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INTRAPARTY CONFLICT AND THE SEPARATION OF POWERS

Gregory A. Elinson*

Intent on reconciling constitutional theory to political reality, public law scholars have in recent decades dismissed as naïve both the logic of the Constitution’s design set forth in The Federalist and the Framers’ dismal view of political parties. They argue that, contrary to the Madisonian vision, competition between our two national political parties undergirds the horizontal and vertical separation of powers. But, in calling attention to the fights that take place between political parties, they underestimate the constitutional significance of the conflicts that persist within them. Reconsidering the law and theory of the separation of powers with attention to intraparty conflict, this Article explains why neither the traditional Madisonian—nor the contemporary party-based—model of the separation of powers accurately characterizes how political parties structure our constitutional framework.

The Article makes several contributions. Descriptively, it argues that intraparty conflict can immunize our constitutional system from the pathologies that arise when partisan warfare is overlayed on the Madisonian model of separated institutions sharing power. Analytically, it argues that public law scholars are wrong to treat partisanship as an identity—a fixed psychological state characteristic of individual officeholders. As the Article makes clear, partisanship is better understood as the product of institutional rules and procedures that empower partisans to join forces or go their own way. Likewise, it argues that there are analytic gains from categorizing decisions on campaign finance, candidate selection, and voter suppression as part of our separation of powers and federalism jurisprudence and explains how doing so might bear on traditional questions of constitutional law.

Today, as was true at the Founding, Americans have no great love for intraparty conflict or party factionalism. But fear of the mischiefs of faction have blinded us to their merits. Preoccupied as we are by the pathologies of political polarization, we have failed to understand that the relative porousness of our parties—the very feature that drives internal party conflict—has helped to safeguard our republic and ensure the representativeness of our institutions.

INTRODUCTION

Nearly a century ago, the venerable American political scientist E.E. Schattschneider observed that political parties had “transformed the American Constitution.”1 Among the dramatic changes he catalogued—including the effective abolition of the electoral college and the rise of what he called a “plebiscitary” presidency—Schattschneider counted as most

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1 E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT: AMERICAN GOVERNMENT IN ACTION 2 (1942).
important the parties’ role in “democratiz[ing]” the Constitution.\(^2\) “As the political entrepreneurs who have mobilized and organized the dynamic forces of American public life,” he wrote, “parties have presided over the transformation of the government of the United States from a small experiment in republicanism to the most powerful regime on earth, vastly more liberal and democratic than it was in 1789.”\(^3\)

Over the past two decades, public law scholars have grappled in earnest with the implications of these ideas. Rejecting as politically naïve both the logic of the Constitution’s design set forth in \textit{The Federalist} and the Framers’ limited attention to parties, this new wave of scholarship rightly contends that partisan competition fundamentally shapes both the horizontal and vertical separation of powers.\(^4\) But, in attending primarily to the constitutional significance of fights that take place between political parties, the conflicts that persist within them have received short shrift. Indeed, our collective preoccupation with partisan polarization and its consequences has led us to overestimate both parties’ internal discipline and ideological homogeneity.

That relative myopia has immediate, practical consequences for the study of public law today. For one, without considering the presence and ramifications of party infighting, we are ill equipped to understand why President Biden struggled to rally Democratic majorities in Congress to swiftly enact his party’s agenda, or what that can teach us about the relative balance of power between the executive and legislative branches under conditions of one-party rule.\(^5\) For another, our collective inattention to intraparty discord has left us with few analytical tools to understand why the Supreme Court’s decision to overturn \textit{Roe v. Wade}\(^6\)—long a Republican aim—has only made it more difficult for red states to further curtail

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\(^2\) Id.

\(^3\) Id. at 2–3.


\(^5\) See infra, Part II.


But, as this Article makes clear, casting a spotlight on intraparty conflict has more enduring descriptive, analytical, and normative implications for the study of constitutional law.\footnote{To be sure, scholars have long appreciated that a “[s]hared party affiliation” is no guarantee that two members of the same party will necessarily share the same policy preferences. Bulman-Pozen, supra note 4, at 1124 (“If it is an overstatement today to characterize our two-party system as more like a hundred-party system, there nonetheless remain disagreements about policies and priorities within each party.”) (internal quotation marks omitted); Levinson & Pildes, supra note 4, at 2335 (“If in some historical periods, and on certain issues in every historical period, intraparty cleavages have rivaled interparty ones.”); see also DAVID R. MAYHEW, DIVIDED WE Govern: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002, at 199 (2d ed. 2005) (“Political parties can be powerful instruments, but in the United States they seem to play more of a role as ‘policy factions’ than governing instruments.”); KEITH WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 18 (2019) (“Legislatures and political parties are not unitary actors. Intracoalitional disagreements are common in American politics.”); Richard A. Epstein, Why Parties and Powers Both Matter: A Separatistist Response to Levinson and Pildes, 119 HARV. L. REV. FORUM 210, 216 (2006) (similar); Jerry L. Mashaw & David Berke, Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience, 35 YALE J. ON REG. 549, 562 (2018) (similar). But while their accounts tend to relegate the internal dynamics of political parties in Congress and in the states to the periphery, this Article puts intraparty conflict front and center.} If the goals of such scholarship are to describe the system of separated powers championed by James Madison, interrogate its premises, and evaluate whether and how well it serves the ends of democratic government, it is imperative to understand how persistent party infighting alters the partisan and institutional incentives that collectively undergird our constitutional system. Absent such engagement, our varied prescriptions to improve upon the American experiment are likely to founder. It is with these ideas in mind that the Article makes four primary contributions.

As a descriptive matter, the Article argues that neither the traditional Madisonian nor the contemporary party-based model of the separation of powers accurately characterizes how political parties structure our
constitutional framework. To make this case, Part I begins with some intellectual history, briefly chronicling the reasons for the traditional exclusion of parties from the study of constitutional law. American parties, it was long thought, were comparatively weak in cross-national perspective—loose associations of local patronage networks that carried little ideological content and engendered little loyalty. By the turn of this century, however, it had become clear that minimizing the role of parties was no longer tenable. As parties became ever more central to American political life, a new generation of scholars began to rethink the foundations of constitutional law. In place of the older emphasis on branches and states, a party-based model was proposed. On that account, America’s increasingly polarized parties functioned as disciplined teams of likeminded and highly loyal ideological warriors.

This way of thinking revolutionized how constitutional law scholars understood the separation of powers. Whereas the Madisonian model of warring branch- (and state-) based loyalties predicted that legislators (or state officials) would always contest executive (or federal) encroachments, this new body of work argued they would do so only when party motives so dictated. Thus, when the legislative and executive branches were controlled by the same party, or when states were motivated by the same partisan concerns as the federal government, the Madisonian engine would sputter.

This Article argues that, despite its considerable strengths, the party-based model meaningfully overstates the extent to which contemporary trends have yielded ideologically homogeneous political parties. In reality, intraparty conflict remains endemic to our constitutional system. Part II

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10 See infra, section I.A.

11 See infra, section I.B.
explains why. Contemporary electoral and campaign finance rules encourage politicians to differentiate themselves from the party they are affiliated with and reduce party leaders’ capacity to enforce ideological orthodoxy. A multitude of parapartisan institutions—from organizations internal to Congress like the House Freedom Caucus and Congressional Progressive Caucus, to outside advocacy groups like the Heritage Foundation and American Legislative Exchange Council—further empower those out of step with their party and collectively stoke intraparty divisions. Finally, the logic of polarization itself contributes to internal party discord. Indeed, as polarization has made it harder to forge stable cross-party coalitions in favor of shared legislative objectives, those outside of each party’s mainstream have gained substantial leverage, as their votes are increasingly pivotal to securing majorities in Congress and statehouses across the country.

Against this backdrop, Part II goes on to assess the analytic gains from revising existing positive accounts of the horizontal and vertical separation of powers by incorporating intraparty conflict. Consider, first, the balance of power between the president and Congress. Proponents of the party-based model contend that the legislature is likely to march in lockstep with the president when both are controlled by the same party. But attention to intraparty conflict makes clear that this prediction elides an important intervening step, for it assumes that members of the majority party will easily resolve whatever (presumably minor) internal differences exist within their ranks. If they are unable to do so, however, even a legislature dominated by the president’s allies may stand in the way of implementing her political agenda. By the same token, the party-based model predicts that legislative power will be at its apex when control of Congress rests in the hands of the president’s partisan opponents. But attention to intraparty conflict points to an alternative possibility. When members of the majority party in Congress

12 See infra, section II.A.
13 See infra, section II.B.
14 As Bulman-Pozen rightly notes, the concept of “control” here is an approximation that “obscures a very messy reality.” Bulman-Pozen, supra note 4, at 1096. At the federal level, one party may hold the White House and only one of the two chambers of Congress. At the state level, the same is true (except in Nebraska, which has a unicameral legislature). So, too, control of key state-level executive positions may be split, as the positions of governor, lieutenant governor, and attorney general may all be subject to direct election. To help simplify the Article’s discussion of unified and divided government, I assume that the same party “controls” both chambers of Congress. When considering state-level dynamics, I look to the president’s party affiliation to determine which party “controls” the levers of power in Washington. See id. Where appropriate, I explore the consequences of loosening these assumptions.
cannot bridge their internal divides, presidential power may in fact increase at the legislature’s expense.\textsuperscript{15}

Similar dynamics shape the balance of power between the states and federal government. The party-based model posits that red states will collectively oppose initiatives advanced by Democrats in Washington, while blue states will welcome them. Likewise, red states are predicted to cheerlead Republican-sponsored exercises of federal power and Democrats to oppose them. But, as in Congress, the presence of intraparty conflict will make it difficult for states to repel (or support) federal initiatives in synchrony. The upshot is that treating the extent of partisan coordination as a variable rather than a constant has real stakes for understanding how our constitutional system is likely to function. High levels of partisan coordination are likely to yield outcomes consistent with the party-based model. But when partisan affiliation fails to induce co-partisans to make common cause, that model has substantially less explanatory power.

Part III then broadens its focus to consider several novel analytic and normative payoffs. Public law scholars have long treated partisanship as an identity—a fixed psychological state characteristic of individual officeholders.\textsuperscript{16} On this account, parties are best understood as associations of like-minded officials, whose pre-institutional views of the world lead them to a shared set of desired political objectives. If this is true, the key mechanism that explains when officeholders are likely to defend the institution of government they inhabit is extra-institutional and therefore extra-legal. As public law scholars, there is little we can say (or do) about how people form preferences about policy and, in the process, develop emotional or social attachments to their partisan team.

\textsuperscript{15} Thinking about parties in this way points to an important commonality between our system of government and the model of multi-party parliamentary democracy that prevails abroad. In many other countries, assembling a parliamentary majority requires the party winning a plurality of seats to negotiate with minor parties. See, e.g., Lanny W. Martin & Georg Vanberg, \textit{Policing the Bargain: Coalition Government and Parliamentary Scrutiny}, 48 AM. J. POL. SCI. 13 (2004); Kaare Strom & Wolfgang C. Müller, \textit{The Keys to Togetherness: Coalition Agreements in Parliamentary Democracies}, 5 J. LEG. STUD. 255 (2007). Governed by its own rules and norms, this process of coalition bargaining culminates in a written agreement formalizing the parties’ accord. Things work differently in the United States, where legislative majorities are won outright. But cobbling together a winning coalition still requires negotiation, albeit within congressional party caucuses. See \textsc{Ruth Bloch Rubin}, \textit{Building the Bloc: Intraparty Organization in the U.S. Congress} (2017). These negotiations, too, are structured by rules and norms that dictate how compromise may be achieved. In this regard, the American constitutional system is less exceptional than it is so often made out to be.

\textsuperscript{16} \textit{See infra}, section III.A.
Not so, this Part argues. Taking intraparty conflict seriously means recognizing that partisan synchrony is as much a consequence of institutional activity as it is an input into it. Accordingly, understanding when partisanship will work as the party-based model anticipates requires examining both the institutional mechanisms that enable members of the same party to join forces as well as those countervailing ones that impede their efforts. For that reason, the institutional rules and procedures that help to generate intraparty harmony—from congressional rules and procedures that empower leaders and other entrepreneurs to forge common ground within their respective party caucuses, to the parallel organizations that help to define and enforce party orthodoxy at the state level—are worthy of our sustained attention. It is through the exploitation of these rules that party synchrony either flourishes or founders. This shift in thinking has practical, as well as intellectual, virtues. This Article demonstrates that applying the standard tools of institutional analysis and design can help us to modify the constitutional system by facilitating (or impeding) efforts to promote intraparty harmony.

Centering intraparty conflict within the study of constitutional law also compels us to develop a more synthetic account of what counts as separation of powers and federalism jurisprudence.\(^{17}\) Traditionally, the field of “structural” constitutional law has focused on cases that explicitly set the rules of engagement for interbranch (and federal-state) conflict. The role of the judiciary is to identify those activities—the legislative veto, for instance, or the executive’s line-item veto—that unfairly advance the interests of one branch at the expense of another, thereby preserving the horizontal or vertical separation of powers. Even as we have come to see the law of political parties, including the rules governing campaign finance, candidate selection, and barriers to voter participation, as “irreducibly structural,”\(^{18}\) decisions implicating these matters continue to be cabined to the study of election law and First Amendment law.

But, as this Article argues, cases that require judicial intercession in party affairs—be it by regulating the composition of electoral districts or the parties’ capacity to raise money—are no less relevant to the horizontal and vertical separation of powers. When courts encourage (or discourage) partisan harmony, they alter how likely the legislature is to collaborate with

\(^{17}\) See infra, section III.B.

the executive or how fiercely the states will contest federal encroachments. For this reason, judicial decisions like *Citizens United v. Federal Elections Commission*\textsuperscript{19} that bear on how parties operate deserve a place in the separation of powers and federalism constitutional canon. At a time when observers are increasingly critical of the Supreme Court’s efforts to police disputes between the branches,\textsuperscript{20} it is critical to recognize the judiciary’s capacity to shape that contest in more subterranean ways.

Attending to conflict between party factions can also help us think differently about more traditional questions of constitutional law. Take the relationship between Congress and the courts.\textsuperscript{21} On both the left and right, judicial deference to legislatures is increasingly en vogue. Progressive critics of judicial review challenge what they contend is the myth of a rights-protective judiciary, arguing that it is the legislature that has more consistently promoted minority rights and, consequently, advocating for a more limited role for courts in our constitutional democracy. Across the aisle, many conservatives assail courts for exercising unconstrained discretion and thereby overstepping their limited boundaries as unelected agents of the legislature. Despite their divergent ideological commitments, both sides increasingly share a common faith—that, in the long run, the views of a majority of the populace will be reflected in winning legislative coalitions.

But this shared conviction rarely reflects the realities of legislative politics. An enduring axiom of congressional behavior is that leaders seek to block consideration of proposals they know will command a bipartisan floor majority if they will also divide members of their own party. Leaders hope to avoid exacerbating conflict between their members, for fear that exposing such divisions will undermine their party’s reputation for effectiveness and responsibility. Reckoning with the fact that leaders often foreclose action on legislation that would otherwise pass with bipartisan support should make us less receptive to calls for judicial deference and more willing to contemplate a muscular judiciary. Indeed, we should recognize and begin to grapple with the truth that popular support is rarely sufficient to impel legislative action.

\textsuperscript{19} 558 U.S. 310 (2010).


\textsuperscript{21} See infra, section III.C. As Keith Whittington argues, judicial review itself owes its expansion in part to its utility in helping to manage factional conflict. See Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 589 (2005) (“The backstop of friendly judicial review may smooth the legislative relations of the members of fractious political coalitions while providing some measure of additional security for the central commitments of party leaders and presidents.”).
Nor should we assume that legislative inaction is the result of an absence of a majority in favor of change. As this Article argues, it is just as likely to flow from the strategic deployment of procedures that wrongly sacrifice majority will on the altar of party discipline. Given that possibility, courts should not abdicate their traditional role as guardians of the political process, responsible for helping to make more seamless the work of translating the people’s will into the acts of their representatives.22

Part III concludes by evaluating the normative consequences of intraparty conflict.23 More than two centuries ago, the Framers warned of the “mischiefs” of faction.24 Today, that skepticism lingers, reflected in critiques that lament the influence of partisan extremists and bemoan both parties’ inability to rein in their respective dissidents.25 Yet, if intraparty conflict is inevitable, it is worth asking instead whether the persistence of such discord speaks to a deeper truth about the durability of our constitutional system. This Article suggests that the relative porousness of our parties—the very feature that drives internal party conflict—has helped to safeguard our republic and ensure the representativeness of our institutions. In a moment where the drive for internal party orthodoxy appears ever more powerful, it is critical that we pause to appreciate the benefits of disharmony. If Schattschneider is right that our parties, for all their warts, have democratized the Constitution, we must do all we can to ensure that they remain ideologically (and intellectually) diverse, open, and pluralistic vehicles for structuring political competition.

I. POLITICAL PARTIES AND CONSTITUTIONAL THEORY

In keeping with the Framers’ well-known skepticism of factions, political parties were long absent from theories of constitutional law. As section I.A briefly outlines, the traditional Madisonian model of the separation of powers is famously rooted in officeholders’ loyalty to their respective governing branch. This branch-based approach made considerable sense at a time when parties were thought to possess only weak (if any) ideological commitments.

23 See infra, section III.D.
In the early 2000s, however, the recognition that parties had transformed into robust, ideologically constrained vehicles for implementing competing policy visions prompted legal scholars to reconsider the role that parties (and partisanship) might play in reigning theories of constitutional structure. Section I.B describes this contemporary shift to a party-based approach and unspools its logic.

A. The Branch-Based Model

For all that has been said about our constitutional system—much of it sounding in hagiography—the branch-based model of the separation of powers is familiar from high-school civics. At the federal level, the Constitution “divide[s] the delegated powers of the . . . Government into three defined categories, Legislative, Executive and Judicial.”26 The aim: “sharpen institutional rivalries, enlarge and improve federal decisionmaking, and . . . impede the consolidation of federal power for potentially abusive or tyrannical ends.”27 It would be officeholders’ self-interest that ensured each branch protected its designated turf. As Madison famously described the Constitution’s effort to link the interests of individuals to the governing branch they called home, “[a]mbition must be made to counteract ambition.”28

Partisan affiliation figured nowhere in the story. For the Framers’, this absence was deliberate. A core aim of Madisonian constitutional theory was to ensure that no single organized interest could dominate a republic founded on a continental scale.29 For subsequent generations of constitutional law scholars, the absence of parties did not register as especially noteworthy. And why should it? By the middle of the twentieth century, America’s national parties were said to be quite weak, particularly when compared with those in other advanced democracies.30

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29 See Madison, infra note 24 (warning of the “mischiefs of faction”).
30 In 1969, for instance, the great American political scientist Walter Dean Burnham—best known for his argument that American politics is characterized by regular, periodic partisan realignments—identified a “long-term trend toward a politics without parties.” Walter Dean Burnham, The End of American Party Politics, TRANS- ACTION 20 (Dec. 1969). Burnham observed a growing “tendency[y] for our political parties gradually to evaporate as broad and active intermediaries between the people and their rulers.” Id. As political historian Sam Rosenfeld summarizes, “National politics in the middle of the twentieth century involved historically high
organizations, they were ideologically heterodox, often housing contradictory and opposing factions representing competing sectional interests. Commanding little in the way of mass loyalty, American parties lacked a stable membership. And the party system itself was remarkably fluid, as powerful mainstream parties occasionally faded from view and dynamic third-party movements emerged to seize the spotlight. Indeed, it was these features of party government that led the American Political Science Association in 1950 to call for the creation of ideologically cohesive, “responsible” parties—one liberal, the other conservative, in the mold of the disciplined membership organizations that characterized European party systems.

It is unsurprising, then, that the criticisms leveled at the branch-based model often had little to do with parties or partisanship. Some scholars, for instance, questioned the premise that separating power was necessary to forge strong institutional identities. Others argued that, regardless, the balance of power was hopelessly tilted toward the executive and away from the legislature. Still others challenged the assumption that an officeholder’s levels of bipartisanship in government, weak and balkanized party structures, and partisan attachments that were defined more by ties of traditional and communal affiliation than by policy issues and ideology. See, e.g., Eric Schickler, Racial Realignment: The Transformation of American Liberalism, 1932–1965, at 13 (2016) (observing that, far from being a “coherent brand managed by party leaders,” the Democratic party of the mid-twentieth century had been “at war with itself for decades”); Paul R. Abramson, Generational Change and the Decline of Party Identification in America: 1952–1974, 70 AM. POL. SCI. REV. 469, 477 (1976) (documenting a “pronounced” decline in party identification in the postwar United States).


For a discussion of the APSA report and its history, see Rosenfeld, supra note 30, at 7–10.

M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 VA. L. REV. 1127, 1172 (2000) (contending that institutional identity can be created even “among departments without any functional differentiation”); see also Jacob Gersen, Unbundled Powers, 96 VA. L. REV. 301, 304 (2010) (arguing that power can be separated in other ways).

primary loyalty would necessarily be to her respective branch rather than to some other identity—her own career, for instance.37

Each of these developments has close parallels in the analysis of American-style federalism. At the level of constitutional theory, the Framers’ institutional innovations hinged on yoking institutional power to the personal interests of officeholders in an effort to ensure that the balance of power between the states and the federal government did not permanently favor one over the other.38 And at the level of critique, scholars proffered a variety of different reasons to question the traditional Madisonian mechanism—all without focusing on political parties. Some challenged the assumption that “the power exercised by the federal government is hardwired . . . to expand or that the state governments have a comparable hardwired incentive to resist federal expansion wherever it occurs.”39 Others argued that states no longer commanded sufficiently strong political loyalties to credibly serve as sites for mobilizing against federal initiatives.40

B. The Party-Based Model

By the early 2000s, however, it was clear that American politics had changed. In place of diffuse, largely indistinguishable agglomerations, the two parties were rapidly polarizing, becoming both more differentiated relative to one another and more internally homogenous. Although the causes and effects of this shift remain the subject of vigorous debate among social scientists, most observers agree on the essentials. Beginning in the late

37 Daryl J. Levinson, Empire Building in Constitutional Law, 118 HARV. L. REV. 915, 927 (2005) (suggesting that members of Congress “experience the competing pulls of . . . multiple institutional identifications”); see also ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 5 (2001) (arguing that members of Congress are motivated by a variety of interests, only one of which is “institutional” in the sense of “bolstering the capacity, power, and prestige” of the legislative branch).
1960s, the parties began to sort themselves ideologically, with conservatives increasingly identifying as Republicans and liberals as Democrats.\textsuperscript{41} Spurred by changes in civil rights law, white southerners abandoned the Democratic party, which had served as the fulcrum of southern politics for nearly a century.\textsuperscript{42} In turn, college-educated city dwellers from San Francisco to Boston increasingly found the new, harder-edged GOP inhospitable, Ultimately abandoning the party of Nelson Rockefeller for that of George McGovern.\textsuperscript{43} Partisan politics newly charged, the parties began to battle in ways that had previously been deemed out of bounds. Taking shape as a fight between two highly motivated and evenly matched teams of officeholders, interest groups, donors, activists, and voters, American politics was no longer a genteel contest between amiable rivals. Rather, it had come to resemble a blood sport—"all-out partisan combat."\textsuperscript{44}

With pitched partisan warfare poised to swallow up the branch-based model, it was no longer tenable to ignore the role political parties might play in the Constitution’s design. As Darryl Levinson and Richard Pildes argued in their now-canonical treatment of the subject, "[t]o the extent constitutional law is concerned with the real as opposed to the parchment government, it would do well to shift focus from the static existence of separate branches to the dynamic interactions of the political parties that animate those branches."\textsuperscript{45}

Contending that partisanship—not branch affiliation—fueled the Madisonian machine, Levinson and Pildes offered up an alternative, party-based account of the separation of powers. "[P]arty competition," they argued, could "either create or dissolve interbranch competition."\textsuperscript{46} When

\textsuperscript{41} MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 2–3 (2009) (identifying elite-driven sorting as the mechanism for "voters to adopt the ideological outlook of their same-party elites").

\textsuperscript{42} The literature on what is often called southern realignment is extensive. For an accessible, popular discussion, see EZRA KLEIN, WHY WE’RE POLARIZED 24–31 (2020); for a more scholarly treatment, see EARL BLACK & MERLE BLACK, THE RISE OF SOUTHERN REPUBLICANS (2002); Richard H. Pildes, Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 CALIF. L. REV. 273 (2011).


\textsuperscript{44} KLEIN, supra note 42, at 217.

\textsuperscript{45} Levinson & Pildes, supra note 4, at 2330.

\textsuperscript{46} Levinson & Pildes, supra note 4, at 2315; see also DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER 26 (2016) (discussing studies demonstrating the difficulty of legislating when one party controls the White House and the other Congress).
one party controlled both branches—so-called unified government—“the engine of party competition [would be] removed from the internal structure of government” and little to no interbranch checking was likely. Accordingly, they predicted that “Madisonians will view the prospect of unbalanced governance by a cohesive majority party as cause for constitutional alarm.” Only when the out-party controlled at least one chamber of Congress—so-called divided government—could one expect a healthy competition between the branches. Thus, Levinson and Pildes concluded, modern-day Madisonians “must count on party division to recreate a competitive dynamic between the branches.” Skeptical though the Framers were of “party animosities,” our constitutional system works only when parties, rather than powers, are separated.

Thickly constituted partisan identities propel this party-based model of the separation of powers. For aspiring officeholders to win elections and hold on to their seats, Levinson and Pildes argued, they needed the help of “parties that would facilitate alliances among groups of like-minded elected officials and politically mobilized citizens on a national scale.” Over time, these partisan alliances yielded durable loyalties that cut across the Constitution’s institutional barriers. Thus, a Republican lawmaker would be unlikely to privilege the interests of Congress as an institution over those of a co-partisan in the White House. And by the same token, a Democratic president would seek to govern in a manner promoting the interests of her fellow Democrats on Capitol Hill.

47 Levinson & Pildes, supra note 4, at 2329.
48 Id.
49 Id. at 2329 (“When government is divided, party lines track branch lines, and we should expect to see party competition channeled through the branches.”); see also SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 22 (2003) (similar).
50 Levinson & Pildes, supra note 4, at 2329.
52 Levinson & Pildes, supra note 4, at 2319. See also JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 28 (2017) (“[G]overnment officials develop primary loyalty to their parties—which both help them advance their personal goals and reflect the political and ideological issues salient to the voters—rather than to the branches.”).
53 See Levinson & Pildes, supra note 4, at 2323 (arguing that the “electoral and policy interests of politicians have become intimately connected to political parties.”).
54 See, e.g., KRIER & SCHICKLER, supra note 46, at 25 (“In a two-party system, it is simply no longer clear that a legislator’s political interests are best served by always and everywhere aggressively defending Congress against executive-branch incursions.”).
Given the potency of partisanship in our newly polarized age, it stood to reason that these ideas would apply in equal measure to the relationship between the federal government and the states. As Jessica Bulman-Pozen observed, partisanship also ensures “thick ties between state and national politicians.”

For that reason, she suggested, states governed by allies of the party in power in Washington do not (as a general rule) protest federal encroachment. When states do resist federal authority, it is only because federalism “provides a consistent forum for party conflict.” Put differently, there is nothing special about the states as institutional entities in their own right. Rather, “partisanship explains both why some states will cast their lot with the federal government and why others will oppose its actions.”

As in the horizontal separation of powers, the constitutional system may work as the Framers intended, but not as they designed it. Partisan identities—not state loyalty—drives competition between opposing state and federal actors.

II. EVALUATING THE SEPARATION OF PARTIES THESIS

Because parties remain central to American political life, it is hard to imagine a return to a purely branch-based model of constitutional law. So-called affective polarization—the motivation to participate in politics out of animus toward real or perceived opponents—increasingly explains much about our electoral politics. And in Washington, D.C. and state houses across the country, partisan “hardball” has become ever more routine, perhaps best exemplified by Senate Republicans’ refusal to cede Justice Antonin Scalia’s seat on the bench to a Democratic appointee or Wisconsin Republicans’ efforts to curtail the powers of their state’s newly elected Democratic governor. Yet, as this Part argues, the party-based model of

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55 Bulman-Pozen, supra note 4, at 1087; see also Kramer, supra note 38, at 219 (“Party politics swiftly displaced republican politics and complicated what the Founders had erroneously assumed would be a permanent and natural antagonism between state and national politicians.”).

56 Bulman-Pozen, supra note 4, at 1090.

57 Id. at 1092.

58 David Fontana and Aziz Huq have importantly suggested that constitutional law scholars not jettison the entirety of Madisonian thinking about institutional loyalties. See David Fontana & Aziz Z. Huq, Institutional Loyalties in Constitutional Law, 85 U. CHI. L. REV. 1 (2018) (arguing that “institutional loyalty may well have been decisive in some contemporary interbranch dynamics”).

59 KLEIN, supra note 42, at 163 (“When you vote, you’re voting to keep a candidate, a coalition, a movement, a media ecosystem, a set of donors, and a universe of people you don’t like and maybe even fear out of power.”).

60 On the concept of hardball, see Mark Tushnet, Constitutional Hardball, 37 J. MARSHALL L. REV. 523, 523 (2004) (defining hardball as an institutional competition in which “practitioners see themselves
constitutional structure is premised on an unfounded expectation: that continued polarization between the parties will yield increasing coherence within them. Indeed, as section II.A shows, both parties remain internally divided in ways that are both meaningful and persistent. Section II.B considers the consequences of those divisions for our understanding of the horizontal separation of powers. It explores how the reality of intraparty divisions ought to change how we think about unified and divided government at the federal level. Section II.C then evaluates the consequences of party divisions for the vertical separation of powers. It demonstrates that the persistence of intraparty conflict conditions whether and how states will check federal power, or, alternatively, facilitate the reach of the federal government when the same party rules both the state and nation’s capital.

A. The Persistence of Party Divisions

Proponents of the party-based model imagine Democrats and Republicans as cohesive leviathans, with each party offering a distinct and well-defined policy agenda. Partisanship, on this view, is a unifying “camaraderie” that organizes politics into disciplined, competing camps.

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as playing for keeps in a special kind of way,” believing that “the stakes of the political controversy their actions provoke are quite high[,] and that their defeat and their opponents’ victory would be a serious, perhaps a permanent setback to the political positions they hold”); Joseph Fishkin & David E. Pozen, Asymmetric Constitutional Hardball, 118 Colum. L. Rev. 915, 922 (2018) (building on Tushnet’s definition and explaining why Republicans have generally been more likely to engage in hardball over the past several decades). For discussion of the battle over Scalia’s replacement, see generally Robin Bradley Kar & Jason Mazzone, The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia, 91 N.Y.U. L. Rev. Online 53(2016); Michael J. Klarman, Foreword: The Degradation of American Democracy—and the Court, 134 Harv. L. Rev. 1, 247–48 (2020); Josh Chafetz, Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past, 131 Harv. L. Rev. 96 (2017). For an overview of Wisconsin Republicans’ efforts to cut back the power of the state’s Democratic governor, see Laurel White, GOP Lawmakers Propose Limiting Governor’s Veto Power, Wis. Pub. Radio (July 9, 2019), https://www.wpr.org/gop-lawmakers-propose-limiting-governors-veto-power [https://perma.cc/2MTB-GPAK (“Republican state lawmakers are proposing a resolution that would limit the veto powers of Wisconsin governors less than a week after Democratic Gov. Tony Evers issued 68 partial vetoes of the state budget.”)].

Levinson & Pildes, supra note 4, at 2338 (“[T]he rise of a mature system of two-party competition nationwide, gerrymandered ‘safe’ election districts, and more powerful party organizations, among other factors, has led to the resurgence of more internally unified, ideologically coherent, and polarized parties than we have seen in many decades. And there is reason to expect that the parties will remain internally cohesive and ideologically distant for the foreseeable future.”); Bulman-Pozen, supra note 4, at 1087 (arguing that co-partisans at different levels of government will cooperate through “ideologically cohesive, polarized” party networks to advance shared ends).

62 Bulman-Pozen, supra note 4, at 1087.
The expectation is that, as the gap between the parties grows, officials with a shared party affiliation will also come to think alike, revealing increasingly consistent, homogenous preferences about policy.\(^63\) As Levinson and Pildes summarize, “partisan officeholders . . . have converged on relatively homogeneous preferences correlating with their party affiliations.”\(^64\)

But while Democrats and Republicans are increasingly polarized, it is clear that within each party significant differences of opinion remain.\(^65\) At the federal level, fights between progressive and moderate Democrats in Congress forced the Biden Administration to make significant concessions to secure majority support and, at times, to abandon pieces of the president’s legislative agenda altogether. Thus, for instance, while the White House ultimately succeeded in shepherding legislation to address the climate crisis through Congress, the president agreed to scale back his initial proposal significantly to win over skeptical members of his party.\(^66\) So too, voting rights reform has been a casualty of Democratic infighting, with moderate senators resisting the procedural changes necessary to move the legislation through the upper chamber.\(^67\) Nor have the party’s factions found common

\(^{63}\) Levinson & Pildes, supra note 4, at 2333 (arguing that today’s parties are “both [1] more internally ideologically coherent and [2] more sharply polarized than any time since the turn of the twentieth century.”) (emphasis added); see also id. at 2335 (“[P]artisan officeholders in recent decades have converged on relatively homogenous preferences correlating with their party affiliations.”); Bulman-Pozen, supra note 4, at 1083 (“If you asked informed Americans what features are most notable about today’s two-party system, you would likely be told that the parties are ideologically cohesive and polarized.”).

\(^{64}\) Levinson & Pildes, supra note 4, at 2335.

\(^{65}\) James M. Curry & Frances E. Lee, The Limits of Party: Congress and Lawmaking in a Polarized Era 17 (2020) (“[T]oday’s congressional parties still struggle with internal divisions on their legislative priorities. In fact, they contend with much more intraparty conflict than one might expect based on their cohesion in roll-call voting.”).


ground outside of legislative policymaking. Early in Biden’s term, for instance, battles between progressive and moderate lawmakers scuttled several high-profile nominations to the executive branch.⁶⁸

Republicans are not immune from these dynamics. For nearly two decades, insurgent conservatives have been at war with their more mainstream colleagues—a conflict only exacerbated by former President Donald Trump’s tumultuous term in office. Little has changed in the ensuing years.⁶⁹ As the party prepares for the 2024 presidential election, fights are already breaking out over the identity of the party’s nominee, including over whether Trump himself should again seek a second term.⁷⁰ These battles mirror the array of smaller-scale skirmishes that marked the lead-up to the 2022 midterms, with Trump-sponsored candidates for a host of national and state-level posts challenging those supported by other party power brokers.⁷¹

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Policy disagreements similarly plague the GOP. Consider, for instance, that the Supreme Court’s decision to overrule *Roe v. Wade* has created an ongoing schism between Republican lawmakers in both Congress and red-state legislatures over how aggressively to restrict access to abortion.72

Intraparty divisions of this kind are a product of our present political system. In particular, developments in election communications, campaign finance law, and partisan institutions—coupled with the rise of political polarization—have tended to advantage dissidents, renegades, and mavericks at the expense of party leaders.

### i. Election Communications and Campaign Finance Law

From email to social media, recent advances in communications technology make it far easier for politicians—often, extremists—“to reach large, intensely motivated audiences of potential voters and donors” without the aid of party organizations.73 This shift has made it more difficult for party leaders to control the messages their candidates convey to voters, the issues they choose to prioritize, and the rhetoric they adopt. Due in part to these changes, party organizations have atrophied, replaced by loose networks of donors, activists, fundraisers, and consultants, which lack the capacity to select candidates for office or discipline them for deviating from party orthodoxy.74 The rise of an explicitly partisan, nationalized mass media has further eroded the harmonizing power of party organizations, encouraging

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73 Pildes, supra note 25, at 834.

aspiring candidates and incumbents to compete for voters’ attention by adopting ever more extreme or outlandish positions.\footnote{See Paul Pierson & Eric Schickler, Madison’s Constitution Under Stress: A Developmental Analysis of Political Polarization, 23 ANN. REV. POL. SCI. 57, 48 (2020) (arguing that “[t]o the extent that a party’s voters come to rely on media outlets with incentives to polarize, and increasingly treat alternative sources of information as illegitimate, polarization is likely to become more intense and durable”).}

Recent developments in campaign finance law also make it easier for politicians to escape party strictures. By limiting party organizations’ capacity to function as “conduits” for contributions, the current campaign finance regime advantages candidates who “seek a greater share of donations directly from ideological individual and group donors.”\footnote{See, e.g., RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL 5 (2015); Pildes, supra note 25, at 836 (observing that, “[a]t the same moment that legislators became able to brand themselves and raise money independently of the parties, the parties were dramatically disempowered relative to other groups”).} This change has had the unintended effect of limiting party leaders’ ability to suppress dissent. Perhaps more important, it has ensured greater returns for those politicians who can credibly claim to be different from the party establishment and thereby “capture valuable political resources from sympathetic donors and activists.”\footnote{Andrew J. Clarke, Party Sub-Brands and American Party Factions, 64 AM. J. POL. SCI. 452, 453 (2020); see also Marisa Schultz, AOC Riles Dems by Refusing to Pay Party Dues, Bankrolling Colleagues’ Opponents, FOX NEWS [Jan. 10, 2020], https://www.foxnews.com/politics/aoc-riles-dems-by-refusing-to-pay-party-dues-bankrolling-her-colleagues-opponents [https://perma.cc/6DVF-MASA] (describing Rep. Alexandria Ocasio-Cortez’s (D-NY) efforts to develop a parallel fundraising network to the Democratic Congressional Campaign Committee).}

These effects are magnified at the state level, where politics is more vulnerable to manipulation by ideologically oriented donors and activists. With fewer interested participants, investments of time and money buy more access and airtime. What’s more, state officeholders typically lack the necessary resources to develop and evaluate policy interventions and thus rely more heavily on the input of outsiders—including lobbyists.\footnote{See, e.g., Jacob M. Grumbach, From Backwaters to Major Policymakers: Policy Polarization in the States, 1970–2014, 16 PERSPS. ON POL. 416, 418 (2018) (“Organizations’ investments in lobbying and the provision of ‘model bills’ to state legislators appear highly effective in shaping state policy outcomes.”).} As state policymaking has become less salient to voters, those on the fringes of their party have had an easier time pursuing policies that only a minority of residents favor, stoking considerable conflict within state party organizations.\footnote{Id.}
ii. Development of Legislative and Partisan Institutions

Institutional changes at both the federal and state levels have weakened the power of party organizations to quell internal conflicts in other ways. In Congress, for example, older norms of legislative behavior that previously helped to maintain internal party harmony—including “intercommittee reciprocity and deference to senior members”—have eroded. At the same time, members of party factions have increasingly institutionalized their collaboration and resistance to party pressure. Over the past two decades, groups like the House Freedom Caucus and Congressional Progressive Caucus have elaborated internal voting rules and other mechanisms that bind their members to group decisions, promote members’ shared policy goals, and enable them to bargain on more equal terms with party leaders. At the state level, the adoption of the “top-two” primary in states like California, Nebraska, and Washington—where the two leading vote-getters compete against each other in the general election, regardless of party—have led to regular fights between candidates of the same party over issues that would otherwise cut along party lines.

Still other institutional developments have made it possible for each party’s factions to forge stronger ties to a diverse constellation of interest groups and donors, making them less reliant on party funds to survive and thrive. On the right, the proliferation and expansion of conservative think-tanks like the Heritage Foundation have helped Republican officeholders, including members of the Freedom Caucus, to design policy proposals without the aid of the party establishment. On the left, moderate Democrats affiliated with the Blue Dog and New Democrat Coalitions have

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80 BARBARA SINCLAIR, MAJORITY LEADERSHIP IN THE U.S. HOUSE 1, 21 (1983).
81 Ruth Bloch Rubin, Organizing at the Extreme: Hardline Strategy and Institutional Design, 49 CONG. & THE PRESIDENCY 1, 19 (2022) (describing the House Freedom Caucus’s formal by-laws, strict code of confidentiality, and internal voting rules); id. at 26 (describing similar efforts undertaken by the Congressional Progressive Caucus).
82 See Jeremy B. White, The Liberal-Moderate Rift Among Democrats Has Brown Open in California, POLITICO (May 5, 2020, 4:30 AM), https://www.politico.com/news/2020/05/05/california-democratic-party-fractures-151712 [https://perma.cc/9NXA-ZWM7] (observing that, “in modern California politics, the critical fault line isn’t between Democrats and Republicans” but instead “between Democrats, thanks to an election system that allows two Democrats to advance out of primaries and collide in the general election”).
leveraged both groups’ fundraising networks to elicit support from conservative donors and corporations, while progressives fundraise with the help of sympathetic issue-oriented PACs that insist on keeping the Democratic National Committee at arm’s length. Institutionalized ties of this kind help dissidents cross traditional Madisonian boundaries to forge powerful alliances. Most notably, former Freedom Caucus co-chair Mark Meadows (R-NC) served as Donald Trump’s last chief of staff, helping to coordinate Trump’s efforts to challenge the legitimacy of the 2020 presidential election.

Similar institutional dynamics shape state-level politics, where party-adjacent organizations stoke intraparty conflict. Within the Republican orbit, for example:

Think tanks affiliated with the State Policy Network (SPN) spew out studies and prepare op-eds and legislative testimony. Paid state directors and staffers installed by Americans for Prosperity (AFP) sponsor bus tours, convene rallies and public forums, run radio and television ads, send mailers, and spur activists to contact legislators. And inside the legislatures themselves, many representatives and senators, especially Republicans, are members of ALEC [the American Legislative Exchange Council], which invites them to serve alongside business lobbyists and right-wing advocacy groups on national task forces that prepare “model” bills.

The result is greater friction between conservative ideologues and “mainstream and center-right corporations and trade associations”—the traditional anchors of the Republican Party.

While institutional change has fostered intraparty conflict at the federal level, institutional stickiness has helped to promote it in the states. Consider that, unlike at the federal level, where partisan parity prevails, many states

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84 Clarke, supra note 77, at 463.
have long been governed by a single party. Thus, in states like California and Mississippi, where one party has long dominated politics, ambitious politicians—regardless of their ideology—are likely to make their careers as candidates for the ruling party. In so doing, they inevitably channel ideological and policy differences into the dominant party’s internal politics. For that reason, scholars have generally found that “one-party states feature factionalized . . . non-programmatic politics.”

iii. Polarization

Rather than depressing intraparty differences as the party-based model long assumed, polarization has instead worked to amplify factional divisions within each party. Crucially, in both Congress and state legislatures, polarization often demands that the majority rely exclusively on the votes of its own members to make law. Should a party’s majority be narrow, as is often the case in Congress and in swing states, dissenters within the ruling party—regardless of ideology—have meaningful leverage. By threatening to withhold their support from even high-profile legislative initiatives, they can secure policy concessions from party leaders or scuttle legislative drives altogether. This helps to explain why, in recent years, majority party

89 Gerald Gamm & Thad Kousser, Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures, 104 AM. POL. SCI. REV. 151, 154 (2010). Nevertheless, ambitious politicians sometimes affiliate with their state’s traditional out-party. Rather than wait in the wings for their turn to pursue state-wide office as representatives of the dominant party, they can catapult themselves to the top by serving as the standard bearer for the opposition. This phenomenon only further exacerbates internal party divisions, as such politicians are often out of step with much of their (national) party. To keep their grips on these traditionally Democratic states, politicians like former Massachusetts governor Charlie Baker often found it necessary, and even beneficial, to vocally criticize Republicans in government elsewhere. See, e.g., Lauren Dezenski, How Charlie Baker Ditched Trump to Become America’s Most Popular Governor, POLITICO (Jan. 13, 2018, 6:59 AM), https://www.politico.com/story/2018/01/13/charlie-baker-massachusetts-trump-339182[https://perma.cc/K2TH-GHFK].

90 CURRY & LEE, supra note 65, at 71.

91 Id. (“When a majority party can expect no help from across the aisle, every intraparty faction knows it has leverage to try to extract concessions.”); MATTHEW N. GREEN, LEGISLATIVE HARDBALL: THE HOUSE FREEDOM CAUCUS AND THE POWER OF THREAT-MAKING IN CONGRESS 6 (2019) (“A faction that is large and unified enough can swing the vote outcome one way or another if its demands are not met[.]”). Students of Congress have long appreciated that individual legislators’ leverage is highest when their votes are pivotal to the party’s floor or procedural majority. See KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 13, 24 (1998) (discussing the power of the floor median in the House and the filibuster pivots in the Senate); Daniel B. Rodriguez & Barry R. Weingast, The Positive Political Theory of Legislative History, New Perspectives on the 1964 Civil Rights Act and Its Interpretation, 151 U. PA. L. REV. 1417, 1439 (defining “pivotal” legislators as those lawmakers who hold the legislation’s “fate . . . in their hands: if they support it, it will pass; if they oppose it, it will fail”)


initiatives in Congress have foundered even when the party in power controls both chambers of the legislature and the White House.92

Polarization can exacerbate intraparty conflict in state party organizations by yet another mechanism. As Bulman-Pozen highlights, states have always offered intraparty dissenters a platform to articulate “opposing views of [their] party’s position.”93 And so, as national politics has polarized, states have become vital arenas for centrists of both parties to advance their careers—in part because their prospects for winning national office are limited. A case in point is Republican Charlie Baker, who held the governorship of reliably blue Massachusetts for nearly a decade by eschewing mainstream Republican talking points in favor of policy positions espoused by centrist Democrats.94 While this strategy paid dividends for Baker, it strained ties between the GOPs moderate and conservative factions, as Baker and other blue-state Republican governors were often publicly critical of their more mainstream co-partisans.95 But the states are not simply havens for party moderates; they also offer hardline candidates, donors, and activists proving grounds to test the public’s appetite for ever more stringent policies. This combination of forces—career incentives pushing centrists into state politics where they are likely to encounter the allies of powerful ideological extremists—mean that pitched intraparty conflict is likely to remain a fixture of state politics across the country.

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If party divisions are so prevalent, why have our theories of constitutional law overlooked them? Most often, social scientists and those in the legal academy who rely on their work use metrics that quantify how consistently members of the same party vote together in Congress or in state legislatures.96

92 See Richard H. Pildes, Focus on Political Fragmentation, Not Polarization, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 151 (Nathaniel Persily ed., 2015); Pildes, supra note 25, at 830 (“Political fragmentation has drained partisan elected leaders of much of the power to control, unify, and discipline members of their own party.”).

93 Bulman-Pozen, supra note 4, at 1125.


But the reality is that most intraparty fights take place well before final floor votes are tallied. Most proposals that are internally controversial within a party are not formally voted on, as skillful party leaders agenda-set to promote the façade of party unity. By the time a floor vote is scheduled, majority leaders and majority-party factions have been engaged in a complex bargaining process. While leaders work to build common ground, dissident members lobby them to adopt substantive changes that “alter bills or rules before they [come] to the floor.” The result is that measures of party coherence that rely on floor votes “systematically deemphasize [] the role of internal deliberation and coalition-building in holding parties together.”

To put the point more strongly, when floor fights reveal intraparty discord, we must assume it represents a mere fraction of the battles being waged behind closed doors.

B. Party Divisions and Their Consequences for the Horizontal Separation of Powers

Attending to party divisions as a permanent feature of our politics has critical consequences for the balance of power at the federal level. Let’s begin with unified government. The conventional worry is that same-party control of Congress and the White House will erode the Constitution’s checks and balances, with Congress simply rubber-stamping the president’s agenda. When one party controls Washington, “[g]overnment may become too efficacious and ideologically aggressive.” But this threat recedes when a president encounters a friendly—but fractious—majority. Shared partisan ties are often insufficient to persuade members of Congress to get on board with the president’s program when they disagree with the executive’s policy or strategic goals. And should partisanship induce congressional cooperation, “the President still has to broker differences of opinion within

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98 GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 24 (2005) (arguing that party leaders will “always obey the first commandment of party leadership”—Thou shalt not aid bills that will split thy party”).
100 LEE, supra note 99, at 46.
101 Levinson & Fildes, supra note 4, at 2339.
his party in deciding just how far to push [his legislative agenda] before risking defection from the ranks.\(^\text{102}\)

For these reasons, contemporary Madisonians are likely to find intraparty conflict during periods of unified government congenial to their cause, as party divisions increase the odds that Congress will insist on having a say in national policymaking. Recent history bears this out. One-party rule under President Biden has not been the cakewalk that Madisonians warned against. Far from helping Democrats steamroll the opposition or rubber-stamp the president’s agenda, West Virginia’s Joe Manchin (sometimes in concert with Arizona’s Kirsten Sinema) has jettisoned or revised many of Biden’s signature policy priorities, forcing the president to alter central pieces of his social spending and climate regulation bills to secure the necessary votes.\(^\text{103}\)

Lest one conclude that the GOP is less vulnerable to infighting of this kind, it is worth remembering that Republican moderates in the Senate and their conservative counterparts in the House collectively stymied Trump’s efforts to take advantage of Republican rule to repeal and replace the Affordable Care Act four years earlier.\(^\text{104}\)

Not only does this reality compel us to reassess the threat of unified government to the separation of powers, but it also calls into question the imagined upsides of one-party rule.\(^\text{105}\) For those who argue that unified government improves electoral accountability by making it easier for voters to link government performance to the party in power, intraparty conflict muddies the waters.\(^\text{106}\) To the extent that intraparty conflict impairs the governing party from fully implementing its agenda, voters will be hard pressed to evaluate whether they like that party’s policies or not. In this sense, parties riven by faction cannot be responsive or responsible in the sense of implementing a set of policies for which they have obtained an electoral mandate. The real danger, recent experience suggests, is not that unified

\(^{102}\) Epstein, supra note 8, at 213.

\(^{103}\) See supra notes 66 & 67.


\(^{105}\) Chafetz, supra note 52, at 35 (arguing that because unified party control indicates broad public support for the dominant party’s agenda, “it makes democratic sense for there to be fewer checks on the implementation of the [ruling] party’s agenda”).

\(^{106}\) Levinson & Pildes, supra note 4, at 2339.
government risks despotism, but that unified government coupled with factionalism risks disillusioning the public over what government can accomplish. When intraparty conflict stalls momentum on popular policy interventions, voters may come to distrust the government’s capacity to improve their lives—undermining the legitimacy of the political branches in the process.

The consequences of intraparty conflict for divided government are in many ways the mirror image. Contending that partisan rivalry motivates interbranch competition, the party-based model holds that the Constitution’s checks and balances work best when the executive and legislative branches are controlled by different parties. But congressional majorities riven by internal divisions may not be able to sustain a “productive tension” with an executive of the opposing party. Differences of opinion increase the costs of coordination between co-partisans and reduce members’ willingness to pursue collective action. Consequently, even a hostile Congress may not muster sufficient capacity to confront the president head on. And when the majority party cannot act decisively, the odds are low that partisan competition will ensure the constitutional system functions as Madison intended.

That a Congress of one party would not delight in clashing with a president of the opposing party might strike some readers as implausible. One might point to then-Minority Leader McConnell’s 2010 pledge to unite congressional Republicans with the goal of making “President Obama . . . a one-term president” as evidence that even divided parties can get it together to battle the opposition. But the truth of the matter is that divided government has not proven a significant obstacle to enacting legislation the

108 In this sense, the account presented here is a more generalized version of Kate Andrias’s contention that the power of resource-rich interest groups “undermine[s], or at least amend[es], the narrative of an unchecked and hyper-partisan executive during times of unified government.” See Kate Andrias, Separations of Wealth: Inequality and the Erosion of Checks and Balances, 18 U. PA. J. CONST. L. 419, 465 (2015). To be sure, the majority’s capacity to push back is limited by the prospect of a presidential veto, although the relative infrequency of vetoes suggests that invoking this constitutional mechanism is costly. For a general discussion of the strategic politics of presidential vetoes, see Charles M. Cameron, Veto Bargaining: Presidents and the Politics of Negative Power (2000).
109 Levinson & Pildes, supra note 4, at 2341.
110 Andy Barr, The GOP’s No-Compromise pledge, POLITICO (Oct. 28, 2010, 8:09 AM), https://www.politico.com/story/2010/10/the-gops-no-compromise-pledge-044311 [https://perma.cc/TG4B-UMX4]. Then-Minority Leader Boehner echoed the sentiment, declaring: “We’re going to do everything—and I mean everything we can do—to kill [the Democrats’ agenda], stop it, slow it down, whatever we can.” Id.
White House supports. As the political scientist David Mayhew notes, over the last half of the twentieth century, “important laws have materialized at a rate largely unrelated to conditions of party control.”\footnote{Mayhew, supra note 8, at 4.} No relic of a bygone era, this phenomenon persists even in our polarized age. Lawmaking in contemporary Washington remains a bipartisan affair. As one influential recent study finds, “minority party support for enacted legislation remains as high as it was in the 1970s.”\footnote{Curry & Lee, supra note 65, at 19 (2020).} Anecdotal evidence provides further support. With his party controlling the Senate by the thinnest of reeds, most of President Biden’s legislative victories—Covid-19 relief, an infrastructure package, gun-safety reform, and industrial policy—have benefited from Republican support.\footnote{Jonathan Chait, Why Biden Is Getting More Bipartisan Laws Than Anyone Expected, N.Y. MAg. [June 14, 2022], https://nymag.com/intelligencer/article/senate-gun-safety-ualde-bipartisan-biden-mcconnell.html [https://perma.cc/C5QP-LEQ2].}

This is one place where the effects of intraparty divisions during periods of divided government are clear cut. Building bipartisan coalitions is easier when a president can identify members of the opposition who are willing to go against the party grain. Nor must these members always be self-proclaimed mavericks. In 2015, for instance, with tensions between the Republican-controlled Congress and Democratic White House at an all-time high, then-Speaker John Boehner (R-OH) collaborated (albeit in secret) with the Obama administration to reform Medicare.\footnote{Id. at 145–48.}

Nevertheless, we should not overstate the point. As the party-based model makes clear, the incentives for congressional majorities to make an opposing president look bad are considerable. But these incentives may cash out in more specific ways than the party-based model would predict. For one, we should expect interbranch competition to be at its apex for only the highest-profile pieces of the president’s agenda—where majority-party cohesion is easiest and most important to achieve—and lower for less publicly salient issues, where majority-party members are more likely to defect from party orthodoxy. Thus, Republicans during the Obama years dedicated themselves to blocking any and all improvements to the Affordable Care Act, lest the president’s signature domestic policy initiative become more popular in the public imagination.\footnote{See, e.g., Ed O’Keefe, The House Has Voted 54 Times in Four Years on Obamacare. Here’s the Full List, WASH. POST (Mar. 21, 2014), https://www.washingtonpost.com/news/the-} Similarly, the Senate GOP held
rank to ensure that President Barack Obama’s nominee to replace Justice Antonin Scalia, then-D.C. Circuit Judge Merrick Garland, would not receive a confirmation hearing or a floor vote.\footnote{See supra note 60 (and accompanying text).}

For another, there is good reason to think that, today, investigations of the executive branch—unlike efforts to block the president’s legislative agenda—will indeed be more frequent under divided than unified government.\footnote{KRINER & SCHICKLER, supra note 46, at 48–49 (finding that during periods of high partisan polarization the frequency of investigations increases during divided government); but see id. at 51–55 (finding differences between the House and Senate).} But this phenomenon, too, requires accounting for intraparty divisions. Because oversight does not require the majority party to muster the support of all (or most) of its members, investigations are less vulnerable to intraparty dissension.\footnote{Id. at 74 ("Investigations avoid some of the problems that generally plague legislative efforts to check presidential power.").} Rather, to the extent that investigations are the domain of individual legislators—entrepreneurs who seek to “boost their reelection and personal power” by “expos[ing] damaging evidence of wrongdoing”\footnote{Id. at 7, 26.}—and their committees, members of the majority party who object to a particular probe will generally have little say in the matter. Under divided government, this means that the president’s life is likely to be especially uncomfortable—notwithstanding majority party infighting. Ambitious committee chairs need not secure the majority party’s full backing before subjecting the executive to scrutiny in the hopes of “sour[ing] public perception of the president’s party.”\footnote{Id. at 26. Of course, divisions within the majority party may prompt some members to advance their own interests by investigating a co-partisan administration. Indeed, as a leading study of investigations argues: “Congress is likely to contain at least a few members inclined to exercise the oversight power . . . in the pursuit of institutional or broader public interests, rather than purely partisan ones.” Bradley & Morrison, supra note 9, at 446. And historically at least, it has been true that “high-publicity investigations . . . seem to go on regardless of conditions of party control.” MAYHEW, supra note 8, at 4; see also Levinson & Pildes, supra note 4, at 2344 (similar). Today, however, both parties make committee appointments with an eye to prioritizing loyalty and punishing dissent. The odds that co-partisan committee chairs will authorize an investigation of a president of the same party are correspondingly rather low.}

Stepping back, what does all of this mean for presidents? At a minimum, attending to the constitutional stakes of intraparty fights suggests that the distinction between unified and divided government is less meaningful than we’ve been made to believe. It is often asserted that divided government will push presidents to make policy through the federal bureaucracy. The logic...
is straightforward. The harder it is for the president to realize her agenda through legislative means, the more likely she is to rely on administrative policymaking. This was how President Obama’s decisions to implement the Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parents of Americans (DAPA) programs were typically explained. Only “after a gridlocked Congress failed to pass legislation resolving the issues that DACA and DAPA addressed,”\(^\text{121}\) did the president resort to an administrative solution.\(^\text{122}\) By the same logic, under unified government, we are taught to expect the president to pursue much of her policy agenda through legislation, rather than administration. With ready allies in control of the first branch, durable statutory interventions are thought to be both better and attainable.

But attending to intraparty conflict demands a more nuanced account. If under unified government, the ruling party is beset by factionalism, presidents may pursue administrative interventions on efficiency grounds. Rather than coax and coddle rival factions within her party, a time-strapped executive may see congressional action as a dead end. If true, presidents may rely on administrative policymaking as much under unified government as under divided government.\(^\text{123}\) It appears the Biden Administration adopted just this strategy after failing to pass key parts of the president’s legislative agenda, promulgating a host of new administrative rules and executive orders at the midpoint of the president’s term.\(^\text{124}\) Intraparty conflict also changes how presidents attempt to manage a hostile Congress. Majority party infighting during periods of divided government means that presidents have an opportunity to identify and lobby wavering members of the opposition. Leveraging their national standing, presidents may be most effective at persuading members of the opposing party who represent split or

\(^{121}\) Mashaw & Berke, supra note 8, at 566.

\(^{122}\) See, e.g., Gillian E. Metzger, Agencies, Polarization, and the States, 115 COLUM. L. REV. 1739, 1744 (2015); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED 97 (1965) (arguing that since the New Deal the United States has experienced “a displacement of parliamentarianism by executive government”).

\(^{123}\) Cf. Alexander Bolton & Sharece Thower, Legislative Capacity and Executive Unilateralism, 60 AM. J. POL. SCI. 649, 649 (2015) (arguing that “[w]hen congressional capacity is low, the president can more effectively circumvent a hostile Congress through unilateral action”).

\(^{124}\) Among other things, the Biden administration took prominent administrative action on Covid-19 vaccination requirements, student loan forgiveness, and fuel efficiency. For a complete list of the Biden administration’s rulemaking activity, see Tracking Regulatory Changes in the Biden Era, BROOKINGS (Aug. 2, 2023), https://www.brookings.edu/articles/tracking-regulatory-changes-in-the-biden-era/ [https://perma.cc/TA87-2ZVA].
“purple” districts—that is, constituencies that backed the president in the preceding election.125

C. Party Divisions and Their Consequences for the Vertical Separation of Powers

The presence of intraparty conflict also shapes the balance of power between the federal government and the states. Under the party-based model, the thinking goes that the party out of power in Washington will rally co-partisan state governments to block or slow federal initiatives, “pushing back against federal policy using the authority conferred on them to carry out federal law.”126 But contemporary Madisonians expecting partisanship to fuel state resistance to federal encroachments are likely to be disappointed. Conflict within parties is more likely to diminish the incentives and capacity of states affiliated with the party out of power in Washington to coordinate their opposition to federal interventions. On this account, party factionalism risks states abdicating their responsibility to police the growth of federal powers.

Consider the dilemma facing Republicans in the aftermath of the Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*,127 which struck down a key requirement of the Affordable Care Act: that states expand Medicaid or forfeit their existing share of federal Medicaid funds. On the one hand, many Republican officeholders had promised to do everything in their power to undermine President Obama’s signature legislative initiative.128 On the other, Republicans in states like deeply red Alabama faced significant cross-pressures.129 Expanding Medicaid was popular with voters130 and influential interest groups; healthcare providers,  

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126 Bulman-Pozen, supra note 4, at 1105.


130 Shanna Rose, Opting In, Opting Out: The Politics of State Medicaid Expansion, 13 FORUM 63, 65 (2015); see also Joshua Meyer-Gutbrod, Between National Polarization and Local Ideology: The Impact of Partisan Competition on State Medicaid Expansion Decisions, 50 PUBLIUS 237, 248 (2020) (“Conservative parties facing strong interparty competition may be more willing to engage in negotiation because it may
in particular, favored the move. Forgoing the program’s expansion would also mean giving up a lot of federal funding—a fact that some Republican governors used to publicly justify their decision to accede to the ACA’s requirement. With red states divided over the issue, efforts to roll back the statute fell not to the states, but to Republicans in Congress and the White House.

Yet, Madisonians today may cheer intraparty divisions when they make it more difficult for states to “line up” in support of federal authority. For just as intraparty conflict makes it unlikely that unified government will undermine the separation of powers by greasing the wheel of legislative-executive collaboration, factionalism is likely to prevent those in control of national institutions from calling upon sympathetic states to serve as partisan lackeys. The consequence is that we need not fear that the partisan interests now dominating our local politics will necessarily undermine Madisonian competition between the states and the federal government.

For the skeptical reader, contemporary examples abound. In the early days of the Covid-19 pandemic, for instance, a number of Republican governors prominently broke with then-President Trump in their responses to the crisis. Ohio’s Mike DeWine—a staunch conservative—moved quickly to issue a statewide shelter-in-place order, pushing back against the administration’s laissez-faire approach to managing the spread of contagion and incurring the wrath of the president’s allies in the state legislature.

Two decades earlier, much of the opposition to President Bush’s signature

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131 Alexander Hertel-Fernandez, Theda Skocpol & Daniel Lynch, Business Associations, Conservative Networks, and the Ongoing Republican War over Medicaid Expansion, 41 J. Health Pol'y, Pol'y & L. 239, 255 (2016); Rose, supra note 130, at 65; see also Rocco, Keller & Kelly, supra note 130, at 497–98.
132 Jacobs & Callaghan, supra note 128, at 1034. Arizona’s Jan Brewer, for instance, declared: “[T]aking advantage of this federal assistance is the strategic way to reduce Medicaid pressure on the State budget.” Id.
133 By early 2015, more than one-third of the twenty-nine states that expanded Medicaid’s rolls had Republican governors, while almost a quarter were under unified Republican control. Rose, supra note 130, at 65. Republican governors in several other states endorsed expansion. See Hertel-Fernandez, Skocpol & Lynch, supra note 131, at 242 (“Despite the divide partisan polarization, Medicaid expansion has been endorsed by eighteen governors in GOP-dominated states—that is, where two or three of the governorship, the lower legislative chamber, and the upper chamber are under GOP control.”).
134 Bulman-Pozen, supra note 4, at 1080.
educational reform, the No Child Left Behind Act, came from conservative states where Republicans officeholders “objected strenuously to the act’s programmatic mandates, penalties, and timetables.”

Even when intraparty conflict is insufficient to prevent states from collectively protesting federal policymaking, it can dictate how state officeholders choose to resist. For example, suing to block federal initiatives outright—an increasingly prominent form of “uncooperative federalism”—may be particularly appealing for officeholders representing states with a divided majority party. As is true in Congress, it is often easier to stand in support of the status quo than agree on how to change it. Similarly, efforts to block federal interventions wholesale, even if unsuccessful, can help paper over party divisions by “messaging” opposition without getting into preferred alternatives. By contrast, state-by-state efforts to subvert the implementation of federal policy initiatives, as in the case of Medicaid expansion, may fall prey to intraparty disputes, making this form of licensed dissent particularly fraught.

III. LESSONS OF CENTERING PARTY DIVISIONS

Thus far, this Article has argued that intraparty conflict is likely to temper the excesses anticipated by the party-based model. Under unified government, party divisions are likely to impede the kind of legislative-executive synergy that Madisonians have long feared. But under divided government, these same cleavages are likely to jeopardize the robust legislative checks on executive power they often celebrate. Likewise, at the state level, party infighting is likely to lower the odds that states allied with the party in control of the federal government will collectively rally to its aid. But by the same token, discord of this kind ought to make it less likely that

138 See Bulman-Pozen & Gerken, supra note 39, at 1272 (observing that, among other things, states can legislate independently, sue the federal government, decline to participate in a federal program, or simply “play[ing] the role of Ferdinand the Bull to federal policymakers”).
139 Id. at 1256.
140 FRANCES E. LEE, INSECURE MAJORETIES: CONGRESS AND THE PERPETUAL CAMPAIGN 53 (2016) (arguing that “partisan messaging” is designed “to draw partisan contrasts in hopes of winning greater or more enthusiastic support for one’s side”).
141 Bulman-Pozen & Gerken, supra note 39, at 1256.
the out-party in the national government will see sympathetic states effectively counter federal action.

The bottom line is that, even in our polarized age, we should not treat party harmony as a constant feature of our constitutional politics. Rather, coordination between co-partisans is highly variable. When it is achieved, the party-based model will generate accurate predictions about constitutional outcomes. But when not, it will have little explanatory power. Against this backdrop, this final Part seeks to refine how we understand the separation of powers by identifying four core lessons—some descriptive, others analytical or normative—that emerge from sustained attention to the presence and persistence of party divisions in our constitutional structure.

Section III.A begins with a survey of some of the key federal and state institutions that facilitate partisan coordination, as well as those that work to impede it. Proponents of the parties-based model often assume that partisans march in lockstep because of shared ideological commitments. But, as this section argues, synchrony of this kind is often manufactured through the strategic deployment of institutional rules and procedures that create the impression of party harmony—from those that enable congressional party leaders to set the agenda and manage the flow of information to those that presidents establish to manage relationships with co-partisans in Congress. Because partisan harmony is as much an output of institutional activity as it is an input, it ought to be treated as an object of study that falls squarely within the collective intellectual domain of lawyers and legal scholars rather than the exclusive province of politically attuned social scientists. The rules and procedures that enable partisan coordination are thus best thought of as critical (but to-date underexplored) features of what has been called the “small-c” constitution.142

Section III.B turns more explicitly to legal doctrine, observing that courts’ capacity to promote (or inhibit) partisan coordination matters quite a lot to how (and how well) our constitutional system functions. As we have seen, high-profile campaign-finance decisions like Citizens United v. FEC have tended to empower party dissidents at the expense of party leaders’

142 See Richard Primus, Unbundling Constitutionality, 80 U. CHI. L. REV. 1079, 1084 (2013) (“The essential move of small-c theory is to decouple one of the attributes of constitutional status, namely textuality, from constitutionality itself. That move is a partial unbundling of constitutionality.”); Pozen, Self-Help, supra note 9, at 83 (defining the small-c constitution as comprised of “the relatively stable set of rules, practices, and arrangements that are not housed in the constitutional text but nonetheless are thought to serve a constitutional function because they are important to the structure of government or because they reflect fundamental American values”) (internal quotation marks omitted).
disciplinary authority. So, too, the Court’s studied non-intervention in questions of partisan redistricting has helped to spur intraparty battles, as general elections recede in importance and primaries come to the fore. Given these dynamics, this section argues that the law of political parties—to date, the purview of election law specialists and First Amendment scholars—ought to be read alongside those classic cases concerning interbranch and state and federal relations that constitute the separation of powers and federalism canon.\footnote{On the concept of a constitutional law canon, see J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 Harv. L. Rev. 964, 964 (1998) (“A revitalized constitutional canon should pay attention to structural questions that do not often come before courts, and it should include nonjudicial interpreters of the Constitution, particularly representatives of political and social movements whose interpretations often shape and influence the direction of constitutional interpretation.”).}

Returning to the heartland of existing separation of powers doctrine, section III.C suggests that careful attention to intraparty divisions can help to provide analytical traction on more traditional questions in the study of constitutional law, including the relative balance of power between Congress and the courts. Contemporary progressives and conservatives alike have expressed renewed enthusiasm for judicial minimalism. On the right, textualists like Justices Neil Gorsuch and Brett Kavanaugh argue that courts should embrace deference to the legislature on the ground that the judicial power under Article III is necessarily circumscribed.\footnote{See, e.g., Bostock v. Clayton Cty., 140 S. Ct. 1731, 1783–84 (2020) (Alito, J., dissenting) (“The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. . . . But the authority of this Court is limited to saying what the law is.”).} On the left, a new generation of legislative supremacists seeks to debunk the myth that courts promote an economically or socially progressive agenda, suggesting instead that progressives ought to put their hopes in the nation’s elected representatives.\footnote{See, e.g., Bowie & Renan, supra note 20, at 2025 (defending a “republican” separation of powers as against a “juristocratic” one); cf. Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 3 (2022) (seeking to “reclaim” a “way of thinking about the Constitution” that does not entail viewing it as a “set of limits on government [] enforced almost exclusively by courts”).} Both camps tend to view Congress through rose-colored glasses, often assuming that legislative majorities will ultimately get their way.\footnote{Bostock, 140 S. Ct. at 1836 (Kavanaugh, J., dissenting) (“In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand.”).}
Yet studies of legislative politics suggest that congressional leaders routinely block consideration of proposals they anticipate will command a bipartisan majority for fear that such proposals will divide their own ranks. To the extent that legislative leaders are free to sacrifice majority will on the altar of party discipline, both progressives and conservatives ought to limit their expectations about what the first branch is likely to achieve. At minimum, a more realistic appreciation for how legislative leaders manage intraparty conflict should give textualists pause when they assume that congressional inaction necessarily reflects the absence of a majority in favor of change. This might liberate courts to intervene more directly to update statutes in the face of these apparent deficiencies in the political process.\textsuperscript{147} That same level of realism might also give progressives pause in assuming that Democratic majorities in Congress or blue statehouses are likely to produce legislation they favor.

Finally, section III.D concludes with a normative appraisal of the status quo. If intraparty fights are endemic to our constitutional system, perhaps their persistence reflects something fundamental about why that system has proven so durable. More than two centuries ago, the Framers warned of the “mischiefs” of faction.\textsuperscript{148} But believing that the “CAUSES of faction [could not] be removed,” they saw value in a large republic that would “take in a greater variety of parties and interests,” such that no one faction would reign supreme.\textsuperscript{149} Channeling those impulses, contemporary observers too often dwell on today’s mischiefs, criticizing the influence of extremist factions and both parties’ lack of discipline.\textsuperscript{150} But in our haste to specify the dangers of faction, we have missed their potential merits. As this concluding section argues, intraparty conflict can be profitably harnessed to reinforce our system of representative government, helping to make our system both more representative and more responsive.

\textsuperscript{147} Cf. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (suggesting that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” might appropriately “be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation”); ElY, infra note 22, at 77 (“Carolene Products . . . asks us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.”).

\textsuperscript{148} See Madison, supra note 24.

\textsuperscript{149} \textit{Id}.

\textsuperscript{150} See, e.g., Persily, infra note 25, at 131–32 (“The principle (or perhaps assumption) that guides the pro-party proposals described here is that extremists within the parties and nonparty groups on the outside are driving polarization.”); Pildes, infra note 25, at 830 (similar).
A. Institutions, Not Identities

Scholars of constitutional law usually conceive of partisanship as a set of fixed, political identities. “Most American adults,” Bulman-Pozen writes, “understand themselves as Democrats or Republicans, and even most self-proclaimed Independents process information and take positions on issues in ways indistinguishable from their partisan-identified peers.” But partisanship is more than just a way for individuals to relate to the world—that is, to express the “instinct to view our own with favor and outsiders with hostility.” It is also the product of institutions that dictate when partisans will work towards a mutually shared goal and when, instead, they will break ranks. Partisan coordination and disharmony, this section argues, flow from rules and procedures deployed by sophisticated political actors with discrete objectives.

Emphasizing the centrality of institutions to party politics is not without precedent. As Levinson and Pildes observe, the rules governing party primaries—closed versus open, for example—can affect whether voters elect centrists or moderates to represent their party in the general election. But institutions structure the content of partisanship (and who is considered a partisan) through mechanisms beyond candidate selection. It is through parapartisan organizations, and by taking advantage of rules and procedures that govern the elected branches and the parties themselves, that leaders and other interested and entrepreneurial actors are able “to build common ground where it does not initially exist . . . and to adjust the bundle of commitments that characterize the party at any given time.” By “literally restructuring and reconstituting the party itself,” partisan actors determine what counts as “centrist” or “extremist,” long before voters (or candidates) have their say.

This institutional basis renders partisanship and partisan coordination fundamentally legible to lawyers and legal scholars. Far from being the intellectual domain of social scientists, the mechanisms that undergird

151 Bulman-Pozen, supra note 4, at 1113.
152 KLEIN, supra note 42, at 51.
153 Levinson & Pildes, supra note 4, at 2381–82 (“Because party activists dominate closed primaries, the winners are more likely to reflect the extreme ideological views of the median party activist.”).
154 LEE, supra note 99, at 45.
155 Id.
156 Cf. Jonathan S. Gould, The Law of Legislative Representation, 107 U. VA. L. REV. 765, 768 (2021) (identifying “the law governing how legislatures organize themselves, how the legislative process is structured, and how members may or may not behave while in office” as a critical component of the “law of representation”).
partisan synchrony are readily accessible to students of constitutional law. But this feature of party competition is of more than descriptive interest. To the extent that variation in partisan coordination is a critical input into the constitutional system, legal scholars should want that input to be comprehensible—and manipulable—through traditional means of changing the rules. The good news is that, at least in concept, we can apply the standard tools of institutional analysis to better understand how to produce more or less partisan coordination, as is deemed desirable.

To illustrate these ideas, this section explores two institutional sites—one federal and one state-level—that are critical to the task of facilitating (or inhibiting) partisan coordination. It begins in Congress, where a variety of cameral rules and internal party procedures shape the ebb and flow of party harmony. It then turns to the states, where partisan associations of officeholders and parapartisan organizations like the American Legislative Exchange Council (“ALEC”) perform similar functions. It concludes by evaluating the consequences of conceptualizing these venues—and the bundle of rules and procedures that constitute them—as components of the small-c constitution.

1. Forging Party Harmony (and Disharmony) in the House of Representatives

It is easy to think of Congress—and the House of Representatives, in particular—as the archetypical site of modern-day gladiatorial combat between teams of likeminded lawmakers. After all, most congressional votes today are predictably partisan, with few (if any) lawmakers breaking with their party to join the opposition.\textsuperscript{157} And yet, this kind of uniformity rarely occurs naturally. Instead, it requires considerable institutional skill to manufacture. Actively forging party harmony through the use of legislative procedure is thought to be so important that leading legislative scholars have argued the “first commandment” of party leadership is to avoid “aid[ing] bills that will split thy party.”\textsuperscript{158}

For leaders struggling to keep the peace between warring party factions, key cameral rules help to prevent divisive legislation from ever reaching the floor. The Speaker, for example, controls the flow of legislative business:

\textsuperscript{157} \textit{See}, \textit{e.g.}, \textit{CURRY \\ & LEE}, supra note 65, at 3–4 (suggesting that “[t]oday’s Congress often exhibits an almost parliamentary level of partisanship”).

setting the legislative calendar and determining the parameters of debate. Facilitating the Speaker’s gatekeeping and agenda-setting powers is the Rules Committee, which—together with the Speaker—crafts rules instructing members about how a bill will be taken up, amended, and voted on. Apart from these formal cameral rules, the procedures that govern each party caucus warrant sustained attention. Take the Hastert Rule. An internal GOP convention, the rule provides that Republican leaders bring to the floor only those bills that have the support of a majority of the party.

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160 James V. Saturno, Cong. Res. Serv., 97-780, The Speaker of the House: House Officer, Party Leader, and Representative 4 (2017) ("[T]he Speaker is able to assert control over what motions may be made and therefore what measures will be considered and the general flow of House floor proceedings."); see also Rule XVII (2), Rules of the House of Representatives, 116th Cong. ("When two or more Members, Delegates, or the Resident Commissioner rise at once, the Speaker shall name the Member, Delegate, or Resident Commissioner who is first to speak."); Saturno, supra note 160, at 8 ([T]he Speaker does not sit on the Rules Committee but does nominate the majority Members in the party conference, effectively making the Rules Committee an integral part of the leadership structure.").

161 Schickler, supra note 37, at 234–35 (describing the responsibilities of the Rules Committee); Douglas Dion & Jon D. Huler, Procedural Choice and the House Committee on Rules, 58 J. Pol. 25, 25 (1996) ("Special rules crafted by the Rules Committee do more than ensure consideration of a bill, however: these rules can also limit debate, waive points of order, restrict admissible amendments, and even rule out amendments altogether."). To be sure, the fact that special rules are subject to a majority vote limits leaders’ capacity to use these rules with impunity to pass legislation that only a minority of the party supports (or that is otherwise especially controversial within the party). Nevertheless, the very fact that restrictive rules are used at all is some evidence that leaders work strategically to mask divisions within their caucuses. If all members of the majority of the speaker would agree on the substance of a policy proposal, it could be considered under an open rule.


164 See, e.g., Sarah Binder, Oh 113th Congress Hastert Rule, We Hardly Knew Ye!, Brookings Up Front (Jan. 17, 2013), https://www.brookings.edu/blog/up-front/2013/01/17/oh-113th-congress-hastert-rule-we-hardly-knew-ye/ [https://perma.cc/K9NT-UAG5] (describing “[t]he basic premise of the rule” as a commitment by House leaders “to use their leverage over the floor agenda to keep measures off the floor that might divide the majority party”); Holly Fechner, Managing Political Polarization in Congress: A Case Study on the Use of the Hastert Rule, 2014 Utah L. Rev. 757, 764 (same). The Hastert Rule is sometimes breached. See id. at 767 (“Bills that address government spending dominate the list of bills that Speaker Boehner exempted from the Hastert Rule.”); Carle
By this expedient, leaders can avoid bruising floor fights over issues they anticipate will splinter the party. Majority-party leaders also rely on whips to gather intelligence and assist in structuring legislation to win favor from wavering members. And they increasingly use their discretion as party heads to centralize control of the legislative drafting process, bypassing committee markup sessions and limiting the information available to their rank and file. By tightly controlling the content and flow of legislative business, leaders aim to strike (and enforce) compromises between rival factions long before any evidence of conflict appears.

Effectively deploying these cohesion-inducing tools can help to foster internal party harmony, even when significant disagreements are present and the issue is highly salient. Consider President Trump’s first impeachment. Speaker Nancy Pelosi (D-CA) resisted pressure for months after Democrats regained control of the House in 2018 to initiate formal proceedings against the president. Sidelifing her caucus’s left flank and instead privileging the views of Democratic centrists who feared impeachment would threaten their electoral fortunes, she used her agenda-setting powers to quash efforts to lay the groundwork for impeachment. Frustrated by these maneuvers, liberal

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166 William Bendix, Bypassing Congressional Committees: Parties, Panel Rosters, and Deliberative Processes, 41 LEGIS. STUD. Q. 687, 706 (2016) (finding that the most ideologically polarized committees are most likely to be excluded from the drafting process).

167 JAMES M. CURRY, LEGISLATING IN THE DARK: INFORMATION AND POWER IN THE HOUSE OF REPRESENTATIVES 40 (2013). Indeed, institutional rules and procedures—most prominently, the structure of the seniority system—have long shaped the balance of power between leaders and members. See, e.g., Levinson & Fildes, supra note 4, at 2383–84.

168 To be sure, the greater the divisions within the party, the less majority leaders are likely to succeed in deploying these cohesion-inducing tools. Nevertheless, there are good reasons to expect that party leaders will be able to deploy their formal procedural powers even when party divisions run deep. To the extent members believe public infighting is bad for the party’s brand, they are unlikely to protest when leaders use cohesion-inducing tools to block potential party-splitting votes or amendments. COX & MCCURBINS, supra note 158, at 27 (contending that “officeholders are expected never to push bills that would pass despite the opposition of a majority of their party”).

169 See Rachel Bade, Mike DeBonis & Josh Dawsey, Inside the Decision to Impeach Trump: How Both Parties Wrestled with a Constitutional Crisis, WASH. POST (Dec. 18, 2019), https://www.washingtonpost.com/politics/inside-the-decision-to-impeach-trump-how-both-parties-wrestled-with-a-constitutional-crisis/2019/12/18/e9def14-20ef-11ea-bed5-880264c91a9_story.html [https://perma.cc/MGX2-9XYG] (“[T]hose close with her said she kept an eye on protecting her vulnerable members as she navigated her caucus through one of the most turbulent three months of her 30-plus-year career.”).
Democrats threatened to initiate the process without her consent. But the Speaker held her ground until Democratic centrists publicly declared their support, praising them for “leading on this issue” and calling their decision to speak out against Trump “courageous.”

As the House’s formal inquiry began to unfold, Pelosi continued to use the tools of her office to manage intraparty tensions. Concerned that centrists would balk at a more sweeping indictment of the president, she resisted liberal efforts to expand the articles of impeachment to encompass the alleged presidential malfeasance detailed in special prosecutor Robert Mueller’s report. Meanwhile, centrist Democrats held their own conclave

170 John Cassidy, The Political Logic Behind Nancy Pelosi’s Go-Slow Strategy on Impeachment, NEW YORKER (May 22, 2019), https://www.newyorker.com/news/our-columnists/the-political-logic-behind-nancy-pelosis-go-slow-strategy-on-impeachment [https://perma.cc/S3DK-FV8U]; Heather Caygle et al., Why Pelosi and Her Party Finally Embraced Impeachment, POLITICO (Sept. 26, 2019, 5:00 AM), https://www.politico.com/news/2019/09/26/nancy-pelosi-impeachment-trump-00218 [https://perma.cc/F4EK-RWFM] (“Pelosi had also faced a barrage of criticism from the party’s activist base, which had begun to question her once-impeccable progressive credentials.”); Heather Caygle, John Bresnahan & Sarah Ferris, Pelosi Clashes with Fellow Dems in Closed-Door Debate on Impeachment, POLITICO (May 20, 2019, 10:30 PM), https://www.politico.com/story/2019/05/20/nancy-pelosi-impeachment-1336587 [https://perma.cc/X3EQ-3WUU] (“For months, moderates have sidestepped the slow march toward supporting impeachment within their caucus. But the number of Democratic holdouts has been shrinking, and less than 40 percent of the caucus is now opposed or undecided, many out of deference to Pelosi.”); Seven Freshman Democrats: These Allegations Are a Threat to All We Have Sworn to Protect, WASH. POST (Sept. 23, 2019), https://www.washingtonpost.com/opinions/2019/09/24/seven-freshman-democrats-these-allegations-are-threat-all-we-have-sworn-protect/ [https://perma.cc/92NX-RH5Y] (explaining, in an op-ed piece authored by seven moderate Democrats, the need to pursue the impeachment of then-president Donald Trump).

171 See Bade, DeBonis & Dawsey, supra note 169; Sarah Ferris, Moderate Democrats Warn Pelosi of Impeachment Obsession, POLITICO (Sept. 15, 2019, 6:52 AM), https://www.politico.com/story/2019/09/15/moderate-democrats-pelosi-impeachment-1495832 [https://perma.cc/X3EQ-3WUU] (“For months, moderates have sidestepped the slow march toward supporting impeachment within their caucus. But the number of Democratic holdouts has been shrinking, and less than 40 percent of the caucus is now opposed or undecided, many out of deference to Pelosi.”); Seven Freshman Democrats: These Allegations Are a Threat to All We Have Sworn to Protect, WASH. POST (Sept. 23, 2019), https://www.washingtonpost.com/opinions/2019/09/24/seven-freshman-democrats-these-allegations-are-threat-all-we-have-sworn-protect/ [https://perma.cc/92NX-RH5Y] (explaining, in an op-ed piece authored by seven moderate Democrats, the need to pursue the impeachment of then-president Donald Trump).
to discuss whether it would instead be better politics to censure the president. As before, Pelosi would prevail in keeping her party together. Using her procedural prerogatives to keep a potential censure resolution off the agenda and limiting the scope of the articles of impeachment introduced on the floor, she made possible Democratic unity on a highly salient and controversial question that divided her party.

Just as majority-party leaders use a variety of procedural tools to induce cohesion, party dissidents can rely on countervailing procedures to resist them. Perhaps their most important weapon in the House is the discharge petition, which permits bills bottled up in committee to be discharged to the floor so long as the petition is signed by 218 members (regardless of party affiliation). This mechanism offers majority-party dissidents the opportunity to join forces with the minority to seize control of the legislative agenda. Used to powerful effect in the mid-twentieth century by northern liberals, this overlooked procedural tool enabled Congress to respond to

See Fandos, supra note 172 (“[S]ome centrist Democrats are worried about the [impeachment] process. A group of them met behind closed doors on Monday to discuss the possibility of opposing the articles of impeachment and instead trying to build bipartisan support for a resolution to formally censure the president.”).


popular pressure for action on civil rights in defiance of southern committee barons.\footnote{176}

But the discharge petition is no relic.\footnote{177} In 2018, frustrated by their leaders’ continued enforcement of the Hastert Rule to prevent a comprehensive immigration reform proposal from reaching the House floor, centrist Republicans initiated a discharge drive.\footnote{178} With the help of the Democratic minority, they found themselves only five signatures short of the requisite 218.\footnote{179} Unwilling to see a party-splitting discharge drive succeed on their watch,\footnote{180} Republican leaders agreed to use their procedural authority to bring two competing reform measures to the floor—one favored by conservatives, the other by the centrists.\footnote{181} Although neither proposal garnered a floor majority, the episode reflects how institutional rules and

\footnote{See Pearson & Schickler, supra note 175, at 1243–47 (finding that northern Democrats were more likely than their southern counterparts to sign discharge petitions, in large part because southern Democrats dominated the House Rules Committee and thus exercised significantly control over the House’s agenda); Eric Schickler, Kathryn Pearson & Brian D. Feinstein, Congressional Parties and Civil Rights Politics from 1933 to 1972, 72 J. POL. 672, 676 (2010) (noting that during the period from 1933 to 1972, “[d]ischarge petitions brought at least four civil rights measures directly to the floor and influenced the consideration of several others”).}

\footnote{See Molly Jackman, How the Discharge Petition Can Help Congress Move on Immigration Reform, BROOKINGS (Aug. 19, 2013), https://www.brookings.edu/blog/up-front/2013/08/19/how-the-discharge-petition-can-help-congress-move-on-immigration-reform/ [https://perma.cc/MS28-AJB] [explaining how the Bipartisan Campaign Reform Act of 2002—better known as the McCain-Feingold Act—also passed the House as the result of a successful discharge petition.}


\footnote{Melanie Zanona, Juliegrace Brufke & Mike Lillis, GOP Will Vote on Immigration Next Week, Sinking Discharge Petition, THE HILL [June 12, 2017, 9:59 PM], https://thehill.com/homenews/house/391082-gop-will-vote-on-immigration-next-week-sinking-discharge-petition [https://perma.cc/5MUN-T1EN] (“GOP leaders have been scrambling to avoid a divisive immigration fight less than five months out from November’s midterm elections.”).}

procedures can be used to both amplify and conceal divisions between co-partisans.\footnote{Discharge petitions, of course, are not the procedural tool dissidents can use to disrupt majority-party unity. Dissenters may also formally move to vacate the chair—a tactic that, much like a parliamentary no-confidence vote, forces an election for the Speakership. See Jacob R. Straus & Matthew E. Glassman, Navigating Congress in the Age of Partisanship, in PARTY AND PROCEDURE IN THE UNITED STATES CONGRESS 1 (Jacob R. Straus & Matthew E. Glassman, eds. 2017) (describing then-representative Meadows’ 2015 resolution to vacate the chair, which would have forced a new election for Speaker). And within the parties themselves, dissidents also have access to posts or venues where they can air grievances and counter-mobilize against party leaders. See e.g., DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 71 (1991) (describing past efforts to influence democratic party leadership via an expansion of leadership representation and via the adoption of a rule calling for whip election instead of whip appointment).}

2. **Forging Party Harmony at the State Level**

Partisan coordination is also a product of deliberate institutional activity in the states. Unlike at the federal level, however, the institutions of greatest consequence lie outside formal governing structures. Within and across states, a wide array of parapartisan organizations exist to aid co-partisan officeholders in their work and to infuse partisan labels with ideological and policy content. As political scientist Steven Teles observes, “[m]uch of the action in American politics currently resides in the realm of elite organizational mobilization, where the great battles of modern politics are being fought and where the alignment of the political system is increasingly determined.”\footnote{STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 9 (2008).} Parapartisan mobilization of this kind is vital to state governance, as state lawmakers, in particular, often lack the relevant experience and resources necessary to develop informed views about specific policy initiatives or draft specific interventions, instead relying on outside organizations for information and off-the-shelf proposals.\footnote{ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESS, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 9-10 (2019).}

It is not surprising that state officeholders are often the driving force behind the creation and maintenance of coordinating institutions of this kind. Take, for instance, partisan associations of state attorneys general. Coming together to identify shared party priorities and strategies to achieve them, both the Republican Attorneys General Association and its Democratic counterpart “meet regularly to discuss . . . issues and strategies in ongoing
Much like congressional leaders who deploy their procedural authority to help broker intraparty compromise, state AGs must decide whether and how to use their institutional position to ratify a select number of lawsuits and legal theories—often ones developed by others. Indeed, the negotiation that takes place within each of the two partisan AG organizations about how state AGs should collectively choose to leverage their respective imprimatur necessarily shapes what counts as a “Republican” or “Democratic” position as much as (if not more so than) pre-existing partisan loyalties.

The origin story of the Supreme Court’s decision in *Sebelius*—upholding the constitutionality of the Affordable Care Act as an exercise of the federal government’s taxing power, but jettisoning the law’s requirement that states expand Medicare and Medicaid—is a good example of how this kind of coordination can play out in practice. Often, the *Sebelius* lawsuit is cast as an organic outgrowth of the Republican party’s vocal frustration with the ACA. But while Republican officeholders were generally hostile to the ACA, the suits that led to the *Sebelius* decision resulted from deliberate institutional coordination that drew on decades of mobilization by conservatives. Red-state AGs worked closely with prominent right-wing lawyers, conservative public-interest organizations, and the National Federation of Independent Business—the most prominent group representing the interests of small businesses—to develop and test promising legal theories and pool the financial resources necessary to keep the Obama Administration on the defensive for years.

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186 Nolette, supra note 185, at 193 (arguing that “AG participation helps add legitimacy and publicity” to the concerns of interest groups).

187 Cf. Lee, supra note 99, at 25 (“[P]olitical conflict is not ordered by a preexisting dimension of individual preferences, but by the collective or the coalition[.]”).


189 See Teles, supra note 183, at 9 (arguing that conservatives developed a “parallel set of elite organizations” that enabled them to counter the power of liberal public interest groups).

190 Nolette, supra note 185, at 171–74; see also Merriman, supra note 185, at 41–46 (describing conservative state attorneys general’s collusion to delay, weaken, or otherwise undermine initiatives promoted by the federal executive). The *Sebelius* case is not an outlier when it comes to high-profile state-led litigation efforts in support of or in opposition to federal initiatives. The lead brief in *Massachusetts v. Environmental Protection Agency*—a critical case concerning the federal government’s capacity to regulate greenhouse gas emissions—involved extensive coordination among the nearly three-dozen state and interest-group plaintiffs seeking to challenge the agency’s conclusion that
At other times, the prime movers in shaping state-level partisan coordination are parapartisan interest groups like the American Legislative Exchange Council (“ALEC”). Nearly half a century old, the organization was founded to give the nation’s largest companies voice in “draft[ing] model bills that are distributed to state legislators across the country.” Today, ALEC offers resource-constrained—generally Republican—state lawmakers off-the-shelf, business-friendly and socially conservative draft legislation they can introduce and claim credit for. Counting nearly a quarter of state lawmakers as members, the group has proven highly effective: Scholars estimate that approximately 1,000 ALEC-drafted bills are introduced in statehouses annually, with more than ten percent enacted every year.

Given this extraordinary level of influence, ALEC is a critical venue for mediating disagreements among Republican politicians, conservative trade associations, and corporations affiliated with the GOP over what issues to prioritize and advance. As is true of partisan associations of state officeholders, elaborate rules and procedures structure ALEC’s efforts to forge intraparty consensus. The group has developed issue-specific task forces that “serve as public policy laboratories where model legislation and policies are discussed, developed and approved for dissemination to legislators across the country.” And, in keeping with ALEC’s mission to expand business’s political reach, power within the task forces is allocated in very specific ways. Not only do corporate members have more influence over the group’s output than lawmakers—including the power to veto draft legislation were not pollutants within the meaning of that term under the Clean Air Act. See NOLETTE, supra note 185, at 193.


Hertel-Fernandez, Business’s Model Bills, supra note 191, at 586.

Kevin Baker, The Soul of a New Machine, NEW REPUBLIC (Aug. 17, 2016), https://newrepublic.com/article/135686/soul-new-machine [https://perma.cc/4G56-E33A]. Democrats, too, are in the early stages of establishing a similar coordinating mechanism for state policymaking, although critics charge that liberals’ answer to ALEC—dubbed the “State Innovation Exchange”—is “more a wind-up toy than a machine.” Id.

As quoted in Hertel-Fernandez, Business’s Model Bills, supra note 191, at 584.
legislation that a majority of lawmakers prefer—but those that contribute more in dues are “more likely to have their proposals promoted by the organization.”¹⁹⁵

These mechanisms have helped the group to define what membership in the contemporary Republican party connotes in many red states. Indeed, ALEC has succeeded precisely because it offers the constitutive parts of the Republican coalition—right-wing ideologues, Trump-style populists, and traditional business conservatives—the opportunity to manage their disagreements in the shadows and to pursue action only on issues they view as mutually beneficial. Thus, for instance, ALEC’s efforts to promote tort reform in the 1980s and 1990s helped big business’s bottom line, while at the same time pleasing harder-edged conservatives by undercutting a traditional source of financing for their Democratic opponents.¹⁹⁶ More recently, this same strategy has yielded efforts to combat what members charge are “woke financial institutions . . . colluding against American energy producers” through legislation requiring state entities to divest from companies that have voluntarily ceased to invest or do business with those connected to the fossil fuel industry.¹⁹⁷

3. Consequences

These insights reveal the considerable cost of treating partisan coordination as a social-psychological phenomenon outside of law’s empire. The conventional wisdom holds that constitutional law—most centrally, the balance of power between the elected branches of the federal government and between the states and federal government—is fundamentally structured by the growing power of partisanship. But the hypothesized relationship runs in only one direction. Law, we are taught, has little capacity to influence how much partisanship we are likely to get. But when we recognize that partisan synchrony (and disharmony) result from conscious, deliberate activity, we can begin to rely on established legal-institutional levers to produce more or


¹⁹⁶ HERTEL-FERNANDEZ, supra note 184, at 35.

less partisan coordination, and thereby shape the separation of powers without addressing interbranch relationships directly.

What might this look like in practice? In search of answers, let us briefly revisit party leaders’ authority to control the legislative agenda. That power has long been the object of a tug-of-war between leaders and backbenchers. For example, dissidents in the early twentieth century successfully lobbied the Speaker to increase the number of “calendar days”—designated periods when rank-and-file legislators could bypass leaders’ hold on the agenda to bring proposals directly to the floor.\textsuperscript{198} In the contemporary Congress, a similar campaign has been waged by the Problem Solvers Caucus, a group of Republican and Democratic centrists, who negotiated a deal with Pelosi in 2018 to liberalize the chamber’s agenda.\textsuperscript{199} Separated by roughly a century, these reforms to increase members’ access to the chamber floor have the potential to impede leaders’ efforts to promote party harmony through aggressive use of their wide-ranging procedural prerogatives.

Building on this foundation, discharge petition drives could be made less onerous by lowering the number of signatures required, so long as an appropriate threshold of support is reached within each party. Likewise, House rules could be amended to privilege bills that have a certain number of majority and minority co-sponsors, immunizing them from hostile amendments or deliberate delay. Committees could also recommend fast-tracking legislation, but only when a sufficient number of committee members from each party favored doing so. As to all of these ideas, the degree of bipartisan support must be sufficiently high that invoking these new procedures would meaningfully signal latent majority support, but not so high that it would be impractical for lawmakers to call upon them to circumvent their leadership. While leaders have historically opposed reforms of this kind, efforts to decentralize control of floor proceedings have often succeeded when they are identified as ways to make Congress less prone to

\textsuperscript{198} See BLOCH RUBIN, supra note 15, at 43 (detailing Progressive Insurgent efforts at the turn of the twentieth century to guarantee “floor access . . . for less powerful committees and their members”).

\textsuperscript{199} Ella Nilsen, Nancy Pelosi’s Problem Solvers Caucus Problem, Explained, Vox (Nov. 26, 2018, 5:20 PM), https://www.vox.com/2018/11/26/18112546/nancy-pelosi-problem-solvers-caucus-explained [https://perma.cc/3HGC-WSSV]. Pelosi ultimately agreed to expedite committee markups for bills with at least 290 co-sponsors, guarantee a floor vote (and debate) on any amendment with at least 20 co-sponsors, and permit all members to bring at least one bill to the floor in a given Congress. \textit{Id.}
stalemate and to empower more junior lawmakers at the expense of senior colleagues.200

While difficult for reformers to implement, changes to party rules and procedures might have similarly salutary effects. Perhaps members might demand a recorded intra-conference vote to overrule a leader’s decision to block consideration of a proposal that they contend will divide the caucus. By forcing leaders to formally defend their decisions to exercise negative agenda control directly to members, recorded votes have the potential to make the practice “traceable” and subject to continued pressure from elites—including opponents in the primary and general election, interest groups, and donors—together with engaged citizens.201 Were more party members made to take a stand on whether they supported their leaders’ decision to keep controversial legislation off the floor—rather than just complain about it after the fact—it is possible that congressional outcomes would more frequently reflect public priorities and preferences.

At the state level, attending to the institutional nature of partisan coordination pays further dividends. For one, because parapartisan institutions like partisan associations of state AGs are not typically recognized as catalysts of our constitutional politics, they are rarely exposed to extended scrutiny.202 But by keeping to the shadows, parapartisan groups are able to exercise influence disproportionate to their place in the broader public consciousness while rendering themselves largely immune from public accountability.

For another, tracing the institutional roots of partisan coordination points to apparent asymmetries in how each party operates at the state level. Consider ALEC’s outsized success relative to Democratic competitors. Given the disparity in performance, we might infer that the left and right are not equally skilled at forging intraparty harmony. Republicans appear better able than their Democrats opponents to work with and within parapartisan organizations like ALEC to forge compromise between vying party stakeholders. The party-based model thus has more predictive power for one party than the other. In expectation, red states will be more likely than blue

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200 See SCHICKLER, supra note 37, at 13 (describing the coalition of junior lawmakers responsible for the Legislative Reorganization Act that disempowered committee chairs).

201 See R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 48–49 (1990) (arguing that electoral politics depends on the ability of constituents, groups, and donors alike to trace their representatives’ responsibility for particular outcomes).

202 See Miriam Seifter, States as Interest Groups in the Administrative Process, 100 Va. L. Rev. 953, 1014 (2014) (explaining how “state interest groups generally do not disclose information about their operations” and noting that their internal deliberations and votes are not made public).
states to collectively resist federal initiatives when theirs is the out-party in Washington. This means that Democrats—already more likely than Republicans to favor new federal initiatives—will face stronger coordinated opposition from state officeholders than the GOP. Put differently, while scholars have observed that Republicans are more likely to play “constitutional hardball” at the national level, attention to this dynamic suggests that red states may have a state-level tactical leg up on blue states as well.

Why have Republicans been better able than Democrats to use institutional mechanisms to reconcile disagreements among their key constituencies? Political scientists have long viewed the Republican party as more unified than the Democratic coalition, reasoning that Democrats represent a patchwork of interest groups with competing policies and principles, while Republicans represent voters who share common values and ideological outlook. But if the work of holding parties together is as much institutional as it is ideological, we should look elsewhere for answers. What appears to be effective partisan coordination may be closer to a modern form of interest-group pluralism. Dating to the party’s founding, business interests have anchored the GOP. And the disparate resources available to business interests mean that they have greater capacity to design—and redesign—coordinating institutions than other kinds of organized interest groups. This suggests that what we observe to be partisanship organically reanimating Madisonian institutions through the power of a shared political outlook turns out to be the work of powerful interest groups shaping governing institutions to achieve their ends.

B. Law of Political Parties and Constitutional Structure

This Article has made the case that variability in partisan coordination impacts both the horizontal and vertical separation of powers, and that it is

203 Fishkin & Pozen, supra note 60, at 918.
207 See Seifter, supra note 202, at 1009–10 (referring to a similar phenomenon as “state-washing”—that is, cloaking private agendas in the name and legitimacy of the states—such that the groups’ bona fides seem beyond question”).
an institutional phenomenon—one shaped by the rules and procedures
governing an array of venues, from Congress to parapartisan groups like
ALEC. Yet courts, too, play a significant role in promoting (or impeding)
partisan coordination. As Part II observed, the Supreme Court has made it
easier for party dissidents to evade their leaders’ control by taking the
position—first articulated in *Buckley v. Valeo*—that campaign contributions
are constitutionally protected forms of expression and therefore largely
immune from congressional regulation. Because candidates for office can
legally raise substantial sums of money without relying on their party as an
intermediary, party leaders’ capacity to punish those who go their own way
by withholding campaign funds is significantly diminished.

More recently, of course, courts have declined to intervene in so-called
partisan gerrymandering cases—those involving the drawing of electoral
district lines in ways that intentionally advantage one party’s candidates over
the other’s. Nonintervention of this kind similarly exacerbates intraparty
conflict by changing the incentives for candidate recruitment and selection.
Politicians too extreme to successfully run in more balanced districts may
seize the opportunity to compete in newly skewed ones. Alternatively, a
majority of voters residing in the redrawn district may themselves prefer a
more hardline candidate to represent their interests. In expectation,
candidates drawn from such districts should be ideologically distinct from
their co-partisans elsewhere in the country.

The recognition that courts shape the internal composition of parties and,
with it, their capacity to hold together (or not) should prompt us to reconsider
how jurisprudence on the subject fits within the broader study of

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208 424 U.S. 1, 19 (1976).
209 Pildes, supra note 25, at 809 (arguing that our current campaign-finance rules have driven the
“external diffusion of political power away from the political parties as a whole and the internal
diffusion of power away from the party leadership to individual party members and officeholders”).
This dynamic is amplified by a second one: donations to individuals by individuals tend to come
from extreme partisans, who are often interested in airing out disagreements with the party’s
mainstream. Id. at 826.
gerrymandering claims present political questions beyond the reach of the federal courts.”); *Gill v.
Whitford*, 138 S. Ct. 1916, 1933–34 (2018) (holding that plaintiffs did not have Article III standing
to contest a statewide redistricting effort unless they could show that their specific district was
unduly skewed).
211 Scholars have argued that gerrymandered districts can also lead to the internal dampening of
political mobilization. The less competitive the district, the worse the quality of the candidate pool
and the overall level of voter enthusiasm. See Nicholas Stephanopoulos & Christopher Warshaw,
*The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGIS. STUD. Q. 609, 611 (2020)
(“[P]artisan disadvantage in districting . . . impedes numerous party functions.”).
constitutional law. The law of political parties most typically falls within the
purview of election law specialists, though it is sometimes grouped with other
individual expressive or associational rights enshrined in the First
Amendment. But, as this section argues, the law of political parties, including
campaign-finance decisions like *Buckley* and *Citizens United* as well as rulings
like *Rucho* and *Gill* that shape competition between the parties, should also be
encompassed within the ambit of “structural” constitutional law—that is, the
law of the separation of powers and federalism.\(^{212}\)

For some this will not be a particularly radical suggestion, as scholars
working elsewhere within public law have long recognized that the regulation
of political parties necessarily structures power in our system—helping to
dictate who wields it and how. Within election law, in particular, that core
insight emerged out of a series of critiques that the Supreme Court’s rulings
on questions of primary organization “inappropriately extended [individual
constitutional] rights doctrines into the design of democratic institutions.”\(^{213}\)
While a number of decisions came in for targeted opprobrium, *California
Democratic Party v. Jones*—holding unconstitutional California’s “blanket”
primary requirement—is representative of the genre.\(^{214}\) Under the
requirement struck down in *Jones*, every voter’s primary ballot listed every
eligible candidate, regardless of party affiliation.\(^{215}\) After the votes were
tallied, “the candidate of each party who [won] the greatest number of votes
[was] the nominee of that party at the ensuing general election,”\(^{216}\) regardless
of whether their support came from party members or others.

Writing for the majority, Justice Scalia explained that this requirement
was subject to strict scrutiny—a bar, he would go on to hold, the state could
not hurdle—because it severely burdened party members’ First Amendment
associational rights. “Proposition 198 forces political parties to associate
with—to have their nominees, and hence their positions, determined by—
those who, at best, have refused to affiliate with the party, and, at worst, have

\(^{212}\) See Pildes, supra note 25, at 807 (arguing that a “rights-based perspective” on political parties “can
spawn, and have spawned, doctrines and policies that undermine the capacity of the democratic
system as a whole to function effectively”).

\(^{213}\) Pildes, supra note 18, at 41; for a discussion of similar critiques, see Guy-Uriel Charles, *Judging the
Law of Politics*, 103 Mich. L. Rev. 1099, 1102 (2005) (arguing that “election law cases cannot be
divided into neat categories along the individual rights and structuralism divide.”); Samuel


\(^{215}\) Id. at 570.

\(^{216}\) Id. (quoting Cal. Elec. Code Ann. § 15451 (West 1996) [internal quotation marks omitted]).
expressly affiliated with a rival.” Party members, in other words, risked having outsiders “hijack” their control over the nominating process.

LambastingJones, scholars responded that, “by borrow[ing] strongly from cases involving expressive associations,” the Court had made a category error. Parties are no ordinary civil-society groups. Rather, they are constitutive of the political system itself, inherently privileging either centrists or extremists, with great consequences for constitutional law. Accordingly, the appropriate analytical path forward was to reject Jones’ emphasis on associational rights in favor of a broader “functional” analysis—one that would involve “substantive judgments about desirable forms of elections and governance.” The judiciary’s role in overseeing the process of candidate selection and financing by political parties necessarily required a wider frame, one that would assess the consequences of a particular change to the status quo for “the relationships between candidates, groups, and parties; the allocation of power between different political actors; and the operation of the electoral system as a whole.” In recognizing that the judiciary played a fundamental role in shaping the substance of politics by establishing the rules of partisan electoral competition, these scholars reanimated the study of what is increasingly termed the “law of democracy.”

These ideas can help us to chart a path forward when it comes to expanding what counts as “structural” constitutional law. As Part II argued, the degree of partisan coordination prevailing at any given moment is a critical input into the horizontal and vertical separation of powers. For that reason, decisions that help to shape the degree of partisan coordination are no less structural than those—likeINSv. Chadha223 orBowsher v. Synar224—that directly raise issues about the appropriate rules of engagement for interbranch (and federal-state) conflict. Even if their effects are indirect, they should be treated as part of separation of powers and federalism jurisprudence.

This reframing has critical consequences for how we think about the role of the judiciary in our constitutional politics. Today, calls abound for the

217 Id. at 577.
218 Id. at 584.
219 Pildes, supra note 18, at 105.
220 As Schattschneider put it: “Whatever else the parties may be, they are not associations of the voters who support the party candidates.” SCHATTSCHEIDER, supra note 1, at 53.
221 Stephanopoulos, supra note 18, at 296.
222 Id.
judiciary to retreat from its traditional role in policing the separation of powers and federalism in favor of a more “republican” approach.\textsuperscript{225} On this account, judicial review of what is fundamentally “a contingent political practice” is a pernicious and undemocratic feature of our politics.\textsuperscript{226} As this Article makes clear, however, courts shape conflict between the executive and legislative branches and between the states and federal government in a variety of ways—sometimes directly and at other times in a more subterranean fashion. For that reason, the judiciary is likely to remain tethered to the separation of powers and federalism in ways that are more difficult to change.

Nevertheless, the dynamics explored in this Article, should lead both judges and scholars alike to approach with greater humility the question of whether courts should use their power to promote more or less intraparty conflict. For instance, as Part II argued, it is hard to predict—absent knowing something about a party’s capacity for cohesion—whether the constitutional system under one-party rule is more likely to operate as Madison intended or whether the proponents of the party-based model have the right of it. Accordingly, we should resist the urge to rely on designations like unified and divided government as easy heuristics to determine how much intraparty heterogeneity is desirable.

To illustrate, consider the longstanding debate within traditional public law about the limits the Constitution imposes on the president’s power to act unilaterally. Courts have tended to answer this question by linking “the constitutionality of presidential action to the requirement of congressional authorization.”\textsuperscript{227} Justice Robert Jackson’s now 70-year-old concurrence in \textit{Youngstown Sheet \& Tube Co. v. Sawyer} remains the analytical lodestar.\textsuperscript{228} In Jackson’s three-part framework, the president’s power “is at its maximum” when she “acts pursuant to an express or implied authorization of Congress.”\textsuperscript{229} In contrast, her power is “at its lowest ebb” when she takes “measures incompatible with the expressed or implied will of Congress.”\textsuperscript{230} In between is where things get tricky. In this “zone of twilight,” where the “[p]resident acts in absence of either a congressional grant or denial of

\begin{itemize}
\item \textsuperscript{225} See, e.g., Bowie \& Renan, supra note 20, at 2020.
\item \textsuperscript{226} \textit{Id.} at 2028.
\item \textsuperscript{227} Levinson \& Pildes, supra note 4, at 2350.
\item \textsuperscript{228} See \textit{Youngstown Sheet \& Tube Co. v. Sawyer}, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); \textit{Zivotofsky ex rel. Zivotofsky v. Kerry}, 576 U.S. 1, 10 (2015) (“In considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from \textit{Youngstown}.”).
\item \textsuperscript{229} \textit{Youngstown}, 343 U.S. at 635 (Jackson, J., concurring).
\item \textsuperscript{230} \textit{Id.} at 637.
\end{itemize}
authority,” there are no clear governing principles. Instead, “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”

Scholars have suggested that distinguishing between unified and divided government can be a useful heuristic to help make sense of this “purgatorial” zone. As Levinson and Pildes urge, judges should adopt a default skepticism toward presidential action undertaken during unified government. “When it is not clear whether congressional statutes prohibit the executive action at issue or simply do not address it, and Congress is controlled by the President’s political party, perhaps courts should follow Justice Jackson in tilting toward prohibiting presidential action . . . .” The reasons for this default rule should by now be apparent. If “Presidents can mobilize same-party Congresses with relative ease,” then the absence of a clear prohibition on executive conduct is unlikely to be meaningful. Courts, then, should use their own authority to check presidential overreach. By the same token, under divided government, courts should give presidents the benefit of the doubt. Given the difficulties of legislating when their opponents are in charge, the judiciary “should more generously construe statutes as supporting executive authority.”

While this approach promises both precision and administrability, the persistence of intraparty conflict means that categorizing politics into periods of unified and divided government may not yield the analytic clarity we seek. Contrast the following two hypotheticals—both arising under unified government. In the first scenario, majority-party leaders are unable to use the tools of their office to prevent members critical of the president from attempting (but ultimately failing) to strike a deal with the minority to pass legislation constraining the executive. In this case, courts ought to treat congressional silence as a meaningful signal of congressional acquiescence. Notwithstanding the efforts of majority-party critics of the president, there

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231 Id.
232 Id.; see also Bradley & Morrison, supra note 9, at 419.
233 Levinson & Pildes, supra note 4, at 2353.
234 Id. at 2354.
235 Id.
236 Id. at 2353.
237 Id. at 2554.
238 Cf. Bradley & Morrison, supra note 9, at 451 (expressing support for “an analytical approach that tends to include rather than exclude evidence of direct congressional engagement with the executive action in question, so that the analysis focuses more on that evidence than on the meaning of supposed congressional silence”); Shalev Roisman, Constitutional Acquiescence, 84 GEO. WASH. L. REV. 668 (2016) (detailing the difficulties of determining when a branch has acquiesced in conduct).
was no legislative majority in favor of prohibiting her action. In the second scenario, however, majority-party leaders successfully deploy their cohesion-inducing tools to suppress opposition to the president’s action within their own party. Here, since dissent never publicly surfaced, and dissenters never got their chance to strike a deal with the opposition, judges can have only limited assurance that Congress’s silence reflects what a legislative majority wanted (or might plausibly have wanted).

Separating these two scenarios—and more muddled ones in between—will doubtless be difficult for even the savviest judges accustomed to scouring the legislative-historical record. And there is good reason to doubt that “in the current constitutional culture” courts will prove willing to “mak[e] legal doctrine turn on the partisan configuration of government.”

Nevertheless, absent such painstaking scrutiny, courts risk over-inclusiveness, mistakenly treating the absence of cross-party action as the equivalent of a one-party rubber stamp.

C. Intraparty Conflict and the Limits of Partisan Majoritarianism

Attending to patterns of intraparty conflict within our constitutional system can provide fresh perspective on the relationship between the courts and Congress in yet another way. In recent years, influential thinkers on both the left and right have argued in favor of legislative supremacy, often expressing a concomitant contempt for robust, American-style judicial review. On the left, advocates for the first branch aim to dispel what they believe to be the pernicious myth of a rights-protective judiciary. Canvassing the judiciary’s record on minority protection since the end of the Civil War, they argue that courts have “undermin[ed] federal majoritarian efforts toward racial equality.”

Equally damning, they observe that “the history of the judicial review of federal legislation” makes clear that the “principal ‘minority’ most often protected by the Court is the wealthy.” To remedy this antimajoritarian equilibrium, they argue in favor of reducing the overall influence of the judiciary and enhancing the power of Congress, an elected body governed (largely) by majoritarian rules. The reforms they advocate—packing the Supreme Court, imposing term limits on justices (and perhaps lower-court judges), or shrinking the jurisdiction of the federal courts—would

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239 Levinson & Pildes, supra note 4, at 2355.
ensure that political decisions are made by an institution designed to represent the will of the people rather than one that instead aggregates “the votes of nine unaccountable lawyers.”

On the right, criticism of robust judicial intervention is fueled by a more formalist concern that an overly energetic judicial branch risks encroaching on the rights and responsibilities of the other federal branches and the states. On that account, the greater the power wielded by unelected judges, the more the system strays from the democratic ideals the constitutional structure embodies. As Justice Brett Kavanaugh puts it: “If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people’s elected representatives.”

Despite their divergent ideological commitments, both sides share an outsized faith in Congress’s capacity to respond to popular pressure. On the right, Kavanaugh’s reprimand of the majority in *Bostock v. Clayton County* is illustrative. Criticizing his colleagues for holding that Title VII, which does not make explicit textual reference to discrimination against gay or transgender individuals, nevertheless prohibits employers from discriminating against gay, lesbian, or bisexual employees as a matter of statutory text, the Justice argued that the Court had jumped the legislative queue. In his view, the *Bostock* majority “cashier[ed] an ongoing legislative process,” wherein Congress, responding to public pressure, would ultimately take “historic votes that would prohibit employment discrimination on the basis of sexual orientation.” In so doing, he suggested, the Court undermined Congress’s constitutional prerogative to delimit the bounds of what qualifies as employment discrimination.

On the left, the court’s critics underscore what they believe to be Congress’s superior record in the realm of rights-protection. Drawing on

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242 Id. at 15.
243 *Bostock*, 130 S. Ct. at 1824.
245 In full, 42 U.S.C. § 2000e-2(a)(1) provides: “It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).
246 *Bostock*, 140 S. Ct. at 1836 (Kavanaugh, J., dissenting).
classic studies of judicial influence—foremost among them, Gerald Rosenberg’s *The Hollow Hope*—they contend that even celebrated cases of judicial rights-protection, like the Supreme Court’s decision in *Brown v. Board of Education*, pale in comparison to legislative efforts to strengthen civil rights and end segregation. In this telling, judicial interventions have always been inferior to congressional action. Even *Brown* falls short. In part because the Court was powerless to combat broad-scale, violent resistance to its desegregation decisions, “[f]ormal segregation drew to a close in the South only after Congress enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965.”

This Article gives reason to doubt that Congress is as responsive to public pressure as defenders of the first branch imagine. What contemporary legislative supremacists do not acknowledge is that intraparty conflict, an endemic feature of our political landscape, creates incentives for the majority party in each chamber to suppress action on policies favored by the public that party leaders nevertheless anticipate will divide their coalitions. Majority leaders’ enduring interest in using the array of available procedural tools to agenda set and otherwise control floor activity means that legislative outcomes will regularly fail to reflect the will of bipartisan majorities in the electorate or in Congress itself. This claim is not speculative. We need only turn to the middle of the last century—notably, an era legislative supremacists laud as exemplary—to see that this very dynamic delayed action on civil rights for decades. Despite increasing popular support for reform, leaders of the Democratic majority in Congress worked assiduously to keep civil rights off the legislative agenda, fearing that doing otherwise would undermine the fragile alliance between the party’s racially retrograde southern faction and its more progressive non-southern one. As remains true today, congressional leaders’ efforts to induce party cohesion through legislative procedure often yield anti-majoritarian outcomes or permit anti-majoritarian status quos to remain in place despite public support for change.

In what ways might attending to the persistence of intraparty conflict (and its effect on legislative politics) inform ongoing debates about statutory interpretation and the appropriate power of the Courts? For textualists,

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248 Bowie, supra note 241.

249 See, e.g., BLOCH RUBIN, supra note 15, at 125 (observing that southerners “could count on an implicit intraparty bargain: legislation that might split the northern and southern wings of the party would not reach the floor”).
greater realism about the legislative process may be of little consequence. After all, textualists have long defended their approach on the ground that legislation is a messy affair and courts should consequently stick to interpreting its outputs, whatever they may be. As today’s leading academic textualist explains: “[G]iven the opacity, complexity, and path dependency of the legislative process . . . modern textualists urge judges to focus on what they consider the more realistic—and objective—measure of how a ‘skilled objectively reasonable user of words’ would have understood the statutory text in context.”

So too, constitutional formalists may find the majority party’s use of procedural rules to suppress bipartisan majorities insufficient justification to change their bottom line—that courts ought to respect the internal rules of co-equal branches, given that the Constitution empowers Congress to set its own procedures. And even some contemporary skeptics of judicial review may be willing to accept that an admittedly flawed legislative process is nevertheless preferable to interventionist courts, as any “good theory of legitimacy will . . . accommodate inevitable defects.”

For others, however, grappling with how intraparty conflict shapes legislative outcomes may revive the view, popularized in the decades following the New Deal, that an interventionist judiciary is normatively desirable. It has long been accepted that courts can mitigate the countermajoritarian difficulty by using their authority to “mak[e] the political process work in the way that it should.” One way to put this ideal into practice is for courts to help shoulder the “burden of updating old statutes” by interpreting existing laws in ways that “infuse[]” them with

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250 John F. Manning, What Divides Textualists from Purposivists?, 106 COLUM. L. REV. 70, 74–75 (2006); John F. Manning, The Absurdity Doctrine, 116 HARV. L. REV. 2387, 2410 (2003) (“The legislative process . . . is too complex, too path-dependent, and too opaque to allow judges to reconstruct whether Congress would have resolved any particular question differently from the way the clear statutory text resolves that question.”).

251 See U.S. CONST. art. I, § 5, cl. 2 (providing that “[e]ach House may determine the rules of its proceedings”). But see Josh Chafetz, The Unconstitutionality of the Filibuster, 43 CONN. L. REV. 1003, 1016–17 (2011) (arguing that “a rule might still be unconstitutional on the grounds that it violates some other constitutional principle”).


contemporary “vitality and significance.” But where the standard justification for this practice often rests on changing social mores or shifts in what Judge Richard Posner has called “culture,” attention to flaws in the legislative process that stem from party factionalism helps to identify an alternative basis for this idea—one grounded in the traditional role of courts as guardians of majoritarian politics.

At minimum, the reality of intraparty conflict, coupled with the incentives of legislative leaders to conceal it, should make us question whether Congress is necessarily capable of reflecting what popular majorities say they want, as critics of judicial intervention so optimistically imply. And any reticence we may have that Congress is capable of heeding popular opinion should give defenders of the judicial branch added reason to insist that courts deploy their interpretive power to help liberate those latent bipartisan majorities suppressed by the majority party in Congress. Judges, on this account, need not claim particular skill in the difficult task of identifying and responding to changes in the cultural zeitgeist. Nor do they need special competence in the area of protecting minority rights. Rather, they need be what their training and experience already makes possible—sophisticated observers of institutional dynamics, situated within the constitutional framework to counterbalance the deficiencies of the legislative (and executive) branches.

D. Toward a Normative Theory of Intraparty Conflict

To this point, this Article has argued that our constitutional system has endured despite persistent intraparty conflict. As we have seen, the mischiefs of faction have complicated—and occasionally threatened—the horizontal and vertical separation of powers. This final section considers the possibility that our constitutional system has survived because of intraparty conflict. Here, I focus on two claims: first, that intraparty divisions can “add representational flexibility” to an otherwise overly “rigid two-party framework,” and, second, that they can provide an important internal check on partisan majorities as well as mechanisms for greater public accountability. In so doing, we can shed new light on Madison’s core conceit that there are virtues to channeling factionalism (rather than suppressing it) and that intraparty conflict might be profitably harnessed to reinforce our system of representative government.

255 Id.; see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (arguing that courts ought to address “legal obsolescence”).
256 BLOCH RUBIN, supra note 14, at 303.
i. Representational Flexibility

Echoing Schattschneider’s view that parties structure modern democracy, political theorist Nancy Rosenblum observes that parties not only “organize debate within government,” but also among “activist citizens.” Parties serve as key representational ligaments, helping to ensure that issues of concern to the governed become the concerns of those in government. Given the vital role parties play in structuring public discourse about politics, it matters when they fail to authentically aggregate and incorporate the polity’s views. Institutionalized mechanisms that endeavor to impose or cultivate greater homogeneity risk estranging citizens, increasing their cynicism about the political process and what can be achieved through democratic means. If this is so, we might posit that our constitutional system has endured precisely because parties are not stable institutions with fixed constituencies, but rather host to many factions whose power will vary depending on the activism of its citizen supporters. It is this instability of party institutions that ensures the stability of our constitutional institutions.

Just as persistent factionalism instills in party institutions a certain representational flexibility, it also guards against the calcification of political ideas. To the extent that parties function as “creative agents” in our politics, helping to refine our collective diagnoses of what ails the polity and identifying possible cures, homogeneity of viewpoints within a party is likely to blinker party elites’ perceptions of what constitutes a problem demanding government attention or resolution and cramp their ability to innovate and experiment freely. Indeed, when officeholders entertain only a restricted range of policy approaches favored by their party’s core constituency, they risk settling on inefficient and suboptimal policy solutions. Factional competition for supremacy within the party increases the odds that there will be competition over ideas and policy solutions. It is that disruptive potential that has the power to “remap[] the politics of the possible.”

Postwar congressional history offers important support for these ideas. In the early 1960s, it was a renegade group of liberal Democrats that provided the necessary energy to pass civil rights legislation over the objections of

258 Id. at 236.
Determined to overcome the obstructionist tactics perfected by their Dixiecrat adversaries, the liberals coordinated a sophisticated parliamentary and public-relations campaign to pass what would become the Civil Rights Act of 1964. Their successful pursuit of civil rights and voting rights legislation makes clear that mobilizing factions, rather than reducing their power, can help our formal constitutional institutions respond to public pressure.

ii. Institutional Accountability

It is also the case that persistent intraparty conflict can promote institutional accountability. In a legislative setting, in particular, competition between rival party factions increases the likelihood that private deals struck behind closed doors will be made public. And when the details of internal party negotiations are aired, voters, donors, interest groups, and activists can better evaluate the choices their representatives are making. In this way, party factionalism is a vehicle for ensuring party responsibility.

The stakes are significant. Consider that, in early 2009, Democratic leaders agreed to put healthcare reform at the top of their political agenda, choosing to delay action on climate change and immigration. But given substantial delays in the drafting and passage of the ACA, there was little time left to take up those reform priorities while Democrats still controlled both chambers of Congress and the White House. Soon thereafter, Republican gains in the 2010 midterm elections foreclosed the prospect of further action on immigration and climate change for more than a decade. Existing accounts suggest that the decision to prioritize healthcare was highly contingent, turning on President Obama’s intuition that “Democrats would unite behind health care,” while climate change and immigration reform “remained divisive within the party.” Had the party been more transparent about these tradeoffs, however, Democrats with a different preference ordering could have better understood the reasons why the


261 Id. at 250.

president chose to spend his political capital as he did and perhaps advocated more successfully for a different ranking of the party’s policy agenda.263

To be sure, tolerating (if not encouraging) intraparty conflict is not without cost. It may at times mean empowering extremist factions that seek to delay and obstruct legislative action. But even extremist factions sometimes do important constitutional work. Under unified government, legislative extremists may be the only members daring—and electorally secure enough—to question a president of their own party. Consider that in 2017, it was right-wing members of the Republican House Freedom Caucus who most vocally insisted on wholesale repeal of the ACA even as President Trump urged them to accept the deal hatched by the party’s congressional leaders that would keep substantial portions of the legislation in place. And it was the absence of common ground between Republican moderates in the Senate and their conservative counterparts in the House that ultimately undermined the party’s ability to repeal an increasingly popular pillar of the American welfare state. Likewise, under divided government, members of extremist factions can make it more difficult for their co-partisans to equivocate when the party wishes to hold a hostile president of the opposition accountable. Think here of Trump’s first impeachment. In 2020, it was liberal Democrats who consistently made the case to their more hesitant colleagues that the president needed to be held responsible for his behavior and that he was, in their judgement, unfit for office. And while their impeachment drive did not end in conviction, it was nevertheless a historic rebuke of a sitting president.

If persistent party factionalism has the potential to promote representational flexibility and institutional accountability, what should we make of reforms that seek to centralize party control or enforce ideological conformity? At the very least, this Article offers reason to doubt that the equilibrium reformers hope to achieve in promoting such prescriptions will improve the status quo across the board. True, greater party cohesion may make legislating more efficient or simplify the choice that voters make at the ballot box. But creating more cohesive “responsible” parties, as these reforms aim to do, may also yield partisan institutions that are less

263 For prominent critiques of transparency in the public law literature, see David E. Pozen, Transparency’s Ideological Drift, 128 Yale L.J. 100, 102 (2018) (“If legal guarantees of transparency were once thought to make government more participatory and public-spirited, they are now enlisted to make government leaner and less intrusive.”); Persily, Stronger Parties, supra note 25, at 130 (suggesting that party leaders should have more power to “skew primary elections”); Pildes, Romanticizing Democracy, supra note 25, at 847 (suggesting that negotiations between parties ought “to take place outside the public eye”).
representative and innovative. Whether this tradeoff is desirable is, like so much else in politics, a matter of taste.

CONCLUSION

Now more than ever, American democracy is “unthinkable save in terms of parties.” It is no surprise, then, that public law scholars have in recent decades sought to improve upon classic accounts of the separation of powers by recognizing political parties as critical actors in our constitutional system. But in emphasizing constitutional stakes of growing interparty competition and the polarization of party institutions, these revisionist accounts tend to downplay or ignore the persistence of intraparty conflict within both parties. This choice has profound consequences for how we understand the vertical and horizontal separation of powers.

As a descriptive matter, highlighting the fights that take place between parties rather than within them means that we regularly overlook the electoral and campaign finance rules that encourage politicians to buck their parties as well as those that reduce party leaders’ capacity to demand conformity. Moreover, it leads us to oversimplify the logic of polarization. Yes, there is a growing ideological gulf between Democrats and Republicans and that has made it harder for party leaders to forge stable cross-party coalitions. But this has had the unexpected effect of increasing the bargaining power of partisans out of step with their party’s mainstream. To the extent that party leaders are unable to secure support across the party aisle, the votes of political moderates and extremists have become ever more pivotal to securing majorities in Congress and statehouses across the country.

Analytically, acknowledging the persistence of intraparty conflict compels us to reconsider the utility of classic categories employed by constitutional scholarship. For example, the party-based account of the separation of powers teaches that divided government can ensure that the separation of powers works as the Framers intended. But what this misses is that divided government can protect the Constitution’s delicate balance only if majority-party leaders in Congress can keep their members together. Often, this is no easy feat. The harder a legislative majority must work to counter the executive, the lower the odds that it will do so. Thus, partisan animosity alone may not be sufficient to ensure the constitutional system functions as intended. Under unified government, by contrast, party divisions may actually safeguard the separation of powers. When infighting hobbles the majority party in Congress, a friendly president may not run the table. As

264 SCHATTSCHEIDER, supra note 1, at 1.
citizens, we are left with the uncomfortable reality that the tension between the branches is never as taut as we might wish it to be, nor as slack as we might fear.

What of federalism? As this Article has demonstrated, the partisan coordination that is essential for states to vigorously contest assertions of federal authority often takes place in little-noticed venues with limited public participation. These are institutions where the parties’ identities are constituted, as co-partisans debate what issues to prioritize and what issues to put to the side. And it is in these fora—from associations of state AGs to groups like ALEC—where what it means to be a Republican or a Democrat is decided, narrowing the range of acceptable views and curbing the heterodoxy that is a hallmark of our party system. Given the pervasiveness of intraparty conflict, the rules and procedures that leaders use to induce cohesion among their members—and those that dissidents use to fight back—are central to the separation of powers at the national level and the balance of power between states and the federal government.

Finally, from a normative perspective, it seems clear that both legal academics and citizens have grown accustomed to an informed pessimism about political parties, not least because of how bitter we feel towards our partisan opponents and the disappointment we feel when our favored party seems to be its own worst enemy. But this Article has argued that better constitutional government will not be achieved by ridding our parties of internal dissent. Rather, persistent intraparty conflict has the potential to lend our system much needed representational flexibility and institutional accountability. In short, we should not let the mischiefs of faction distract us from making the most of their merits.