

Unbundled Powers

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INTRODUCTION

If the dominant aspiration of constitutionalism is to constrain government, avoid tyranny, and produce desirable public policy, then separation of powers and elections are surely the mechanisms of choice in United States.<sup>1</sup> The eloquent idea that the combination of powers in the

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<sup>1</sup> The literature on separation of powers in the United States is expansive, but for summaries of bits of the field, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* (1997); W.B. GWYN, *THE MEANING OF SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* (1965); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE*

same hands is the very definition of tyranny has been repeated by prominent constitutional theorists including Montesquieu,<sup>2</sup> Blackstone,<sup>3</sup> Madison,<sup>4</sup> and many others.<sup>5</sup> The U.S. Constitution, of course, adopts the Madisonian variant on separation of powers: (1) dispersion of government authority, accomplished by (2) allocating the functions of government or, equivalently, types of government power, into (3) three branches, the (4) leadership of which is selected via different mechanisms, each with (5) more or less balanced powers to be exercised in accordance with (6) checks, whereby one institution can raise the costs of action by another. The costs and benefits of separating and combining government functions in this way have been well canvassed over the years in debates between presidentialists and parliamentarists.<sup>6</sup>

Note, however, that these debates presuppose that if government authority is to be separated and allocated to different branches, the only or at least the best way to do so is by government function (executive, legislative, judicial). In the United States, government functions are separated, but the functional authority of each branch includes the power to act over all policy domains, at least as a default.<sup>7</sup> There is one Congress that exercises the legislative function for all policy domains rather than two Congresses, one for foreign affairs and one for domestic affairs. Functions are separated and substantive powers are bundled together within each function.<sup>8</sup>

The questions of whether and how to separate government functions have dominated debates in constitutional theory since the founding. While clearly important, these disputes obscure alternative regimes by making what is actually a design choice seem like an inevitable feature of the institutional landscape. For purposes of comparison, imagine three new branches of the national government, one controlling war, one economic policy, and one education. The

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CONSTITUTION (1996); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (2d ed. 1998, 1967) For an overview historical materials *see generally* 1 *The Founders' Constitution*, 311-54 (Philip B. Kurland and Ralph Lerner, eds. 1987).

<sup>2</sup> MONTESQUIEU, *SPIRIT OF LAWS* book 11 (1748).

<sup>3</sup> WILLIAM BLACKSTONE, 1 *COMMENTARIES* 149 (1765) (“The total union of them, we have seen, would be productive of tyranny; the total disjunction of them for the present, would in the end produce the same effects, by causing that union, against which it seems to provide.”).

<sup>4</sup> *THE FEDERALIST*, No. 51.

<sup>5</sup> *See* GWYN, *supra* note 1, at 8.

<sup>6</sup> WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 187 (1885). *See generally* Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 *Wm. & Mary L. Rev.* 679 (1993); Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 633 (2000). *See also* *Clinton v. New York*, 524 U.S. 417 (1998); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983); *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361, 381 (1989); *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>7</sup> There are exceptions to this default, of course. Certain actions may only be taken by the Executive, Legislative, or Judiciary alone.

<sup>8</sup> The same bundling phenomenon is evidence in the parliamentary structure. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (1873); WILSON, *supra* note 6. For more recent discussions, *see* GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* (2d ed. 1997); Ackerman, *supra* note 6. Semi-presidential regimes blend the explicit commitments further, providing for the election of a president and the selection of a prime minister by the legislature. *See* Maurice Duverger, *A New Political System Model: Semi-Presidential Government*, 8 *EUR. J. POLIT. RES.* 165 (1980). Executive and legislative functions are combined, but parliament or the ruling coalition retains the authority to utilize those powers over the entire set of permitted policies.

heads of each institution would be directly elected, perhaps as multi-member decision-making bodies or perhaps as single individuals. Each political institution would have plenary policy-making authority within their policy domain, but no authority outside it. While political institutions that exercise functionally blended authority in topically limited domains have costs and benefits, structuring government authority in this way would arguably produce government behavior more in keeping with underlying constitutional aspirations than Madisonian separation alone.

In fact, structural separation of functions across branches was originally described as an *auxiliary* precaution; electoral mechanisms were to be “the primary control on the government.”<sup>9</sup> On the auxiliary precaution view, it is necessary to separate functions and allocate them to different branches precisely because elections are an imperfect check on government action. What these early descriptions belie, however, is that the effectiveness of elections is itself a function of the structure of topical government authority. One might well sacrifice the benefits of combined powers regimes to guard against the more serious threat of tyrannical rule. The more electoral mechanisms constrain the government, however, the less the need to separate functions. Unbundling topical powers facilitates electoral control of public officials: as a consequence, the need for auxiliary protections is less.

Focusing on this latter set of design questions also helps clarify why some conventional claims made in the separation of powers debates are wrongheaded or at least incomplete. Passages in the Supreme Court’s separation of powers cases often read as implicit claims of uniqueness or optimality. Separation of powers produces liberty, accountability, and effective government;<sup>10</sup> other regimes do not. Separation of functions, however, is neither the only nor clearly the best way to achieve these laudable goals. The paper’s main task, therefore, is to compare U.S. style separation of functions with what the paper calls the unbundled powers alternative: multiple branches exercising combined functions in topically limited domains. Functional separation is certainly sometimes preferable, but there is no good reason to think it is better as a global matter; and there are many reasons to think it is not.<sup>11</sup>

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<sup>9</sup> THE FEDERALIST, No. 51 (Madison) (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”).

<sup>10</sup> See, e.g., *Clinton v. New York*, 524 U.S. 417, 450 (1998) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”); *Loving v. United States*, 517 U.S. 748, 758 (1996) (“By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable. . . . The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.”).

<sup>11</sup> The paper’s main reference point is Madisonian separation, but parliamentary alternatives are mentioned in passing, particularly when the justifications for topical separation dovetail with the justifications for combining powers in the parliamentary scheme. See Alan Siaroff, *Varieties of Parliamentarism in the Advanced Industrial Democracies*, 24 INT’L POLIT. SCI. REV. 445, 446–47 (2003) (identifying direct election as one of three definitive distinctions between parliamentary and presidential systems); Ackerman, *supra* note 6, at 664–65 (contrasting presidentialism with constrained parliamentarism); Alfred Stepan and Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism*, 46 WORLD POLITICS 1, 3–4 (1993) (contrasting “pure parliamentarism” with “pure presidentialism” and identifying the electoral mandate of the executive power as a critical component of a presidential system). For analytic tractability, the paper defers comparisons to constrained parliamentary and semi-presidential regimes. See Ackerman, *supra* note 6 (constrained parliamentarism); Sartori, *supra* note 8 (semi-presidentialism).

Although creating several new branches of the federal government, each with exclusive authority to regulate the environment or the economy would be radical surgery on the constitutional order, the motivating impulse is not at all foreign. Various real world political institutions exercise authority that is allocated by topical domain instead of or in combination with functional separation. Federalism allocates some topics to the federal government and others to the states.<sup>12</sup> Within the federal government, administrative agencies exercise powers only within limited topical domains (e.g. health, environment, labor). The Supreme Court has described agencies' functional authority as a mix of executive, quasi-judicial, and quasi-legislative.<sup>13</sup> This has long been an embarrassment for constitutional law because together with strong separationist impulses, the vesting clauses of articles I and III might be taken to require that only the legislature exercise legislative power and only article III courts exercise judicial power. But agencies can as easily be seen as a model for constitutional theory as an embarrassment. Agencies exercise authority that is overlapping with other institutions rather than plenary, but nevertheless, functionally blended authority is granted in substantively limited domains.

The hybrid status of agencies notwithstanding, separating functions rather than unbundling policies is clearly the dominant approach at the federal level. Within state government, however, there is far more variation. The vast majority of states adopt an internal government structure at the highest level that echoes the separation of functions structure of the national government: an executive, legislative, and judicial branch each exercising separated functional authority. But importantly, many states also further subdivide within function by topic and directly elect officials to formulate policy. For example, a majority of states directly elect not just a governor as the chief executive but also other executive offices like Attorney Generals, Lt. Governors, and Secretaries of State.<sup>14</sup> Many also elect heads of departments with limited policy responsibilities like insurance, public utilities, agriculture, education, state finances, and transportation.<sup>15</sup> Virtually all of these state political institutions exercise only one type of functional authority (most typically executive), but do so only in a single policy dimension. Authority is functionally separated, but then also further unbundled by topic.

Special-purpose local government units like school boards wield authority that blends legislative, executive, and often even adjudicative functions, but they exercise power only in a topically limited field like public schools. There are more than 35,000 special-purpose political institutions in the United States.<sup>16</sup> School districts, sewer districts, park districts, and water

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<sup>12</sup> See, e.g., Martin H. Redish, *The Constitution as Political Structure* 25-26 (1995); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 4 (1950).

<sup>13</sup> See *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935). See generally Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 615-16 (1984).

<sup>14</sup> See *Book of the States* (2002); see also Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453-55 (2006) (discussing interaction between elected attorneys generals and governors).

<sup>15</sup> *Id.*

<sup>16</sup> See generally CHRISTOPHER R. BERRY, *IMPERFECT UNION: REPRESENTATION AND TAXATION IN MULTILEVEL GOVERNMENTS* (forthcoming 2009); U.S. Census of Governments (2002).

districts are but a few examples.<sup>17</sup> In essence, special district governments combine functional authority (executive and legislative) in a single institution, but their powers are limited by scope (policy domain). They are limited-purpose institutions in the sense that school districts do not have authority to regulate greenhouse gases or set mayoral salaries, but many do perform actions that would ordinarily be considered legislative, executive, or even judicial in nature.<sup>18</sup>

In other historical and geographic settings, one finds similar variations on the theme. China in the 1920s had five branches of government, the usual three plus one for elections and one for examinations. Functional authority for most topics was split and allocated to different branches, but responsibility for certain topics was allocated to different institutions with functionally blended authority. Magistrates in Rome exercised authority that was sometimes combined and sometimes separated, but also unbundled. This was true of upper level magistrates, but also true of Quaestors or junior magistrates<sup>19</sup> and minor magistrates, the bulk of whom were directly elected and exercised power over areas like judging lawsuits, being masters of the mint, and caring for roads.<sup>20</sup> In countries with both a President and a Prime Minister, some of the executive functions are further split and allocated by topic, either in practice or formally.<sup>21</sup>

These examples serve to illustrate two points. First, although functional separation has long been the dominant approach to allocating federal government authority in U.S. constitutional theory, it is not the only approach. Just as functional authority can be separated or combined in political institutions, substantive policy responsibilities are sometimes bundled and sometimes unbundled. Second, topical allocation is not just an alternative to functional allocation; empirically, the two often coexist. The power to make policy in most fields can be separated by function, while a different political institution wields exclusive authority to make policy in one domain. Functional separation can be employed instead of or together with topical unbundling.

The remainder of the paper is structured as follows. Part I presents a general theory of unbundling government authority. The idea is generic and can be used to analyze executive branch structure, local government, federalism, and other constitutional structures. Part I then applies the unbundling model to the problem of branch design in the federal government, clarifying the theoretical relationship between the allocation of government functions, division of policy responsibility, and electoral control. Part II compares Madisonian separation of functions with the unbundled powers regime on a series of standard constitutional design dimensions like accountability, energetic government, avoiding tyranny, protecting against factions, and so on. The list is inevitably incomplete, but the idea is ask how unbundled institutions perform along

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<sup>17</sup> See BOOK OF THE STATES (2006).

<sup>18</sup> These institutions generate problems as well. For example, overlapping taxing authority may generate incentives to over-tax a local population. BERRY, *supra* note 16. And institutions responsible for a single policy may be insufficiently attentive to the impact of their decisions on other government units. And as discussed below, an increase in the number of political institutions that must be monitored by citizens can produce excessive coordination costs and monitoring costs, potentially resulting in minoritarian or ineffective policies.

<sup>19</sup> ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 134-35 (1999).

<sup>20</sup> See *id.* at 137-138. Cicero referred to related functions for minor magistrates as well in his discussion of the ideal republic.

<sup>21</sup> See Ezra N. Suleiman, *Presidential and Political Stability in France*, in *The Failure of Presidential Democracy* 137, 139 (Linz & Valenzuela, eds., 1994).

these critical dimensions. Part III emphasizes the role of courts and constitutional doctrine in the unbundled powers structure.

### I. UNBUNDLED POWER IN CONSTITUTIONAL DESIGN

This Part articulates a theory of unbundled authority in government, starting with the general theory and then moving to the concrete problem of allocating power to branches of government. Partial unbundling makes elections more effective mechanisms for controlling public officials. Depending on one's view about how elections interact with functional separation, unbundling might improve the performance of functional separation or reduce the need for functional separation altogether.

#### A. Unbundling Political Institutions

The unbundled powers regime builds on insights by Timothy Besley and John Coate, who initially argued that the unbundling intuition explains both differences in the performance of elected versus appointed regulators and the power of citizen initiatives.<sup>22</sup> To illustrate, suppose the set of possible political issues in a generic policy space can be described as  $j$  policy dimensions (or domains). Assume for simplicity that on each dimension there are two alternatives: a voter-friendly policy and a special-interest-friendly policy. A majority of voters prefers the voter-friendly policy on each dimension. However, there is an interest group in each domain that prefers the special-interest policy and the group will provide a private benefit to a government official if the special interest's preferred policy is enacted. One goal of institutional design is to establish a government structure that produces desirable outcomes on as many dimensions as possible.<sup>23</sup>

Elections are the main mechanism by which representative democracy tries to achieve that goal.<sup>24</sup> Although it is not entirely clear whether separation of functions presupposes effective elections or is intended to compensate for their failure, the founders were well aware that separation of powers without serious electoral checks would not suffice to control the State.<sup>25</sup> Political science and public choice have grappled with the effectiveness (or lack thereof) of elections for many years, but it seems safe to say that any simplistic view of elections tightly controlling politicians or translating the general will into public policy has been definitively

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<sup>22</sup> Timothy Besley & John Coate, *Elected versus Appointed Regulators: Theory and Evidence*, 1 J. EUR. ECON. ASSN. 1176 (2003); Timothy Besley and Stephen Coate, *Issue Unbundling via Citizens' Initiatives* (unpublished manuscript 2000) (suggesting that issue bundling explains the relevance of direct democracy in a representative system where candidates must already compete for the right to control policy). An obvious intellectual debt to Besley and Coate here and elsewhere. See Christopher R. Berry & Jacob E. Gersen, *Fiscal Consequences of Electoral Institutions*, 52 J. L. & ECON. (forthcoming 2009); Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008).

<sup>23</sup> There are many intricacies ignored for the time being. For example, perhaps voters do not have well-defined preferences or view a large part of government action to be about the quality of decisionmaking process rather than policy outputs, and so on. Begin however with a simplifying assumption that voters have well-specified preferences about policy on all dimensions and that accountability in government is desirable.

<sup>24</sup> See Jane Mansbridge, *Rethinking Representation*, 97 AM. POLIT. SCI. REV. 515, 516–25 (2003) (developing models of representative democracy). See generally ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989); AMARTYA SEN, *POVERTY AND FAMINES* (1983).

<sup>25</sup> See Levinson & Pildes, *supra* note 1, at 2319; Federalist No. 51 (Madison); Federalist No. 72 (Hamilton).

rejected.<sup>26</sup> One might cite many reasons for this failure including that the very notion of a popular will to be translated into policy is less than robust.<sup>27</sup> Most of the problems with electoral control however can be succinctly referenced by noting that the relationships between voters and politicians are riddled with agency problems.<sup>28</sup>

Information asymmetries between voters and politicians plague elections, often making it difficult for voters to distinguish bad politicians from good politicians or even bad from good policy.<sup>29</sup> For example, if voter information is worse than politician information, voters will often not be able to tell whether a policy that diverges from their own preferences diverges for a good reason (politician expertise) or bad reasons (divergent legislative preferences or self-interest).<sup>30</sup> The agenda control exercised by elected officials may also allow politicians to enact policy that systematically diverges from voter preferences.<sup>31</sup>

Standard formal models in political science and economics argue that elections manage this agency problem in two ways.<sup>32</sup> First, elections are a way for voters to try to select “good types”—public officials that will take desirable actions and exert high levels of effort in their

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<sup>26</sup> See, e.g. TORSTEN PERSSON & GUIDO TABELLINI, *POLITICAL ECONOMICS: EXPLAINING ECONOMIC POLICY* (2000) (providing survey and synthesis of the contemporary literature on democratic policymaking).

<sup>27</sup> See generally ANGUS CAMPBELL, ET AL., *THE AMERICAN VOTER* (1960) (documenting widespread lack of information and opinions about politics). See also JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 311–13 (1992) (finding that public opinion is created by officials and elites rather than preexisting in voters); WILLIAM RIKER, *LIBERALISM AGAINST POPULISM* 136 (1982) (explaining that there is “an unresolvable tension between logicity and fairness” that prevents discovery of a true majority preference through electoral voting mechanisms).

<sup>28</sup> Seminal contributions to the literature on agency problems in politics include Robert Barro, *The Control of Politicians: An Economic Model*, 14 *PUB. CHOICE* 19, 22–26 (1973) (explaining that in the absence of electoral consequences, a politician will seek to maximize his own utility), and John Ferejohn, *Incumbent Performance and Electoral Control*, 50 *PUB. CHOICE* 5, 5–26 (1986) (arguing that voters should pay more attention to actual performance than to campaign promises, and presenting a model by which to do so).

<sup>29</sup> See R. Douglas Arnold, *Can Inattentive Citizens Control Their Representatives?*, in *CONGRESS RECONSIDERED* 401, 404–06 (Lawrence C. Dodd and Bruce I. Oppenheimer, eds, 5th ed. 1993) (explaining that many citizens have outcome preferences but not policy preferences, and that it is difficult for legislators to know the preferences of their constituencies on many issues unless the preferences are particularly strong); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 219 (1957) (explaining that decision-makers must select only part of the total available information, biasing the information gathered); ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 79 (1998).

<sup>30</sup> See generally DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003).

<sup>31</sup> See Thomas Romer and Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 *PUB. CHOICE* 27, 27–28 (1978) (“When the setter has monopoly power, voters are forced to choose between the setter’s proposal or the status quo or fallback position.”). So long as representatives propose a new policy that is far from voter preferences but less far than the status quo ante, voters may not be able to obtain desired policy outcomes.

<sup>32</sup> Jeffrey S. Banks & Rangarjan Sundaram, *Optimal Retention in Agency Problems*, 82 *J. ECON THEORY* 293, 294 (1998) (describing that “the threat of dismissal . . . may itself be a powerful tool against the principal”); Scott Ashworth, *Reputational Dynamics and Political Careers*, 21 *J. L. ECON. & ORG.* 441 (2005); Scott Ashworth and Ethan Bueno de Mesquita, *Electoral Selection, Strategic Challenger Entry, and the Incumbency Advantage*, *J. POL.* (forthcoming); Brandice Canes-Wrone, Michael C. Herron, & Kenneth W. Shotts, *Leadership and Pandering: A Theory of Executive Policymaking*, 45 *AM. J. POLIT. SCI.* 532 (2001).

jobs.<sup>33</sup> Second, elections are a way for voters to sanction politicians who fail to enact policy consistent with voter preferences and reward those who perform well with reelection.<sup>34</sup> Ideally, the threat of sanction at the next election helps ensure good behavior during the previous term. Structural safeguards like federalism and separation powers both depend on and interact with the idea that elected officials are accountable to citizens. Elections were and remain the dominant vehicle for ensuring that accountability.

Different institutional structures affect the relative efficacy of elections, however.<sup>35</sup> And more generally the effectiveness of elections affects the relative desirability of different institutional structures. If elections do not control officials at all, other constraints like separating functions appear more desirable; if elections perfectly control officials, separating functions might be unnecessary.

Suppose there is only a single elected official with authority for all  $j$  policy dimensions. In common parlance, this is a “general purpose” official. The President is a general purpose executive. A senator or congressperson is a general purpose legislator. If there is only one general purpose official in charge of the government, the single official will be ascribed all the blame and all the credit for policy decisions. Senators exercise authority over both military affairs and the environment, the President over health and education. Voters in a single jurisdiction cannot pick one congressperson to manage environmental policy and a different one to manage the economy. The political branches cannot usually pick one judge to hear federal criminal appeals and another to hear first amendment challenges.

As such elections of general-purpose government officials require voters to make a single elect-reject decision on a given candidate or party. Citizens vote on a bundle of policy positions. As a consequence, the yes-no vote must be a weighted average of voter approval (disapproval) on all relevant dimensions. This is one reason that elections are a poor way to control policy in any specific domain. This structure allows the official to enact policies not favored by a majority on some dimensions, so long as she enacts voter-friendly policies on a sufficient number of other dimensions to secure reelection. Crudely speaking, this is an incentive problem. If citizens

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<sup>33</sup> James Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 55, 82 (Adam Przeworski, Susan C. Stokes, and Bernard Manin, eds. 1999) (suggesting that, while elections serve both selection and sanctioning purposes, voters may be reasonable to focus more on using elections as a method of selecting good candidates rather than as a sanctioning mechanism); Sanford C. Gordon, Gregory A. Huber, and Dimitri Landa, *Challenger Entry and Voter Learning*, 101 *AM. POLIT. SCI. REV.* 303 (2007); Scott Ashworth and Ethan Bueno de Mesquita, *Delivering the Goods: Legislative Particularism in Different Electoral and Institutional Settings*, 68 *J. POL.* 168, 169 (2006); Gautam Gowrisankaran, Matthew F. Mitchell, and Andrea Moro, *Why Do Incumbent Senators Win?: Evidence from a Dynamic Selection Model*, *REV. ECON. DYNAMICS*, at \*4 (forthcoming) (modeling voters as “identical dynamically optimizing agents” and finding that quality differences in candidates accounts for about half of the incumbency advantage).

<sup>34</sup> Barro, *supra* note 28, 26–32; Ferejohn, *supra* note 5, at 22–23; David Austen-Smith & Jeffrey Banks, *Electoral Accountability and Incumbency*, in *MODELS OF STRATEGIC CHOICE IN POLITICS* 121, 122 (Peter C. Ordeshook, ed. 1989); Paul Seabright, *Accountability and Decentralisation in Government: An Incomplete Contracts Model*, 40 *EUR. ECON. REV.* 61, 61–89 (1996); Torsten Persson, Gerard Roland, & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 *Q. J. ECON.* 1163, 1166 (1997).

<sup>35</sup> SARTORI, *supra* note 8, at 27-39; Matthew C. Stephenson & Jide Nzelibe, *Political Accountability Under Alternative Institutional Regimes*, unpublished m.s. (2009); Jide Nzelibe & Matthew Stephenson, *How the Separation of Powers Influences Electoral Strategies*, unpublished m.s. (2009).

cannot credibly threaten to remove a candidate from office, future elections will imperfectly control political behavior in the current time period.

In recent years, the incentive effects of elections have come under increasing attack from formal theorists, who argue that elections generate weak incentive effects.<sup>36</sup> Instead, such theorists argue that elections facilitate accountability mainly through *selection* effects. Elections allow voters to pick “good types” of candidates for office, who exert high levels of effort, develop expertise, and exercise discretion in desirable ways.<sup>37</sup> Precisely because officials exercise far-ranging discretion once in office, voters should attempt to pick good type candidates who will work diligently and carefully.

Unfortunately, there are critical selection problems with general-purpose elections too. The core problem is that candidate quality will often vary across policy dimensions. Candidates who would make for excellent officials in some policy domains like military affairs might not be especially good officials for other domains like education. In the completely bundled regime, voters must select a candidate either who is an “average” good type or who is a good type on some dimensions, but a bad type on others. These tradeoffs are an inevitable cost to general purpose elections that pick officials to exercise bundled power.

The general-purpose-bundled structure contrasts with the special-purpose-unbundled structure. Rather than selecting one official or institution to oversee all policy domains, three different officials could be elected to oversee three different policy domains. Each would have exclusive and exhaustive authority over one and only one policy. In the unbundled-special-purpose regime, the vote is no longer a weighted average of approval on many dimensions, and as a consequence, accountability is enhanced. Now, a vote for or against the head of the war department is a summary of voter views only on war policy. The special-purpose official cannot placate citizens with voter-friendly policies on education and health, while enacting disfavored policies in foreign affairs.

This reduction in dimensionality—making an institution responsible for one thing rather than many things—produces a related selection effect benefit as well. When policy domains are combined, voters must select an average good type or make trade-offs, picking an official who is a very good type on one dimension like national security but very bad on others like economic policy. In the unbundled regime, voters are free to select a good environment type to oversee the environment while selecting a good military type to oversee the war department. Unbundling of this sort allows voters to better match the underlying need of different policy domains to the relevant characteristics that make for good performance on that dimension. As such, government policy is likely to be not only more accountable, but also more effective precisely because good-type characteristics may not correlate across dimensions. Policy unbundling of this sort seems to enhance accountability in a wide range of political contexts,<sup>38</sup> including local government,<sup>39</sup>

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<sup>36</sup> Fearon, *supra* note 33.

<sup>37</sup> *Id.*

<sup>38</sup> See generally ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 158–61 (2000) (comparing the consequences for the agent when the principals exercise oversight unilaterally versus cooperatively). The logic of issue unbundling has been applied sporadically in other settings. This same theme is at play in the scattered assortment of justifications given for single-subject limitations in state constitutions, for instance in Colorado and Florida. Robert D. Cooter & Michael D. Gilbert, *Chaos, Direct Democracy, and the Single Subject Rule* (unpublished manuscript 2006) (explaining that stronger single-subject rules would improve direct democracy by preventing cycling and

direct democracy,<sup>40</sup> executive design,<sup>41</sup> and regulatory policy.<sup>42</sup> Unbundling authority also produces costs, which are discussed more extensively below. In particular, unbundling authority generates inter-policy coordination challenges, raises the costs of monitoring multiple political institutions, and transition costs when new policy domains emerge or old domains wane.

## B. Public and Private Organizational Structure

Once the choice between dividing authority by function and dividing by policy domain is made explicit, the design problem connotes an old economics literature on the optimal structure of firms. The analogy is imperfect, but it is also close enough that the literature helps clarify some of the relevant tradeoffs. Suppose a firm produces three types of foods (soup, fruit, and pasta), and the production process involves three types of functions: recipe design, manufacturing, and marketing. One alternative is to structure the firm into three departments—recipes, manufacturing, and sales—each of which performs their respective function for all the products—soup, fruit, and pasta. A second alternative is to divide the firm into three divisions—soup, fruit, and pasta—each of which independently performs the functions of recipe design, manufacturing, and marketing, but does so only for their single product. These two alternative structures are canonical organizational forms: the Unitary Form (U-form) and Multi-division form (M-form) respectively. Each structure also naively corresponds to a constitutional design alternative: whether to divide responsibility by tasks/functions or products/policies.

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riders); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 812–21 (2006) (setting forth the history of and principal justifications for the single-subject rule); Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 114–16 (2001) (explaining the purpose of single-subject limitations in state constitutions). The single-subject limitation is supposed to preclude logrolls in which policies favored only by a minority of politicians or voters are enacted together. The logic of unbundling then is general. In the single-subject context, logrolls could easily be welfare enhancing so long as the value to the minority receiving benefits along each dimension is high enough. The point is merely that the idea of unbundling has been usefully applied in a handful of other legal and policy contexts.

<sup>39</sup> Berry & Gersen, *supra* note 22.

<sup>40</sup> The unbundling intuition has also been used to explain one of the benefits of citizen initiatives. See John G. Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 103 J. POL. ECON. 587, 590 (1995) (explaining that the use of voter initiatives correlates to lower levels of state spending). For an extension of the implications of the direct democracy argument for the executive branch, see John G. Matsusaka, *Direct Democracy and the Executive Branch* 23–24 (unpublished manuscript 2007), available online at [http://www-rcf.usc.edu/~matsusak/Papers/Matsusaka\\_DD\\_Executive\\_2007.pdf](http://www-rcf.usc.edu/~matsusak/Papers/Matsusaka_DD_Executive_2007.pdf) (explaining that direct democracy changes the executive branch by allowing policy decisions on some issues to be made by citizens directly and by altering the institutional structure of the executive branch). By unbundling a single issue from a legislative logroll—be it budgetary or policy—voters are thought to be able to better ensure outcomes close to majoritarian preferences for the given policy dimension. *Id.* at 24.

<sup>41</sup> Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008).

<sup>42</sup> For example, one paper provides empirical support for the issue unbundling argument by contrasting elected and appointed utility regulators. Besley and Coate, 1 J. EUR. ECON. ASSN. 1176. Using panel data for U.S. states, they find that elected regulators systematically enact more consumer-friendly policies than appointed regulators. *Id.* at 1191.

Ford Motor Company before World War II is often held up as a U-form firm.<sup>43</sup> It was organized into functional departments like production, sales, and purchasing, each of which performed their function for all products. In the M-Form structure, popularized by General Motors and DuPont in the 1920's,<sup>44</sup> different divisions like Chevrolet and Oldsmobile operated as largely autonomously divisions.<sup>45</sup> No doubt the reality of actual firm structure on the ground only approximated these forms. Nevertheless, as ideal types, both models are perfectly viable ways to structure firms or organizations;<sup>46</sup> each has strengths and vulnerabilities that make one or the other preferable in different contexts.<sup>47</sup> Writing in the 1980s, Oliver Williamson concluded that history does not reveal an unambiguous march toward the M-form structure, "[s]ince 1945, however, large firms quite generally have undergone a reorganization along M-form lines."<sup>48</sup>

Like the U-form firm structure, Madisonian separation locates complementary tasks necessary for producing a single policy or product in different organizational divisions, for example, locating executive environmental authority and legislative environmental authority in different institutions, but executive environmental authority and executive education authority together. Like the M-form structure, the unbundled powers regime groups the complementary functional tasks of executive environmental and legislative environmental authority together in a single department but locates executive educational power and executive environmental power in different institutions. For current purposes, it is enough to note that the literature suggestions neither structure is optimal as a global matter. If the analogy has legs, then there is little reason to suspect dividing authority by government function is globally preferable to unbundling policy domains.<sup>49</sup>

Designing firms is different than designing States of course, but two factors in common are the need for evaluation of performance and coordination. First, consider evaluation. Part of the challenge of designing effective incentives is accurately appraising past performance. Consider a marketing department that does advertising for many different types of products in many different market segments. Alongside the marketing department on the organizational chart lies a manufacturing division, which produces products for many different market segments. In the U-form firm, supervisors must appraise the performance of the marketing department and the production department based on aggregate performance across a series of distinct products. When bicycle sales fall, they must determine whether it is the result of bad advertising, the production of a weak product, or a hard winter. Evaluation of performance is made more difficult, in part, because of the challenges in linking the efforts of different subunits to overall product performance. When the scope of activities is small, the oversight produced by the U-

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<sup>43</sup> See Eric Maskin, Yingyi Qian, and Chenggang Xi, *Incentives, Information, and Organizational Form*, 67 REV. ECON. STUD. 359, 360 (2000).

<sup>44</sup> See ALFRED CHANDLER, JR. STRATEGY AND STRUCTURE (1962); See OLIVER E. WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR: AN INQUIRY INTO THE EFFECTS OF ORGANIZATION FORM ON ENTERPRISE BEHAVIOR 113 (1970).

<sup>45</sup> Id.

<sup>46</sup> See Maskin et al., *supra* note 43, at 360.

<sup>47</sup> Id. at 363.

<sup>48</sup> WILLIAMSON, *supra* note 44, at 117.

<sup>49</sup> Id.

form structure is desirable,<sup>50</sup> but when the operations of an enterprise become increasingly complex, the problems of coordination evaluation grow more severe.<sup>51</sup>

In the government structure setting, citizens rather than upper level management are tasked with evaluating performance. When responsibility for a given policy (product) is shared, accurately attributing responsibility can be costly in much the same way. Early in the history of the United States, the federal government did relatively little, but over time, the volume of policymaking activity has grown enormously. In part, selecting and controlling federal officials is challenging because each branch exercises functional authority in so many different substantive domains. When the Federal government administered only a couple of policies, say foreign trade and military defense, it might have been better to have two departments—legislative and executive—each of which exercised their authority over both trade and defense. But when there are hundreds of policy domains, and voters must evaluate “legislative performance” and “executive performance” in the aggregate, evaluation is anything but easy. Dividing authority by policy domain eases the evaluative burdens on citizens. A judgment about whether environmental policy succeeded or failed is still required, as is an inference about whether success is due to government effort or chance. But citizens need not make an inference about the relative credit or blame attributable to different branches because the functional authority is combined in the same unbundled institution.

Cast in this way, combining tasks/functions and unbundling products/policies seems like it might be globally superior but it is not. Part of the reason has to do with the challenges of coordination.<sup>52</sup> In the U-form firm, supervisors must coordinate one department’s manufacturing of a product with another department’s advertising. In small organizations with only a handful of products, the costs of coordinating across tasks are modest. In larger more complex organizations, the U-form is often said to lag because the burdens of coordination grow too great for the centralized management (or citizenry).<sup>53</sup>

Two standard coordination problems are attribute matching and attribute compatibility.<sup>54</sup> Attribute matching involves coordinating among several tasks, all of which are necessary for a successful product. The tasks might be “assembling subroutines for a software package, synchronizing travel plans” or ensuring that nuts and bolts are the same size.<sup>55</sup> Attribute compatibility involves less critical, but still useful coordination like designing two different

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<sup>50</sup> See Maskin, *supra* note 43, at 360.

<sup>51</sup> CHANDLER, *supra* note 44, at 111; Williamson calls the difficulties of the U-form enterprise “indecomposability, incommensurability, nonoperational goal specification, and the confounding of strategic and operating decisions.” Williamson, *supra* note at 114.

<sup>52</sup> Ingyi Qian, Gerard Roland, Chenggang Xu, *Coordination and Experimentation in M-form and U-Form Organizations*, 114 J. POLIT. ECON. 366 (2006).

<sup>53</sup> The conventional account of the M-form is that it removes the burden of operational decisions and the need for coordination from top-level executives by delegating those to more distinct divisions, “each having complete jurisdiction over manufacture, sales, and finance, subject to control from the central authority.” WILLIAMSON, *supra* note 44, at 115 (quoting Donaldson Brown, *Pricing Policy in Relation to Financial Control*, 1 MANAGEMENT AND ADMIN. 195 (1924)).

<sup>54</sup> Maskin et al, *supra* note 43, at 367-68.

<sup>55</sup> *Id.*

automobiles so that the same engine or parts can be used in both. Here, if the same parts are not used in both engines, both cars will run, but potential efficiencies will be lost.

The attribute matching problem in government involves ensuring that executive and legislative actors work together within a policy domain. When Congress passes a statute that requires robust air pollution controls and EPA declines to implement new regulations, this is akin to attribute matching failure. The combined-functions-unbundled-powers regime makes this type of failure less likely. When regulations implementing two related parts of a statute use two different technological standards, this is an attribute compatibility problem. If different agencies or different regulations utilized the same technological standards, it would make matters easier for both government and industries. One idea from the literature is that the M-form (here unbundled authority) generally performs better at solving the attribute matching problem, but not as well at achieving attribute compatibility.<sup>56</sup>

In the context of separating functions and unbundling powers, the choice depends on the relative costs of coordinating decisions across functions within a policy domain versus the costs of coordinating across policy domains within functions. When the benefits of coordinating across policies are high—for example, when labor and environmental policies will fail if not coordinated—then separating functions and bundling policies will be preferable. When the benefits of coordinating across functions within a policy are high, then combining functions and unbundling powers will be better. The modest claim is that it will not always be more important to coordinate across policies (products) than across functions (tasks).

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The problem of structuring government authority is clearly not identical to the problem of structuring authority in firms. But the tasks for citizens controlling government and executives controlling firms have much in common. The analogy is only that, but if it is often preferable to combine functional authority while dividing substantive responsibilities in private organizations, it is worth asking why the same would not be true for the State.

### C. Unbundling and the Distribution of Federal Powers

Take the traditional categories of Legislative (L), Executive (E), and Judicial (J) as the primary way to describe the functional authority of government. Obviously, the separationist view is that these three types of government power should be allocated to three different government institutions.<sup>57</sup> For ease of exposition, suppose then that there are three important

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<sup>56</sup> Id. at 369. The M-form also generally outperforms the U-form structure in terms of innovation and experimentation because the M-form can experiment in a distinct division before adopting it firm wide. Small scale experimentation in the U-form is always dominated by full-scale experimentation because the small-scale experimentation produces attribute-matching costs. Id. at 370. Suppose one wanted to see whether internal separation of functions facilitated government performance. In the current U.S. regime that is all but impossible. Functions are combined or not, system-wide. In the unbundled structure, several different institutions exercise policy-making authority for one and only one policy domain. One branch could separate executive authority for that domain from legislative authority for that domain. Another branch could continue to operate with such powers combined. Experimentation of this sort would be imperfect because it would be impossible to compare environmental policy established using separation to environmental policy not using separation. Nevertheless, at least some experimentation is possible without adopting system-wide changes. The U-form must innovate in total or not at all.

<sup>57</sup> This idea is today mainly represented by the formalist school in separation of powers scholarship. See, e.g., MARTIN REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 102-108 (1995); David Currie, *The Distribution of*

policy domains that any national government must address, denoted A, B, and C. A might be international policy, B domestic policy, and C economics, or any other set of policy domains. A series of straightforward design alternatives exist, which might be summarized with a 2x2 table.

(1) U.S.-style Madisonian separation is a *separated-bundled* regime. Three institutions exercise different and exclusive functional authority over the entire bundle of topical policies. (2) The parliamentary alternative is a *combined-bundled* regime. Rather than separate government powers, functional authority is combined within a single institution (parliament) that exercises authority over the entire set of policies. (3) Special-purpose local government units are *combined-unbundled* institutions. Such institutions exercise combined functions in topically limited domain.<sup>58</sup> (4) Elected officials in state government that exercise only executive authority are *separated-unbundled* institutions. Their authority is separated by function, but also limited by topic. So understood, the fight between presidentialists and parliamentarists concerns the choice between regimes (1) and (2). The trouble is that this choice also depends on the relative performance of regimes (3) and (4). The paper articulates and defends primarily regime (3) with periodic allusions to regime (4).

Many other familiar institutions can be located within these categories or as hybrid arrangements. In practice, unbundled arrangements are partial. Responsibility for most policies remains in a general purpose institution or institutions, while responsibility for a few policies is spun off to a separate entity. A perfectly-separated-perfectly-unbundled structure in the artificial example above with three functions and three policies would entail nine different institutions, each exercising one type of functional authority over only one policy domain. There would be an environment executive, an environment legislator, a military legislator, a military executive, etc. Judges too would be specialized military judges or specialized environment judges. This regime produces the greatest possible fragmentation of government authority.

Separated functions institutions that are also unbundled sometimes further sub-divide authority as well,<sup>59</sup> as in the case of some administrative agencies.<sup>60</sup> The APA's provisions require that the employees or officers who adjudicate cases are different than those who investigate or prosecute cases.<sup>61</sup> Due process requirements dictate that investigation and ultimate

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*Powers after Bowsher*, 1986 SUP. CT. REV. 19; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994).

<sup>58</sup> For simplicity sake, judicial authority is included with executive and legislative, but much of the theoretical argument applies with greatest force to legislative and executive authority.

<sup>59</sup> See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (explaining how internal separation powers regime could check overall authority within the executive branch); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 612 (2001) (arguing that existing diffusion of power within branches provides sufficient checks for concerns about excessive concentrations of authority).

<sup>60</sup> See Strauss, *supra* note 13.

<sup>61</sup> See generally Kenneth Culp Davis, *Separation of Functions in Administrative Agencies. III. Interpreting the Administrative Procedure Act*, 61 HARV. L. REV. 612, 612-614 (1948); Richard J. Pierce, Jr. 1 ADMINISTRATIVE LAW TREATISE 551-55 (2002).

judgment be separated in many settings.<sup>62</sup> Such institutions are separated by function, unbundled by policy domain, and then separated by function again.

The main descriptive point of the paper is that in the United States one observes a mixture of these institutional ideal types notwithstanding the theoretical dominance of separation of functions in constitutional rhetoric. A sensible next question is whether the existing mix of unbundling and functional separation is optimal. Although the paper cannot answer this question with certainty, the relevant thought experiment is to maintain the existing U.S. constitutional structure, with one exception. Authority to act in one policy domain would be taken from the other political branches and given to a new political institution with directly elected leadership. Constitutional powers would remain mostly bundled (within the federal government) and mostly functionally separated according to the conventional executive, legislative, and judicial division. But some discrete policy authority would be located exclusively and exhaustively elsewhere. Would partial unbundling of this sort make the world better or worse?

To start with, note that partial unbundling is unlikely to disrupt the management of policies that remain bundled and separated. The legislature and the executive would continue to exercise precisely the same powers in precisely the same way for all but one policy domain. When decisions about the unbundled policy produce externalities on bundled policies (or vice versa) there would be coordination costs, a point discussed below. But importantly the existing regime produces coordination costs across functions too;<sup>63</sup> the comparative question is which produces greater coordination costs.<sup>64</sup>

Whereas the impact on the remaining separated branches and bundled policies would be modest, the impact on the unbundled policy dimension could be significant. Expertise and ability could be narrowly tailored to the policy domain in question. The leadership of the institution could no longer produce private interest policy on some dimensions and placate monitors with public interest policy on others. If so, then creating even one unbundled institution to regulate a single important policy domain would seem to be a net improvement over the current state of affairs.<sup>65</sup> Such reforms are unlikely as a predictive matter, and they would come with costs as well as benefits. Nevertheless, the basic contours of the federal system could remain largely untouched, while some further unbundling were pursued.

## II. CONSTITUTIONAL DESIGN PRINCIPLES

With the four major institutional alternatives and a theoretical analysis of some of the benefits of unbundling powers on the table, this Part discusses the relationship between unbundled institutions and a standard laundry list of design principles in constitutional theory. Separation of

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<sup>62</sup> See generally Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984); PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 123.

<sup>63</sup> See Part II.F, *infra*.

<sup>64</sup> See *id.*

<sup>65</sup> If this alternative looks too radical, executive authority for a single policy domain could be parceled off, consistent with a separated and partially unbundled office. See Berry & Gersen, *supra* note 14. Here, the question is whether implementation of law would be better if the public could be one general purpose executive to do most things, and one single purpose executive to do just one.

powers debates tend to obscure the possibility of unbundling policies in lieu of or in combination with separating functions. As a result, many standard tropes in the field are either wrong or incomplete.

### A. Accountability

Advocates of presidential (separated-bundled) and parliamentary (combined-bundled) democracy, both claim the accountability mantle. Arguably, however, combined-unbundled institutions would produce more accountability than either common alternative alone. Accountability, as used in constitutional parlance, entails at least two related preconditions. The first is *clarity* of responsibility.<sup>66</sup> One problem with separated functions is that because the responsibility for policy is shared among multiple institutions, it is often costly to accurately allocate credit (blame) for policy success (failure). Not so in the parliamentary alternative because there is a single institution or coalition with clear institutional responsibility.<sup>67</sup>

The second accountability idea concerns the ability of citizens to effectively utilize information about institutional responsibility.<sup>68</sup> That is, once voters make an accurate inference that Official X or Institution Y is responsible for failed Policy A, how effectively can they utilize elections to control political behavior? Separationists argue that electing the legislature and executive separately allows voters to condition sanctions on two different pieces of information and therefore more effectively control officials.<sup>69</sup>

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<sup>66</sup> See, e.g., Ethan Bueno de Mesquita & Dimitri Landa, Transparency and Clarity of Responsibility (Sept. 25, 2007) (unpublished manuscript, on file with author); Margit Tavits, *Clarity of Responsibility and Corruption* 51 AM. J. POL. SCI. 218 (2007); G. Bingham Powell, Elections as Instruments of Democracy: Majoritarian and Proportional Visions 52 (2000). The idea of institutional clarity has been a core part of the debate between presidentialists and parliamentarists for at least a century. It was at the root of the critiques of presidentialism. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 200-03 (1873).

<sup>67</sup> See generally G. BINGHAM POWELL, ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS (2000). More recently, scholars have argued that other sub-institutional conditions affect this calculus as well, such as majority/minority status of the government, party cohesion, opposition committee chairs, and opposition control of upper chambers in bicameral settings. Timothy Hellwig & David Samuels, *Electoral Accountability and the Variety of Democratic Regimes*, 38 Brit. J. Polit. Sci. 65, 69 (2008); Powell, Elections as Instruments of Democracy, *supra* note 67. See also Cheibub and Przeworski, *Democracy, Elections, and Accountability for Economic Outcomes*, in Democracy, Accountability, and Representation (Przeworski, Stokes, Manin, eds. 1999).

<sup>68</sup> See Hellwig & Samuels, *supra* note 67, at 68 (distinguishing these two elements of democratic accountability); Thomas J. Rudolph, *Who's Responsible for the Economy? The Formation and Consequences of Responsibility Attributions*, 47 AM. J. POL. SCI. 698 (2004).

<sup>69</sup> Compare Torsten Persson, Gerard Roland, & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q. J. ECON. 1163, 1166 (1997), with Matthew C. Stephenson & Jide Nzelibe, *Political Accountability Under Alternative Institutional Regimes*, unpublished m.s. (2009); Jide Nzelibe & Matthew Stephenson, *How the Separation of Powers Influences Electoral Strategies*, unpublished m.s. (2009). Relevant institutional variables might include "separate executive and legislative elections, variation in the electoral cycle for executive and legislative elections and the possibility of cohabitation in semi-presidential systems." Hellwig & Samuels, *supra* note 67, at 68. In pure presidential regimes, voters directly elect the executive and the legislature separately for fixed terms. Id. See also POWELL, *supra* note 67; Juan Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990). In semi-presidential systems, the president is elected for a fixed term, but the legislature is not. See MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 1992. See generally Robert Elgie, ed., SEMI-PRESIDENTIALISM IN EUROPE (1999). Concurrent legislative and executive elections may enhance also enhance incentive effects because both branches may be held to account in

To be sure, these two ideas about government accountability are related. If one cannot identify who failed or succeeded in government, it will be impossible to control government officials with elections. And if elections are ineffective ways of controlling public officials, then it will not much matter if institutional clarity is high or low. Nevertheless, a set of institutions might perform well on one dimension, but poorly on the other; democratic accountability requires success on both,<sup>70</sup> or an institutional workaround that compensates for electoral failure. To oversimplify the conventional wisdom, the parliamentary system tends to produce more institutional clarity than presidentialism because only one institution is responsible for policy outcomes. Presidential regimes tend to produce stronger incentives because institutional actors can be selected and sanctioned separately, conditional on different sources of information. In either the combined or separated functions regimes, however, further unbundling produces even greater accountability.

### *1. Institutional Clarity*

The problem of institutional clarity in democracy is neither new nor unique to political theory.<sup>71</sup> When the authority to make decisions is shared, as by a council or a legislature or any group, it can be difficult to control the behavior of the group by selecting or sanctioning any one of the members. Finger pointing inevitably follows policy failure and when things go well in politics, all parties claim responsibility. In economics, this is a standard problem of team production.<sup>72</sup> When individual effort is an input to a single jointly-produced output, and individual effort cannot be directly observed by the manager (principal), there is often an incentive for members of the team (agents) to shirk.<sup>73</sup> This problem can be managed of course; the relevant question is how well different institutional arrangements do so.

Suppose citizens are unhappy with the federal government's policy decisions about the regulation of air pollutants produced by stationary sources. Is the problem that Congress drafted a bad statute in the Clean Air Act? Is it that EPA proposed and implemented undesirable New Source Review Rules? Or, did judges strike down the wrong provisions of EPA's regulations? Are all of these government institutions to blame? Are any? When the power to make policy in a given domain is functionally differentiated across actors or institutions, accurately assigning responsibility is costly.

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any given election. Hellwig and Samuels, *supra* note 67, at 70; David Samuels, *Presidentialism and Accountability for the Economy in Comparative Perspective*, 98 AM. POL. SCI. REV. 1 (2004); *see also* Matthew S. Shugart, *The Electoral Cycle and Institutional Sources of Divided Presidential Government*, 89 AM. POL. SCI. REV. 327 (1995).

<sup>70</sup> *See generally* POWELL, *supra* note 67; Joshua A. Tucker, *Regional Economic Voting: Russia, Poland, Hungary, Slovakia and Russia, 1990-99* (2006); Raymond Duch & Randolph T. Stevenson, VOTING IN CONTEXT: HOW POLITICAL AND ECONOMIC INSTITUTIONS CONDITION THE ECONOMIC VOTE (2008); Alexander C. Pacek & Benjamin Radcliff, *the Political Economy of Competitive Elections in the Developing World*, 39 AM. J. POL. SCI. 745 (1995); Sam Wilkin, Brandon Haller & Helmut Norpoth, *From Argentina to Zambia: A World-Wide Test of Economic Voting*, 16 ELECTORAL STUD. 301 (1997).

<sup>71</sup> *See generally* GARY J. MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* (1993)

<sup>72</sup> Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. (324) (1982).

<sup>73</sup> The study of team production occupies an enormous body of literature and conclusions about moral hazard and adverse selection depend critically on settings and assumptions. The idea in the text and alluded to throughout is one of the possible problems associated with such a structure. For a general, if technical overview, *see* PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* (2005).

When functions are combined and authority allocated by topic, the problem of institutional clarity is obviated because functional responsibility is not scattered across multiple institutions. When environmental policy falters, it is the responsibility of the environmental branch. By eliminating overlapping responsibility for a given task, the unbundled powers regime links institutional effort to policy success, which provides greater institutional clarity and as a result, a stronger foundation for electoral control.

## *2. Institutional Control*

To be fair, some parliamentary variants accomplish this same feat equally well. Whenever government power is clearly aligned with one institution or political party, near-perfect institutional clarity is produced. The problem is that parliamentary alternative fixes the institutional clarity problem, while leaving the institutional control problem untouched. Even if citizens could cheaply and accurately assign political responsibility to the right institution, accountability also requires that they be able to do something meaningful with that information.

Suppose that for one reason or another, it is clear that one institution is transparently to blame for the failure of environmental policy. For a voter that cares about the economy, war, and the environment, what is she to do when the institution has botched the environment while performing well on the economy and the war? Even when institutional clarity of responsibility is high, when policy domains are bundled, the ability to select and control officials is undermined. To elect capable environmental leadership voters must often elect officials that are less capable at leading with regards to war and peace. When an institution succeeds at fixing the environment, but fails in its war planning, the public can reward the institution for doing well on one front or punish it for failing on the other, but cannot do both. Institutions that combine functions and unbundle policy tend not to share this weakness. Because a single institution has all responsibility for a given policy domain, clarity is high, and because the institution is responsible for no other policy domains, public control is greater on the margin.

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The unbundled regime generates more institutional clarity and responsiveness than the separated function alternative. Combined-functions-unbundled-powers arrangements facilitate accountability because they produce clarity about which institution is responsible for which policy and make elections more effective mechanisms for selecting and sanctioning public officials. So understood, the fight between separationists and combinationists over the accountable mantle seems starkly incomplete. Unbundling powers would seem to produce more accountability than either of these standard alternatives.

## B. Tyranny & Liberty

Tyranny tops any list of evils to be avoided in constitutional theory. Any institution that exercises combined functional authority has long been the subject of derision.<sup>74</sup> The oft-quoted Madison passage from Federalist 47 reminds that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether

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<sup>74</sup> See generally Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998) (discussing link between separation of powers and protection of liberty); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967); Candace H. Becket, *Separation of Powers and Federalism; Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & M. L. REV. 635, 640 (1988).

hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” As Montesquieu eloquently put it:

When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.<sup>75</sup>

If this statement of the problem is famous, Madison’s proposed solution is more so: balanced branches exercising separated government functions and competing against each other so as to avoid tyrannical government.<sup>76</sup> The precise role that elections play in this structural scheme is unclear. Must functional powers be separated because elections will not check officials or are effective elections a necessary prerequisite for separation of functions to avoid tyranny? Regardless of Madison’s view, it should be clear by now that structure of government authority has implications for the power of elections and vice versa. If elections were perfect controls, the threat of tyranny from combined powers would seem to be attenuated.

This theme from Montesquieu actually incorporates at least three related normative concerns. First, when government functions are combined and not checked by other institutions, there is a risk that general legal pronouncements will be applied arbitrarily, inconsistent with the rule of law.<sup>77</sup> Second, by requiring the consent of multiple political institutions, the U.S. constitutional design raises the costs of government action, sacrificing efficiency (speed, decisiveness, and so on) to protect liberty and minoritarian interests. The checks and other vetogates in the U.S. system help avoid the tyranny of (bare) majorities. The checks mechanisms are built on an assumption of functional separation; without separation, there would be no different entities to check one another. Third, separation of powers is a way to enhance accountability in government. By clearly delineating each branch’s sphere of functional authority, citizens (and other branches) can more easily hold the relevant government officials responsible. The greater accountability of the unbundled regime has already been discussed. The other two lines of inquiry are treated below.

These ideas remain a steady part of the conventional wisdom, but they have come under increasing strain in recent years.<sup>78</sup> One line of criticism argues that the Madisonian solution to the problem of concentration of political power is conceptually incoherent<sup>79</sup> or at least under-theorized.<sup>80</sup> The relationship among a rigid separation of government functions, balance of

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<sup>75</sup> Federalist No. 47 (Madison) (quoting Montesquieu).

<sup>76</sup> Federalist No. 51 (Madison). *See generally* CASPER, SEPARATING POWERS, *supra* note 1 at 9-10.

<sup>77</sup> Magill, *supra* note 1; Thomas O. Sargentich, *The Contemporary Debate About legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987).

<sup>78</sup> *See generally* SEPARATION OF POWERS: DOES IT STILL WORK? (Robert A. Goldwin & Art Kaufman, eds. 1986);

<sup>79</sup> *See* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001).

<sup>80</sup> *See* Magill, *supra* note 1; JACK. N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 282 (1996) (“Federalist 51 does not so much explain how these ambitious will work as assume the differences in election and tenure among the branches will foster the desired attachment”).

aggregate authority, and good government is hardly self-explanatory.<sup>81</sup> If balance of powers were the key to checking excessive government authority, ever-increasing federal powers would seem to be unobjectionable so long as all three branches gained powers proportionately, a view at fundamental odds with at least many founders.<sup>82</sup> A second line of attack argues that abstract government institutions do not compete with each other as the Madisonian vision assumes; individual officials do.<sup>83</sup> Individuals have party loyalties and personal interests, however, which may systematically diverge from institutional interests.<sup>84</sup> Such loyalties might facilitate inter-branch competition during times of divided government, but undermine inter-branch competition during times of united government.<sup>85</sup> Whether one takes these critiques to be devastating or partial, they suggest some renewed interest is justified in alternative institutional means for achieving the stated constitutional goals.

### *1. Arbitrary Exercise of Discretion*

Note that even intense critics of the Madisonian solution, take the underlying statement of the problem to be self-evident. As Bruce Ackerman puts it:

The power to make laws must be separated by the power to implement them. If politicians are allowed to breach this barrier, the result will be tyranny. . . . Although we may pretty this conclusion up with a citation from Madison or Montesquieu, it is simple common sense.<sup>86</sup>

Yet, one reason this idea seems like “simple common sense” is that the separation of powers debates have so diligently ignored alternative dimensions for dividing government authority. Perhaps when the power to make policy is bundled and therefore an institution exercises substantive authority over everything, the combination of functions inevitably gives rise to tyranny. But it simply does not follow that combining functional authority in limited-purpose institutions does so too. If tyranny is produced when too much aggregate authority is located in one place, unbundling powers is a potential substitute for separating functions.

The darkest possibility for the combined-functions-unbundled-powers alternative is that each unbundled policy domain is taken over by a local tyrant exercising combined functional authority. This might or might not be worse than a single tyrant with authority for all bundled policy dimensions, but it would hardly be something to celebrate. But here, the importance of

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<sup>81</sup> See JACK. N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 282 (1996) (“Federalist 51 does not so much explain how these ambitious will work as assume the differences in election and tenure among the branches will foster the desired attachment”). See also Levinson & Pildes, *supra* note 1, at 2317.

<sup>82</sup> This line of attack was explicitly addressed by Madison in Federalist No. 47, and these ideas have been replicated many times over in the commentary. See Federalist No. 47 (Madison) (“One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty.”).

<sup>83</sup> Levinson & Pildes, *supra* note 1.

<sup>84</sup> *Id.*

<sup>85</sup> Another gloss on the same underlying ideas would be that there are agency problems between branch interests and the officials that administer policy within a branch. Sometimes these problems will be slight; other times, severe.

<sup>86</sup> Ackerman, *supra* note 6, at 689.

elections becomes paramount. For local tyrants to dominate special-purpose political institutions, citizens would have to select and then reelect local tyrants. If the electoral system is working, it is hard to see why alleged tyrants could ignore the political preferences of their constituents and still be reelected. If the political system is fundamentally broken, then parchment barriers are unlikely to protect individual liberty in any case. In the normal course of affairs, if so-called elected tyrants exercise their combined executive and legislative authority in an undesirable way, they will lose elections. Because policies are unbundled, elections are more effective controls to boot.

Setting aside electoral controls on local tyrants, restrictions on the substantive domain in which authority can be exercised also serve as a partial constraint. Officials in unbundled institutions could ignore substantive restrictions, for example, implementing military policy from the environment branch. But it seems odd to have faith that the substantive restrictions on the domains in which the national legislature can act will control the federal government, while assuming substantive limits on unbundled institutions would not. The papers are not exactly filled with reports of tyrannical over-reach by sewer districts. The basic intuition, also at evidence in federalism itself, is that systems can control the excessive concentration of power in two ways: limit the domain in which a political institution may act or limit the way in which the institution's power can be exercised. Both separation of functions and unbundling powers are possible responses to excessive concentration of political authority.

If this approach seems fanciful or somehow inconsistent with constitutional ideals, note that some of the Supreme Court's recent pronouncements follow much the same logic: the risk posed by excessive discretion can be controlled by restricting the domain in which that power is exercised. In *Whitman v. American Trucking Association*,<sup>87</sup> the Supreme Court considered a nondelegation challenge to a provision of the Clean Air Act. Although the aspirations of the nondelegation doctrine are contested,<sup>88</sup> one standard account holds that the doctrine helps avoid the arbitrary exercise of discretion by the bureaucracy. The Court upheld the challenged provision, holding that the act provided a sufficient "intelligible principle" to guide the EPA's exercise of discretion.<sup>89</sup> In its exposition of the nondelegation doctrine, the Court wrote:

It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define "country elevators," which are to be exempt from new-stationary-source regulations governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy.<sup>90</sup>

According to the Court, controlling potentially arbitrary government power can be legitimately accomplished in two ways. Either discretion can be substantively limited by providing a more

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<sup>87</sup> 531 U.S. 457 (2001).

<sup>88</sup> See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). Cf. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004).

<sup>89</sup> 531 U.S. at 473-74.

<sup>90</sup> *Whitman v. Am. Trucking Ass'n*, 531 U.S. at 475 (internal citations omitted). See also *Loving v. United States*, 517 U.S. 748, 772-73 (1996); *United States v. Mazurie*, 419 U.S. 544, 556-557 (1975).

serious intelligible principle or the domain in which largely unbounded discretion is exercised can be narrowed. Indeed, the nondelegation doctrine is part of the Court's broader separation of powers jurisprudence, in which avoiding the arbitrary exercise of state power is a running theme.<sup>91</sup> Combined-functions-unbundled-powers models take this second view of institutional restraint.

## 2. *Minoritarian Protections*

Madisonian separation with checks is also said to avoid tyranny by raising the enactment costs of making new legislation.<sup>92</sup> Advocates of checks like presentment and split powers argue that requiring the agreement of multiple institutions makes it less likely that the government will intrude upon individual liberties or, more generically, produce bad policy.<sup>93</sup> "The cardinal virtue of the Madisonian separation of powers is supposed to be that, by raising the transaction costs of governance, it preserves liberty and prevents tyranny."<sup>94</sup> National institutions that combine functions and unbundle powers would eliminate the need for inter-branch agreement within a given policy domain. This shift would almost certainly change the set of government policies produced (or else the entire endeavor would be pointless), and the nightmare scenario would be a stream of new legislation that systematically infringes on minority interests.

Institutions that combine functions in a single political institution should reduce enactment costs for new policy. Some may find this a net benefit, but if one favors high enactment costs to avoid liberty-infringing legislation, there are other ways to raise them. Voting rules are used throughout the Constitution, legislation, and government.<sup>95</sup> If it should be very costly to produce legislation, then the constitution could simply require a supermajority vote to pass any new measure rather than a simple majority of both houses and the signature of the president. Unlike presentment, voting rules are easy to administer and straightforward to calibrate if the costs of new policy should be made a little higher or a little lower.<sup>96</sup> Like voting

<sup>91</sup> See, e.g., *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."). See generally Brown, *supra* note 74 (collecting cites).

<sup>92</sup> U.S. Const, art. I, § 7, cl. 2. See also WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 59 (3d ed. 2001). For a general discussion of legislative enactment costs, see Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Enactment Costs*, 118 YALE L.J. 2 (2008).

<sup>93</sup> U.S. Const, art. I, § 7. See, e.g., Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145 (1992) (bicameralism); William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) (presentment).

<sup>94</sup> Levinson & Pildes, *supra* note 1, at 2338. See, e.g., Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998); 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, 56 (2001); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1236 (2002).

<sup>95</sup> Adrian Vermeule, *Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004) (discussing justification for supermajority and sub-majority voting rules for the legislature that are specified throughout the Constitution).

<sup>96</sup> See Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007) (discussing tradeoffs between voting rules and other mechanisms). See generally ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* (2007).

rules, timing rules raise enactment costs.<sup>97</sup> Requiring two simple majority votes in two different time periods before a measure is passed can be roughly equivalent to a supermajority voting rule in one time period.<sup>98</sup> Timing rules may be especially effective at avoiding temporary majoritarian factions that arise in politics,<sup>99</sup> one of the evils that presentment targets. One finds remnants of timing rules in the existing constitutional rules and legislative rules, but they could be used more extensively in the unbundled powers regime if necessary. To be sure, such rules can be and obviously are utilized in separation of functions regimes also. The point is just that increasing procedural hurdles for government action is the easy part of constitutional design. It can be accomplished via separation of functions, but also with many other tools.

That is not to say that using checks—the requirement that multiple institutions assent before action is taken—affect enactment costs in precisely the same way that voting rules or timing rules do. Both a supermajority voting rule without presentment and a simple majority rule with presentment generate higher enactment costs than a simple majority rule without presentment. However, the legislation produced in either of the first two settings may differ. The simple majority with presentment regime will produce policy that the President favors but that only a simple majority (not a supermajority) of legislators favors. In the supermajority rule without presentment regime, this subset of legislation will not be produced. Either regime raises enactment costs and filters out some legislation favored by a simple majority of legislators, but checks and voting rules will not always produce identical legislative outputs. To favor checks over voting rules, however, one would need an account of why one subset would be more intrusive into individual liberty than the other.

Many advocates of checks, however, have something additional in mind that makes checks function in a different way than voting rules or timing rules. Not only is it important to raise enactment costs, nor only to ensure the assent of multiple institutions. It matters, for example, that the President must sign or veto legislation because the President is selected by a national electorate. Because Congress is selected on a different time interval and using local rather than national elections, the approval of both Congress and the President generally means that legislation has been approved by three bodies (House, Senate, and President). Legislation that passes these hurdles is likely to be better than legislation that merely passes a two-thirds

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<sup>97</sup> See Jacob E. Gersen & Eric A. Posner, *Timing Rules & Legal Institutions*, 121 HARV. L. REV. 543 (2007) (presenting framework for analyzing timing rules and contrasting with supermajority voting rules).

<sup>98</sup> *Id.*

<sup>99</sup> See generally Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 250 n. 7 (2007). The idea of temporary factions is featured prominently in the Federalist Papers. For example, Madison argues in Federalist No. 10 that the republican form of government is a partial shield against the willingness of citizens to sacrifice justice on the basis of “temporary” or “partial” views. Federalist No. 10 (Madison), in THE FEDERALIST 56, 56-57 (Wesleyan 1961) (Jacob E. Cooke, ed). Similarly, in Federalist No. 27, Hamilton draws a parallel between factions and “temporary views.” Speaking of representatives, Hamilton notes that “[t]hey will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors or temporary prejudices and propensities, which in smaller societies frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes, which though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.” Federalist No. 27 (Hamilton), in THE FEDERALIST 171, 172. Hamilton's concluding remarks in Federalist No. 85 echo the negative vision of temporary views and temporary factions: “No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country or to his posterity, an improper election of the part he is to act.” Federalist No. 85 (Hamilton), in THE FEDERALIST 587, 590.

supermajority vote in the legislature, or so the argument goes. So understood, checks are better than or at least different from voting rules.

This view of checks has intellectual precursors in the idea of mixed government, in which different political institutions drew legitimacy from different sources.<sup>100</sup> Specifying the relationship between mixed government and separation of powers is tricky, particularly in a world in which “the people” are the source of democratic legitimacy.<sup>101</sup> Nevertheless, even without high democratic theory, it is perfectly sensible to deem the representation of different groups of societal interests in government desirable. If rich, poor, north, south, local, and national interests all agree on a course of action, surely it is more likely to be wise policy.

As applied to the U.S. case, however, there are a number of problems with this view. First, it is a descriptively inaccurate account of presentment because the President’s approval is, in constitutional fact, interchangeable with a two-thirds supermajority of the legislature.<sup>102</sup> Legislation can be implemented without the President’s signature so long as a supermajority of the legislature overrides the veto.<sup>103</sup> Second, the view assumes rather than concludes that the President is more likely to have different political preferences than a minority of the legislature. True, the President is selected by a national electorate and legislators are selected by more local electorates.<sup>104</sup> As others have emphasized, however, the relevant comparison is not a random legislator versus the President, but instead the median or pivotal legislator versus the President.<sup>105</sup> On this front, there is little evidence that the President has views that sharply diverge from those of the median legislator, at least in any way that is systematically more protective of individual liberty.

Indeed, when government is united and public officials are partisans, presidential views are likely to converge with the majority coalition in Congress.<sup>106</sup> Far from providing an independent justification for checks as roadblocks for tyranny as opposed to voting rules, this line of inquiry reveals one of the core vulnerabilities of the checks and balances system and one of the strengths of voting rules.<sup>107</sup> Unless officials within branches prioritize institutional interests ahead of personal or partisan ones, the effectiveness of checks rests on the lucky happenstance of divided government.<sup>108</sup> Government in the United States often is often divided, but this seems too loose a peg for democracy’s heavy hat. The voting rule approach does not hinge on historical happenstance. And if an existing voting rule produces too little protection for

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<sup>100</sup> See generally MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 102-104 (1995) (discussing transition from theories of mixed government to separation of powers). See also VILE, *supra* note 1, at 23; George Lawson, *An Examination of the Political Part of Mr. Hobbs’ Leviathan* (1657).

<sup>101</sup> REDISH, *supra* note 12, at 103.

<sup>102</sup> U.S. Const., Art. I, sec. 7.

<sup>103</sup> *Id.*

<sup>104</sup> Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. REV.* 1217 (2006).

<sup>105</sup> *Id.*

<sup>106</sup> Levinson & Pildes, *supra* note 1, at 2324-25.

<sup>107</sup> VERMEULE, *supra* note 96.

<sup>108</sup> See MORRIS FIORINA, *DIVIDED GOVERNMENT* 6 (2d ed. 1996) (government divided roughly 40 percent of the time from 1832-1992); see also Levinson & Pildes, *supra* note 1, at 2330 (discussing implications).

liberty and too much legislation, it can be easily adjusted. Compare the requirements of presentment, advise and consent, or bicameralism. These are on-off switches, increasing enactment costs but in crude ways that are nearly impossible to adjust.<sup>109</sup>

### C. Energetic Government

Avoiding tyranny was an important concern for the Framers, but the founding era debates are populated with many other design principles. One such example is the search for a sufficiently energetic government, a task often inversely related to tyrannical threats. In the early debates, energy seems to refer to the incentives generated by the constitutional structure for government officials to be diligent in the performance of public functions. In Federalist No. 37, for example, Madison argued that “[e]nergy in Government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good Government.”<sup>110</sup> In No. 70, Hamilton argued that:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy.<sup>111</sup>

Unfortunately, energy is another constitutional ideal claimed by all the relevant intellectual camps, in part because everyone agrees that some energy is a good thing, but too much energy is bad. Parliamentarists often critique the U.S. separation of powers regime because requiring the consent of multiple institutions before implementing a policy program produces exorbitantly high transaction costs.<sup>112</sup> This critique boils down to a claim separated functions schemes produce insufficiently energetic government.<sup>113</sup>

Although the founding era debates used different linguistic formulations, energetic government is related to the team production problem discussed earlier. Because policy outputs are jointly produced in the separation plus checks regime, they are a function of the individual effort of different branches. To say there is a lack of institutional clarity is also to say that the relevant activities or effort level of each branch (actor) are costly to observe, producing an incentive to shirk. Shirking is the very essence of a lack of energetic government. The Framers were acutely aware of this problem with respect to the executive branch. They roundly rejected plural executive councils for exactly this reason: “We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in them.”<sup>114</sup> Shared powers regimes produce insufficient energy, which itself is sometimes taken as a reason to not separate functions.

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<sup>109</sup> Cf. Gersen & Vermeule, *supra* note 96; but see Matthew C. Stephenson, The Costs of Voting Rule Chevron, 116 YALE L.J. POCKET PART 238 (2007).

<sup>110</sup> Federalist No. 37 (Madison), in *The Federalist* 231, 233.

<sup>111</sup> Federalist No. 70 (Hamilton), in *The Federalist* 471, 471.

<sup>112</sup> Levinson & Pildes, *supra* note 1, at 2325.

<sup>113</sup> See generally Wilson, *supra* note 6, at 187.

<sup>114</sup> James Wilson, *Pennsylvania Ratifying Convention* (4 Dec 1787), Elliot 2:480 in Kurland and Lerner, eds, 3 *The Founders' Constitution* at 501.

Insufficiently energetic government can arise because it is too difficult to act or because incentives are poorly calibrated to generate high levels of effort. As to the first problem, combined-functions institutions tend to be more energetic because different branches no longer have to agree before policy can be implemented. The costs of acting are lower, producing more energetic government. As to the second problem, one reason overlapping jurisdiction regimes produce insufficiently energetic government is that the incentives for good behavior are weak. When an institution with combined functions, with or without unbundled powers, exerts little effort or implements bad policy, all the blame is laid at the right institutional doorstep. As a result, there is no inter-branch incentive to shirk; there is no cross-branch team production problem to manage. In this way, combined-powers-unbundled powers institutions may produce more energetic government, in part, precisely because government is more accountable.

If powers are unbundled and the relevant institution has responsibility only for one policy domain, selection effects may translate into more energetic government too. When a hawkish ex-general is elected to Congress, it seems unlikely that she will exert the same level of energy on education policy as she will on military policy. Such motives are not nefarious. All public officials have policies in which they are more interested and it is only natural that they would work harder on pet projects. The same is true of Presidents. Bundling policy domains together tends to institutionalize this tendency. Unbundling powers compensates for it, matching the interests and capacities of officials with the appropriate political institution.

#### D. Monitoring Institutions

Unbundled powers institutions fare well on the dimensions of energy and accountability, but unbundling powers also produces concrete costs. One of these is an increase in monitoring costs associated with the sheer number of political institutions. If a little unbundling is a good thing, it is tempting to think a lot would be even better. But a national government with three dozen unbundled institutions, each elected, and each pursuing policy within a limited domain, is obviously not ideal. One reason is that there can only be greater accountability if citizens are informed and monitor the relevant actors. Currently, in the U.S, citizens must monitor three branches of government. If there were three dozen branches, citizens might not pay attention to most of them, reducing overall monitoring—and therefore accountability—even below today's level. This is a critical concern and it is a reason to favor partial unbundling rather than anything approaching pure unbundling in government. But a caveat is also in order.

The three-branch separated functions regime is not quite as easy to monitor as it first appears. True, voters must monitor only three branches, but to apportion policy responsibility effectively, voters must monitor three branches multiplied by the number of policy dimensions the voter cares about. If there are nine important domains, the voter must monitor 27 branch-domain pairings, not just three branches. In the combined-functions-unbundled-powers world, voters would have to monitor nine branches instead of just three, but they would also only need to monitor nine branch-issue pairings because policy responsibility is not shared across branches.

A different kind of information cost is also at issue, however. When voters select or sanction an institution/official responsible for many different policy dimensions, voters might be able to monitor only a handful of dimensions and still make an accurate inference about whether the official is a good type exerting high effort.<sup>115</sup> If political performance is correlated across

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<sup>115</sup> Fearon, *supra* note 33.

dimensions, then it could be possible for citizens to monitor only a few dimensions and still accurately ascertain the politician's quality. When policy domains are unbundled, citizens must monitor all policy dimensions to evaluate the quality of their elected representatives because voters only observe one dimension of performance for each branch. If all this sounds opaque, note that many voters historically vote their pocketbooks in Presidential elections. One possible gloss on this tendency is that voters think if the executive is good at the economy, the executive is probably good at lots of other things. If there were two Presidents, one in charge of the economy and one in charge of everything else, the first President's economic performance would tell voters nothing about the quality of the second president. Unbundling would make these sorts information costs rise.

A different informational concern has to do with the costs of inter-branch monitoring rather than citizen monitoring of the government.<sup>116</sup> To say that Congress does or should monitor the behavior of the executive is to emphasize the principal-agent problems that exist between branches.<sup>117</sup> Models of delegation illustrates that the implemented policy will often diverge from Congressional preferences.<sup>118</sup> Congress has a standard toolkit of resources for mitigating this problem, but it cannot be eliminated entirely.<sup>119</sup> These intra-policy-inter-branch agency problems are eliminated in the combined-functions-unbundled-powers setting, but new intra-branch-intra-policy agency problems are generated. Intra-organizational agency problems are not always easier to manage than inter-organizational ones, but in this context, there are reasons to think the former would be less severe than those built into the existing separationist structure.<sup>120</sup>

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<sup>116</sup> Levinson & Pildes, *supra* note 1, at 2343 (“But of course it is a different type of accountability that they have in mind. 142 The existence of checks and balances between rivalrous branches, each with an incentive to monitor and prevent the other's misbehavior, might be regarded as a systemic form of accountability in its own right.”). See also Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 718 (1993); GWYN, THE MEANING OF SEPARATION OF POWERS 16 (1965). See also TIMOTHY BESLEY, PRINCIPLED AGENTS? THE POLITICAL ECONOMY OF GOOD GOVERNMENT 98 (2001).

<sup>117</sup> DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999) (developing and testing a theory of variation in delegation to agencies); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991) (exploring the history and theory of delegation and delegation mechanisms); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 439 (1989) (discussing how agencies can “shift . . . policy outcomes away from the legislative intent”).

<sup>118</sup> See Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1 (1997) (analyzing authority delegated to agencies as a function of information distribution); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995) (analyzing the tradeoff between political control and agency expertise); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004) (extending delegation models to consider costs of information gathering).

<sup>119</sup> See Sean Gailmard, *Discretion Rather than Rules: Choice of Instruments To Constrain Bureaucratic Policy-Making*, POL. ANALYSIS (forthcoming) (“comparing “menu laws” (rules) and “action restrictions” (discretion) as tools of control in delegation); Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469 (2007) (analyzing the impact of decision costs on the development of agency expertise).

<sup>120</sup> Cf. GARY MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* (1992); MURRAY J. HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION: INSTITUTIONAL CHOICE IN THE PUBLIC SECTOR* (1995).

### E. Capture & Selective Participation

Guarding against factions is another standard justification for allocating government authority to multiple institutions. Although the Founders seem more concerned with guarding against majoritarian factions, minoritarian factions are no less a threat to bad governance. If it is costly for factions or private interests to capture government institutions, perhaps it is best to make them capture more than one institution in order to gain control of policy. In the separated functions regime, a faction must capture at least two and perhaps three different institutions to take over a field of policy; when institutions are unbundled, only one must be captured. Industry interests seeking to prevent stringent air pollution controls would only need to influence the environmental institution to implement their will, rather than convince the legislature, executive, and the courts.

Although intuitively appealing, this conflates what might be called positive and negative capture. A faction seeking to implement new policy that changes the status quo, perhaps all three branches must be captured to do so. When a faction seeks to block changes to the status quo, only one branch must be captured, or in less pejorative terms, influenced. When industry seeks to block stringent pollution controls or avoid new taxes, capturing one branch, not three, is usually sufficient.

That said, the concern about capture is real and it is actually closely related to the problem of monitoring costs, further illustrating the downside of excessive unbundling. When there are a few dozen unbundled institutions in the national government, all must be monitored. In theory perhaps, each institution implementing local policy would be more accountable to the public. In reality, however, the costs of monitoring each of the institution make this unlikely. If monitoring is costly, some citizens will choose not to monitor some of these institutions and/or not to vote in those elections. The groups willing to participate and bear these costs will be those that care most about the relevant policy domain. The median voter in this subgroup will almost certainly have different preferences than the median voter in the general population. Whether we call this capture or minoritarian policy or just democracy, it is important to note that policy outcomes will be driven by a minority's preferences. If school boards are sensible approximations of combined-unbundled institutions, it is revealing that special interests like the teachers union and parents of school-age children tend to dominate these elections.<sup>121</sup>

There are two related points to make on this front. First, this selective participation dynamic means that excessive unbundling can produce either a lack of responsiveness because no one monitors effectively, or minoritarian policy because only special interests monitor. To say that a large number of unbundled political institutions would be bad, however, is not to say that a few would not be good. A small amount of medicine facilitates health; a large amount threatens it. Although the paper's main goal is to demonstrate that the addition of some combined-functions-unbundled-powers institutions could be desirable, because enhanced accountability trades off against other design concerns like selective participation, there is always a subsequent design question about how much unbundling is too much unbundling.

Second, the selective participation point is quite general and also underappreciated. All institutional arrangements generate costs for political participation. This is no less true of the

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<sup>121</sup> Members of teachers' unions are up to seven times more likely to participate in school board elections than the average registered voter. Terry M. Moe, *Political Control and the Power of the Agent*, 22 J. L. ECON. & ORG. 1, 22 (2006).

separated functions regime, in which a subset of potential voters participates in a given election. If one of the many reasons citizens might choose not to vote is that a vote for a bundled office means so little for the issue most important to them, voter participation might increase with unbundling. But the converse is also true. Virtually any shift from one regime to another will produce important participation effects: some subset of old nonvoters will become new voters and a subset of old voters will become new nonvoters. One should care about these relative proportions, but it is difficult to know how they net out in the abstract. Regardless, there is no reason to assume the status quo's participation costs are optimal. To say that policy is more majoritarian or more minoritarian, one needs a normative baseline. It is tempting but wrong to specify the existing status quo as the benchmark and presume that deviations away from it are necessarily undesirable.

#### F. Coordination

Yet another potential problem produced by unbundling is coordinating across policies allocated to different political institutions. The benefit of combining policy domains in a single institution is that decisions in one policy domain often impact decisions in another. Environmental policy impacts economic policy, which in turn impacts foreign relations, which impacts energy policy and so on. If each of these policy domains were exclusively and exhaustively assigned to different institutions, policy coordination (and effectiveness) would likely be sacrificed.

Coordination problems of this sort are real concerns. If inter-policy coordination is an important enough value, then it is an argument against unbundled-powers institutions. Still, given the use of unbundling in federalism, state government, local government, and comparative institutions, it seems unlikely that coordination concerns of this sort always trump all other considerations. Sometimes it makes sense to have general-purpose political institutions; other times not. For purposes of comparative analysis, however, it is not enough to point out that unbundled institutions produce coordination costs because similar costs are attendant in the separated functions alternative too.

Whether separating functions or unbundling policies is preferred in any given setting turns partially on whether it is more important (or difficult) to coordinate across functions within a policy domain or more important to coordinate across policy domains within functions. In real world settings, either coordination problem might dominate, but it would be surprising if one always did. For example, it could be more important to coordinate executive and legislative activities on military policy than to coordinate executive military activities with executive education policies.

Separation of functions guarantees that there will be positive coordination costs across functions within every single policy domain. Further, officials in the three existing functional branches of the United States often have divergent views about a policy. Whether this fact is celebrated or decried, it ensures that inter-function (branch) coordination will often be a real challenge within any given policy domain. In unbundled institutions, sometimes preferences on economic policy would conflict with preferences about education policy, producing high coordination costs. But sometimes there would be no conflict and therefore no need to coordinate.

Nevertheless, take the hardest case for unbundled powers: assume the costs of coordinating across government functions are zero and focus only on the costs of coordinating

across policy domains. Surely, it is easier to coordinate policies when the same institution has the authority for all of the policy domains, and indeed, this is a standard claim in the unitary executive<sup>122</sup> and centralized regulatory review literature.<sup>123</sup> Centralized control is thought to be a prerequisite for effective coordination of decisions across policies; unbundling is the exact opposite.

Although this argument is likely correct as a general matter, it is not always so. One reason is that the analysis often equates coordination with centralized control,<sup>124</sup> even though centralization is neither a necessary nor a sufficient condition for coordination. Strong vertical control over subordinates may facilitate coordination, but there seems to be no shortage of lackadaisical supervisors in the world. Moreover, the key to effective coordination is accurate information. The centralized official, for example the chief executive, must generally depend on information provided by decentralized subordinates (agents) that are to be coordinated. Because, the local policy preferences of the subordinates diverge from the coordinated outcome (or else there is no need for centralized control to achieve coordination), there is a risk that biased information will be generated, undermining the coordination benefit of centralization.<sup>125</sup> The inter-policy coordination problem is only solved if the supervisor can effectively access and evaluate the information passed up the chain of command by those with local expertise.

When unbundled institutions share information with other unbundled institutions, there may be a lower risk that biased information will be produced because neither institution has formal authority to check the other. If accurate information is very important and coordination benefits both policy domains, then in some limited settings unbundled institutions could theoretically achieve it. To be clear, this result will be the exception rather than the rule. In most settings, unbundled institutions produce higher inter-policy coordination costs than the separationist regime, while producing lower inter-function coordination costs.

## G. Deliberation

Separation of powers principles are also sometimes said to support something like deliberative democratic ideals.<sup>126</sup> For example, perhaps the process of arguing and bargaining, deliberating and deciding, is what ensures high-quality legislation. Having the same public officials deliberate on the entire bundle of policy issues could produce wiser and more balanced judgments. Legislators responsible for making new policy on education, civil rights, and the

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<sup>122</sup> See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994).

<sup>123</sup> See generally Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245 (2001).

<sup>124</sup> See Ricardo Alonso, Wouter Dessein, & Niko Matouschek, *When Does Coordination Require Centralization*, 98 *AM. ECON. REV.* 145 (2008) (surveying contexts in which coordination of agents can be achieved without centralized control).

<sup>125</sup> *Id.* See also Masahiko Aoki, *Horizontal vs. Vertical Information Structure of the Firm*, 76 *AM. ECON. REV.* 971 (1986); Patrick Bolton & Joseph Farrell, *Decentralization, Duplication and Delay*, 98 *J. POLIT. ECON.* 803 (1990); Luis Garicano, *Hierarchies and the Organization of Knowledge in Production*, *J. POLIT. ECON.* 874 (2000). See generally Dilip Mookherjee, *Decentralization, Hierarchies, and Incentives: A Mechanism Design Perspective*, 44 *J. ECON. LIT.* 367 (2006).

<sup>126</sup> See generally Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 45 (1995); *DELIBERATIVE DEMOCRACY* (John Elster, ed. 1996).

environment might produce higher quality deliberations than three groups of legislators each deliberating only on one of these questions. When institutions are unbundled, this benefit could be undermined. These concerns are a bit far afield for current purposes, but suffice it to say that tradeoffs abound. Sometimes insights from one area will produce insights in another, producing desirable cross-fertilization. Specialization, however, allows for greater depth and expertise in a field, increasing the quality of discussions. There are deliberative costs from specialization, but there would be deliberative benefits as well.

Perhaps more important, the conventional separation of powers scheme produces similar tradeoffs across government functions. If there are deliberative benefits from having the same institution discuss the entire portfolio of policy domains, why would there not be similar benefits when the same institution considers enactment, implementation, and adjudication? If unbundled institutions exercise combined functional authority, more cross-fertilization of ideas across government functions would exist, whereas the bundled regime produces more cross-fertilization across policy domains. Once again, the diversity of structures in private firms might suggest that a rigid adherence to separating by function is a bit too quick. More extensive analysis would be required to make a powerful case for or against bundled legislatures on deliberative grounds, but at first blush deliberative ideals do not present an unqualified case against the unbundled regime.

#### H. Change

A working premise of any unbundled powers regime is that policy domains can be cleanly defined such that no two institutions exercise overlapping authority over the same underlying policy. Even if this were possible in a static sense, how would unbundled institutions adjust to change over time? Most pressing policy issues of the day were not on the immediate agenda in the late 1700s. Even within relatively short time periods, new policy dimensions emerge; others fade in importance. A nice feature of the bundled nature of power in the Madisonian structure is that it is (usually) easy to ascertain which institution is responsible for a new policy domain. When authority is unbundled, matters are more complicated. If the Madisonian scheme were better at adaptation or emergency response, that would be an important reason to disfavor the unbundled powers scheme.<sup>127</sup>

Concerns about institutional change are another reason that partial unbundling is likely to be better than perfect unbundling. When powers are partially unbundled, some residual authority is always vested in one or several existing political institutions. Whether the result of gradual or cataclysmic change, when new policy domains arise, the institution with residual powers would act. Additionally, the magnitude of this problem will be a partial function of the level of generality at which the domains of unbundled institutions are defined. Cabinet level domains have remained largely steady over the years and if unbundled institutions operated at that level of generality, fewer truly new domains would emerge over time. By the same token, within the education domain, sub-domains change quite often. The more narrowly drawn the policy domain, the greater the accountability benefits, but the greater the costs associated with change and the greater the coordination and monitoring costs noted above.

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<sup>127</sup> Cf. Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091 (2006); Adrian Vermeule, *Self Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631 (2006); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

Responding to new policy domains is one type of challenge for unbundled institutions, but responding to the death of old policy domains may be just as important. If it were the case that unbundled institutions, once created, had to exist forever, there could be either a growing mismatch between government institutions and existing policy problems, or perpetual growth of political bureaucracy. Here too, the unbundled powers regime generates costs. Yet, the problem has been faced by state and local governments for many years. New elected offices are created with some frequency; others are eliminated. Special district governments emerge, but they also fade away.

### I. Quality of Legislation

Any comparison of the quality of public policy produced by different hypothetical institutional structures is inherently speculative. Most real policy outputs can be characterized as a success or failure depending on one's perspective and baseline. Nevertheless, recent commentary has argued that policy produced by Madisonian separation is systematically poor, irrespective of whether government is united or divided.<sup>128</sup> When branches are controlled by different parties there is a risk of impasse—inaction or inter-branch bickering—or a complete breakdown of government.<sup>129</sup> The Madisonian aspiration is that the control of different branches by different interests will produce inter-branch dialogue and fruitful compromise. Others are more skeptical, pointing to the frequent failure of separation of functions regimes elsewhere in the world.<sup>130</sup> Even when branches are controlled by the same party, however, some scholars argue that the U.S. regime produces an undesirable mix of symbolic or empty legislation (under-reaching) together with efforts to entrench legislative programs quickly (over-reaching) due to the possibility of losing control of one branch at the next election.<sup>131</sup> One might quibble with this argument, perhaps questioning why controlling majorities would want to entrench merely symbolic legislation, but suppose *arguendo* that this is an accurate description of policy-making in separationist regimes during united government.<sup>132</sup>

How would unbundled institutions perform along this dimension? There are at least some reasons to think the regime less susceptible to either impasse or collapse. Because law-making and law-implementing functions for a given policy domain are combined in a single political institution, there is no risk that agreement will not be reached between two institutions with competing views. Nor is there a risk that an executive will grow impatient and call out the military to take over the state, at least so long as legislative intransigence is really a common

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<sup>128</sup> Ackerman, *supra* note 6.

<sup>129</sup> *Id.* at 146-47.

<sup>130</sup> See generally Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795 (1997); THE FAILURE OF PRESIDENTIAL DEMOCRACY (LINZ & VALENZUELA EDS. 1994).

<sup>131</sup> Ackerman, *supra* note 6, at 650-52.

<sup>132</sup> The parliamentary alternative is said to produce more desirable intermediate level legislation for two reasons. First, coalitions do not inevitably face a quick second election, with the accompanying risks of losing control of one branch. Because the timing of elections is not pre-set in the Westminster system, there is less pressure to under-reach with symbolic legislation that appeals to voters even if not in the long-term interest of the country. Second, there is no incentive to create *de facto* entrenchment because the executive cannot veto changes by a future coalition. In the presidential regime, when the legislature is lost to the opposing party, the president can block efforts to undo the old united government policy. This might produce too much quick legislation that can be changed subsequently only by a supermajority of the legislature. Ackerman, *supra* note 6, at 652-53.

motivation for coups.<sup>133</sup> These inter-branch-intra-policy problems of compromise and conflict are avoided when functions are combined and powers unbundled. Nor, at first cut, should the unbundled powers regime produce excessive under-reaching or over-reaching. While the officials controlling the given unbundled branch might lose control at the next election, there is no risk of de facto entrenchment because no checks (cross-branch vetoes) exist. Because the unbundled powers regime does away with the inter-branch assent requirement on any given policy dimension, majorities will come and go, but there is no systemic incentive to overreach, at least that relate to checks.

To be fair all this is simply an applied variant of the parliamentary critique of separation of functions. But another way to think about this comparison is that in the parliamentary system, citizens select parties, which are in essence pre-set bundles of policy positions. A coalition government is a bargain among these bundles. The majority coalition bargain produces a new bundle of positions, but the coalition bundle will not generally be the legislative program that would have been enacted if citizens voted policy-by-policy or dimension-by-dimension. Thus, even if the legislative program is implemented at the right level of generality in the parliamentary regime, it is as likely to diverge from majoritarian or median voter preferences. Put differently, there is inevitably slack between the policy program implemented by a coalition and the set of policies that citizens would have selected counter-factually.<sup>134</sup> This is not slack than can be mitigated using elections precisely because elections in the parliamentary system force a single vote for or against a bundled candidate or party. Instead of systematic divergence between citizen views and public policy, unbundling should produce systematic convergence.

Lastly, expertise and specialization are obviously closely related to the quality of policy. To refrain an earlier point, unbundled institutions will be characterized by greater expertise. When voters elect officials to a general-purpose institution, they must pick general-purpose officials, most of whom will either be good at one thing and bad at many other things; or who are good, on average, but not especially good on any given dimension. By allowing voters to select special purpose officials, unbundled institutions help avoid these tradeoffs; they facilitate the selection of government officials with relevant expertise.

A possible reply to this point is that expert staff and bureaucrats formulate and implement most policy, not general-purpose officials.<sup>135</sup> If so, one should be cautious in touting the comparative advantage of unbundled institutions along the expertise dimension. But in the typical separated functions regime, the public selects general-purpose officials who then rely on technocrats. One would therefore, need to give an account of why general purpose officials, be they legislative or executive, will be sufficiently informed to evaluate technical bureaucratic judgments. Moreover, voters then need to evaluate these evaluations. Elections become doubly crude in this world, worsening not just the agency problem between voters and elected officials but also between elected officials and bureaucrats.

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<sup>133</sup> Id.

<sup>134</sup> Some of these statements should be taken with a grain of salt as the implications differ depending electoral rules like proportional representation or first-past-the post.

<sup>135</sup> See Terry M. Moe & Michael Caldwell, *Institutional Foundations of Democratic Government*, 150 J. INST. THEOR. ECON. 171, 172 (1994) (arguing that professionalization of bureaucracy is endogenously determined as a function of presidential and parliamentary regime features).

### III. LAW & COURTS

To this point, courts, judges, and constitutional doctrine have remained largely on the periphery. Nevertheless, the role of courts—either as potentially unbundled institutions or as enforcers of institutional boundaries—is obviously quite consequential. It is to these issues this Part turns. Courts fit into the unbundled powers scheme in one of three ways. First, judicial power might be treated identically to legislative and executive power: combined in a single institution with narrow policy responsibility. Although the above analysis mainly emphasized unbundling in the political branches, most of the analysis would be the same for the combination of judicial functions. Second, one might easily favor local combination of executive and legislative authority, while still preferring a separated judiciary. One possible variant would be to establish some specialized courts with limited jurisdiction over a single policy domain. These courts would exercise separate and independent judicial functions, but only with regard to actions taken by the parallel unbundled political institution. Environmental courts would hear only challenges pertaining to actions taken by the environmental branch. Third, the judiciary could remain largely untouched, independent and generalized courts. Courts would then be called on to enforce the unbundled powers scheme just as they currently enforce the separation of functions regime. Some policy authority from the political branches would be unbundled, but the judicial branch would remain largely bundled. This Part discusses these latter two possibilities.

#### A. Courts as Unbundled Institutions

In the purest form of a combined-functions-unbundled-powers regime, judicial functions would be combined with executive and legislative functions within a single institution whose topical authority would be limited by policy domain. Many non-article III government bodies adjudicate claims, including the executive and legislative branches. In certain types of cases, it might be especially important to separate the adjudication of legal claims from the enactment of general legal pronouncements, but this need not be the case as a global matter. The case for combining judicial functions with political functions differs somewhat, however, from the case for combining executive and legislative authority. A main benefit of the unbundling scheme, for example, is enhanced accountability. Yet, independence—or equivalently a lack of accountability—is a hallmark of article III courts. If separating the judicial function were only a check on government overreach, then the greater accountability produced by topical unbundling might reduce the need for separation. Nevertheless, the conventional account of independent courts is clearly broader and therefore the case for combining judicial functions presents some additional pitfalls.

For the moment, rather than resist the powerful bias in favor of independent or separated courts in the U.S., the paper considers the prospect of unbundling courts within a separated functions regime. This is partially a question about whether it is better to have generalized courts or specialized courts.<sup>136</sup> Courts of general jurisdiction may facilitate neutrality and minimize pre-judgment, but courts of limited jurisdiction allow judges to develop expertise in complex and recurrent legal matters. Particularly in highly technical domains, having some specialized courts, exercising adjudicative powers parceled off from general-purpose institutions is not uncommon.

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<sup>136</sup> See, e.g., ISAAC UNAH, *THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY-MAKING* (1998); Christopher Zorn, 9 L. & POL. BOOK REV. 127 (1999) (reviewing book and discussing tradeoffs).

Generalized courts are the norm within the national government, but specialized courts exist in both federal and state judiciaries. The unbundling framework provides a lens for analyzing these questions.

Article III judges are appointed with tenure, making the incentive effects difficult to realize. Nevertheless, the selection effect benefits from unbundling would still accrue. Many generalist judges are more interested and more capable in one area of the law than another. For particularly important or complex legal domains, unbundling would allow political institutions to pick judges with local expertise or ability. When judges exercise general-purpose legal authority, one must either pick a judge that is good, on average, or pick a judge that is good in one area like bankruptcy but less good in another like the First Amendment.

Another alternative would be to elect some judges to unbundled courts, in which case the unbundled structure would generate the standard set of incentive effects emphasized above. Many state court systems, of course, do directly elect judges and others require periodic re-approval by political institutions. Indeed, many states also unbundle judicial authority such that elected judges hear cases in a limited topical domain. These unbundled specialized courts might also facilitate public monitoring, evaluation, and performance for all the same reasons that unbundled political institutions do so.

#### B. Courts as Arbiters of Unbundled Structures

Instead of combining topical judicial authority with executive and legislative authority, or separating judicial authority and subsequently unbundling it by topic, a third possibility is simply to leave the judiciary untouched. In this variant, courts would be called on to enforce the unbundled powers regime.<sup>137</sup> Judicial enforcement of unbundled powers would not be easy, but it would be an order of magnitude less difficult than enforcing the separation of functions regime. To be clear at the outset, any shift to a partially unbundled powers structure would produce a net increase in judicial decision costs. Courts would continue to enforce separation of functions limitations and also have to enforce topical jurisdictional boundaries. But within the set of new cases, the burden on judges would be slight.

The conventional account of separation of powers doctrine is that it incorporates two substantive strands, each with a methodological tendency.<sup>138</sup> Functionalists emphasize the necessity of maintaining balance of powers among the branches.<sup>139</sup> Formalists emphasize the need for rigid separation of the functions so that executive, legislative, and judicial powers are

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<sup>137</sup> See Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 689 (1997) (“The separation of powers puzzle appears to have stumped the Supreme Court. In a series of decisions over the last half-century, and particularly in the last twenty-five years, the Court has veered between two separation of powers doctrines that cannot easily be reconciled.”); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) (“Unanimity among constitutional scholars is all but unheard of. Perhaps when achieved it should be celebrated. But one point on which the literature has spoken virtually in unison is no cause for celebration: the Supreme Court’s treatment of the constitutional separation of powers is an incoherent muddle.”); William B. Gwn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789, 817-18.

<sup>138</sup> See generally Magill, *The Real Separation*, *supra* note 1, at 1129.

<sup>139</sup> See, e.g., Strauss, *supra* note 13.

not mixed.<sup>140</sup> When faced with a new institutional arrangement, the functionalist asks whether it tends to upset the existing branch parity.<sup>141</sup> One persistent critique of the functionalist emphasis on balance is that it entails high decision costs:<sup>142</sup> there is no obvious constitutional metric or baseline for analyzing whether a new institutional arrangement impermissibly disrupts the balance between branches?<sup>143</sup>

Setting decision-costs aside, branch parity is supposed to ensure that no one branch has an advantage:<sup>144</sup> if constitutional authority is akin to military arsenals, then branch parity ensures a fair fight. The powers-as-arsenal view tends to assume that government problems result from congressional incursion into executive territory or vice versa. But modern separation of powers cases almost always result from consensual arrangements among the branches, not unilateral action by one or another.<sup>145</sup> These problems arise because of branch agreement, not attacks. Given this reality, it is hard to understand how equal arsenals will do much in the way of preventing government excess. Powerful defensive weapons are protections against incursion only to the extent that there is an incentive to use them and apparently, there is not. Judicial efforts to ensure branch parity do not seem to have the desired effect.

On this view, collusion among already powerful political actors is the thing to be avoided. The unbundled powers regime hardly solves the problem of collusion because it explicitly merges the two institutions' authority. Of course, separating functions did not avoid these collusive threats either. If the ultimate evil to be avoided is undesirable government overreach, the unbundling model picks a different mechanism for avoiding it. Rather than relying on a mechanism that seems to have underperformed historically, the unbundled powers regime relies on express limitations on the domain in which government action may be taken.

To evaluate a separation of powers dispute, the formalist judge “must first identify the type of power being exercised and, unless one of the explicitly provided-for exceptions is relevant, make certain that that power is exercised by an official residing in the appropriate governmental institution.”<sup>146</sup> That is, the formalist must first ask whether the power being exercised is executive, legislative, or judicial; and second, match the power to the appropriate institution.<sup>147</sup> Like the functionalist method, this task involves high decision costs and residual

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<sup>140</sup> Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 857 (1990) (“The separation of powers principle is violated whenever the categorization of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such a blending.”).

<sup>141</sup> Magill, *supra* note 1, at 1142–43. See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231; Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 477 (1989); Strauss, *supra* note 18, at 578; Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions--A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987).

<sup>142</sup> Redish, *supra* note 41, at 125.

<sup>143</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>144</sup> See CASPER, *supra* note 1, at 8–12.

<sup>145</sup> Many of the most prominent recent separation of powers cases like *Bowsher v. Synar*, 478 U.S. 714 (1986), or *United States v. Chadha*, 462 U.S. 919 (1983), involve issues of exactly this sort. Violations of separation of powers principles tend to occur with the consent of two branches rather than unilateral incursion by one.

<sup>146</sup> Magill, *Real Separation*, *supra* note 1, at 1139–40.

<sup>147</sup> See Martin Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1740–41 (1996).

uncertainty about permitted institutional arrangements. “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.”<sup>148</sup> Courts are good at many things, but delineating the precise boundaries of categories that exist mainly in the imagination of constitutional theorists is unlikely to top the list.

The combined-functions-unbundled-powers regime replaces these disputes with questions mainly about jurisdictional boundaries between unbundled institutions. Does an issue involve environmental policy or economic policy; is it therefore, within the purview of the economic branch or the environmental branch? These jurisdictional determinations can involve high decision costs too, particularly when cases involve fuzzy boundaries, but these are familiar issues for administrative lawyers. Ambiguities about the jurisdictional boundaries of agencies<sup>149</sup> or whether agencies should receive deference on jurisdictional views<sup>150</sup> are common and involve precisely this type of question. Similarly, when faced with two conflicting interpretations of a statute issued by two different agencies, courts often identify the agency with primary policymaking authority and give deference to this interpretation.<sup>151</sup> These judgments are rarely straightforward, but it would be surprising if they involved higher decision costs than those called for by current separation of powers doctrine.

Theoretically, courts would not have to make judgments about whether branch parity was maintained because there is neither inherent nor instrumental value to parity in the unbundled powers regime. Nor would courts have to make metaphysical distinctions about how executive power can be distinguished from legislative power because those functional duties would be combined within a given branch of government. On balance, the judicial burden from enforcing unbundling restrictions would seem modest compared to the burden from enforcing separation of functions limitations.

#### CONCLUSION

The U.S. Constitution creates a federal government with three and only three branches, each exercising a different type of functional authority. Yet, the broader institutional landscape also includes structures that unbundle government power by topic. This design alternative is largely ignored in the separation of powers debates. It should not be. Either instead of functional separation or together with it, unbundled powers institutions produce concrete costs and benefits. Unbundling may enhance accountability, energy, and expertise, while also making certain types of coordination, monitoring, and political participation more difficult. But the decision to structure government power by function or by policy domain should be explicit rather than implicit. To the extent that separation of powers is an auxiliary precaution against bad

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<sup>148</sup> Lawson, *supra* note 57, at 1238; *see also* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 (1994). *See generally* Magill, *Real Separation*, *supra* note 1, at 1142 (discussing these views).

<sup>149</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 357 (1988); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd and remanded*, 127 S. Ct. 1438 (2007); *United Transportation Union v. Surface Transportation Board*, 183 F.3d 606 (7th Cir. 1999); *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995).

<sup>150</sup> *See generally* Jacob E. Gersen, *Overlapping & Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (discussing justifications for giving deference to agency determinations of their own jurisdiction).

<sup>151</sup> *Id.* (discussing these questions).

governmental behavior, constitutional theory should also be concerned with institutions that strengthen the primary safeguard of democratic elections. Even a modest degree of topical unbundling in the national government might better serve the underlying constitutional aspirations than Madisonian separation alone.