extent either

²²⁸ Cf. John Donne, *Selected Poems* 54-55 (John Hayward, ed., 1950).

²²⁹ Note that in the legislative context in particular, collective action problems arise, and are typically overcome by cameral rules, which concentrate agenda-setting and deliberation-structuring authority in a small number of actors. Kenneth A. Shepsle, *Congress is a ‘They,’ Not an ‘It’: Legislative Intent as Oxymoron*, 12 *Int'l. J. L. & Econ.* 239 (1992).

²³⁰ Mayhew, *Imprint of Congress*, supra note 178, at 99.

²³¹ The research agenda suggested by Magill—which would resist the urge to transhistorical and cross-institutional generalization—escapes this problem. See Magill, *Beyond Powers and Branches*, supra note 68, at 659.

law or convention has been identified on the basis of historical fact (e.g., past practice, or a specific decision), the further question arises of criteria for navigating from fact to legal norm. Different species of historical facts (e.g., a judicial decision, a statute, a congressional committee report, an executive decision to launch an overseas military action) might be subject to different criteria to ascertain their normative freight—but then some account of the ensuing interbranch differences seems warranted. At best, the cream of current scholarship offers a series of partial equilibrium models on these points, with no Walrusian general equilibrium in sight.

The final metatheoretical question concerns the extent of stability versus change in interbranch relations. Separation and balance theories are distinguished by the different levels of generality at which they answer this question. They are united insofar as neither explains why the institutions they sketch would honor those equilibriums once they are set off and running in the live space of political contestation. Political economy's account of institutional institution provides no help on this front. The constitutional politics account instead draws fruitfully on APD's richer toolkit of institutional intercurrency. But whatever the gain in descriptive accuracy, there is a loss in normative traction. Ultimately, efforts to theorize the separation of powers must grapple with the difficult question of how the law can create a set of institutions for the conduct of national politics that simultaneously remain stable but also responsive to the inevitable efforts of different political coalitions to refashion the inchoate and underspecified terms of political engagement.

It must do so, moreover, while remaining alive to the possibility that past stability is an unreliable guide to future performance. In constitutional law, like the political life it regulates, there are no firm guarantees. Theories of the separation of powers that embed optimistic metatheoretical assumptions about the extent of systemic stability, the certainty and force of law, and the predominance of benign motives merit especially careful and critical handling at a moment when the trajectory of our chief national institutions appears uncertain and up for grabs.²³² In *Congress's Constitution*, citizens and scholars are who committed to maintaining the best historical legacies our Constitution as a vehicle for decent and civilized conversation and settlement have an invaluable and important resource. And for that Chafetz's accomplishment deserves resounding applause.

²³² For a more plenary rehearsal of worries on this front, see Tom Ginsburg & Aziz Z. Huq, *How to Lose a Constitutional Democracy*, 65 *UCLA L. Rev.* -- (forthcoming 2018).