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Subordination and Separation of Powers

ABSTRACT. This Article calls for the incorporation of antisubordination into separation-of-powers analysis. Scholars analyzing separation-of-powers tools—laws and norms that divide power among government actors—consider a long list of values ranging from protecting liberty to promoting efficiency. Absent from this list are questions of equity: questions of racism, sexism, and classism. This Article problematizes this omission and begins to rectify it. For the first time, this Article applies critical-race and feminist theorists’ subordination question—*are marginalized groups disproportionately burdened?*—to three important separation-of-powers tools: legislative appropriations, executive conditions, and constitutional entrenchment. In doing so, it reveals that each tool entails subordination by creating generalized benefits at the expense of marginalized groups. It illustrates this skewed distribution through novel case studies tracing harm to Native peoples to the use of appropriations to empower Congress, harm to residents of Puerto Rico to the use of executive conditions to empower the President, and disparate coronavirus harms to Black communities to the use of nonentrenchment to empower the future and disempower the “dead hand” of the past.

The Article’s descriptive insight that separation-of-powers tools can and do entail subordination motivates its call for the incorporation of antisubordination into both institutional and doctrinal separation-of-powers analysis. The antisubordination movement’s rights-focused approach has stagnated. The separation of powers offers a desirable, upstream means through which to pursue the goal of antisubordination by shifting attention beyond the courts and toward other political actors. Moreover, considering antisubordination in separation-of-powers analysis has historical precedent, is consistent with the aspiration for “neutral principles,” and advances already established separation-of-powers values such as liberty and accountability.

Incorporating antisubordination alters institutional analysis, doctrinal analysis, and the agenda of separation-of-powers theory. The subordination question (“who pays?”) should be as familiar to institutional analysis of separation-of-powers questions as is the legal-process question (“who decides?”). This question might be used to interrogate particular separation-of-powers tools, categories of such tools, or overarching doctrinal and conceptual approaches. Antisubordination should also change doctrinal analysis, where courts should at the very least include antisubordination among the structural values they consider in resolving ambiguities, weighing interpretive tools, and conceptualizing constitutional questions. In this context, antisubordination’s greatest impact may be as a counterweight to courts’ use of historical gloss. Finally, antisubordination requires a new, creative agenda for separation-of-powers theory that focuses not on evaluating existing arrangements or the relative power of the branches, but instead on developing alternative arrangements that maintain the balance of power without imposing skewed costs. The



Article illustrates these interventions with novel prescriptions for ongoing legal controversies about the debt ceiling, foreign affairs, legislative standing, and government shutdowns.

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INTRODUCTION

“[T]he values of liberty and accountability protected by the separation of powers belong . . . to the Nation as a whole.”¹

— *Chief Justice Roberts*

“[I]n February, um, we just ate less.”²

— *SNAP Recipient*

At the end of 2018 and stretching into the early days of 2019, a power struggle between the House of Representatives and President Trump produced a partial government shutdown which, among other things, caused a forty-day gap in Supplemental Nutrition Assistance Program (SNAP) benefits not only for the family quoted in the epigraph above but also for millions of other SNAP recipients like them.³ Were their stress and hunger justified? Put aside for a moment the specifics of the dispute between former President Trump and House Speaker Nancy Pelosi and consider instead the laws that empowered them to shut down the government in the first place. Congress could change those laws to prevent shutdowns once and for all. But legal scholars, including myself, have cautioned that if it did, Congress would relinquish its “power of the purse” and thereby undermine values, such as liberty and accountability, advanced by the separation of powers.⁴ Do you think the SNAP recipients who will go hungry during the next extended shutdown share that view? Will they experience their personal,

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1. *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 696 (2015) (Roberts, C.J., dissenting).
 2. Wendi Gosliner, Wei-Ting Chen, Cathryn Johnson, Elsa Michelle Esparza, Natalie Price, Ken Hecht & Lorrene Ritchie, *Participants’ Experiences of the 2018-2019 Government Shutdown and Subsequent Supplemental Nutrition Assistance Program (SNAP) Benefit Disruption Can Inform Future Policy*, 12 *NUTRIENTS* 1867, 1877 (2020) (quoting an interview with a SNAP beneficiary describing shortages associated with missed February benefits despite the enhanced January benefits).
 3. *Id.* at 1873-80 (describing the increased stress, poorer food security, and disrupted finances that resulted from the extended gap in benefits).
 4. See JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 314 (2017) (“[I]f we abjure autocracy and instead seek to use our collective practical reason to navigate among and negotiate between the different, and often incommensurate, interests in the polity . . . then we must accustom ourselves to messiness and discord.”); Matthew B. Lawrence, *Disappropriation*, 120 *COLUM. L. REV.* 1, 65 (2020) (“[E]fforts to reduce the harms of disappropriation may inadvertently reduce . . . legislative power.”); *Protecting Congress’ Power of the Purse and the Rule of Law: Hearing Before the H. Comm. on the Budget*, 116th Cong. 11-22, 75-84, 97-109 (2020) [hereinafter *Protecting Congress’s Power of the Purse and the Rule of Law*] (testimony of Josh Chafetz, Professor of Law, Cornell Law School; Eloise Pasachoff, Associate Dean, Georgetown University Law Center; and Philip G. Joyce, Senior Associate Dean, University of Maryland School of Public Policy).

involuntary sacrifice as worthwhile for the benefits the separation of powers brings the nation as a whole?

Separation-of-powers scholarship does not ask such questions. Legal scholars consider a broad range of values in analyzing “separation-of-powers tools” – that is, the laws and norms that allocate power among actors in the federal system.⁵ These values include liberty, accountability, deliberation, transparency, antityranny, the rule of law, efficiency, general welfare, and partisan balance.⁶ Different scholars consider these values in different proportions because there is no “consensus on which values, exactly, the separation of powers is supposed to protect.”⁷ There is uniformity, however, in this regard: ideals of equity – like whether it is right to make SNAP recipients sacrifice in order to secure liberty and accountability for the nation as a whole – are not among the constellation of

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5. Scholars describe laws and norms that allocate governmental power among actors within the federal system as “separation-of-powers tools” or “separation-of-powers mechanisms.” See, e.g., Christopher J. Walker, *Restoring Congress’s Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1112 (2018) (referring to “separation-of-powers tool[s]”); Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 721-22 (2012) (conceptualizing “hard tools” and “soft tools” of congressional influence); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 435-37 (2009) (referring to “separation of powers mechanisms”). By revealing the predictable, particularized, and skewed impacts of some such tools, this Article calls into question the rationale of analytically separating the analysis of such tools. See *infra* notes 369-371 and accompanying text (discussing the distinction between structure and substance).
 6. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 32 (2020) (accountability, efficiency, and liberty); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2243-70 (2016) (efficiency, deliberation, legality, and transparency); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 553 (2015) (accountability, deliberation, expertise, and nonarbitrariness); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 481-86 (2015) (accountability, efficiency, and liberty); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1609-10, 1668 (2014) (accountability, provision of public goods, and liberty); Metzger, *supra* note 5, at 427-29 (accountability, deliberation, liberty, and antityranny); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 302 (2010) (liberty, antityranny, and welfare); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2338-43 (2006) (accountability, efficiency, liberty, and antityranny); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432-33 (1987) (efficiency and antityranny); cf. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1014-15 (2006) (addressing the “threat of discriminatory enforcement” in criminal law as a separation-of-powers concern because it poses a “danger to liberty”).
 7. Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 4 (2021); see also Bradley & Siegel, *supra* note 6, at 31 (“[T]here does not exist among judges and commentators a well-developed normative sense of the horizontal division and interrelation of powers.”).

values that they consider.⁸ Indeed, when separation-of-powers scholars have mentioned equity, they have tended to doubt its relevance.⁹ When allocating

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8. I am unaware of published legal scholarship considering questions of equity – including, but not limited to, subordination – in analyzing separation-of-powers tools. Such questions are also not mentioned in prior legal scholarship canvassing and summarizing separation-of-powers values. See Epps, *supra* note 7, at 32–39 (listing values considered in the separation-of-powers literature, but not including equity); Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1526–38 (2018) (reviewing CHAFETZ, *supra* note 4) (same); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 382–90 (2016) (same); Andrias, *supra* note 6, 480–87 (same). Bijal Shah has lamented the absence of critical perspectives on the separation of powers. See Bijal Shah, *Toward a Critical Theory of Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (2020), <https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah> [<https://perma.cc/GW84-5865>] (“The separation of powers . . . would benefit greatly from serious engagement with critical theory.”); see also Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, YALE J. ON REGUL.: NOTICE & COMMENT (2020), <https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani> [<https://perma.cc/CM6Y-5RJ6>] (“[A]dministrative law, as traditionally taught and studied, often avoids confronting questions of race and racial inequality.”). Howell Jackson, in an unpublished précis for his long-running Federal Budget Policy Seminar at Harvard Law School, does raise the possibility that the decision to leave particular spending programs to the annual appropriations process implicates equal-protection values. See Howell Jackson, *The Federal Budget Process as a Subject for Academic Study: What Are the Core Issues and What Should a Budget Policy Course Cover?* 3 (Nov. 18, 2019) (on file with author). Kate Andrias notes how economic power changes the workings of separated powers, thereby undermining accountability, and calls for reforms to counter this problematic influence. Andrias, *supra* note 6, at 485, 495. Section III.A.2 notes that valuing antisubordination in analyzing separation-of-powers questions is consistent with and provides a foundation for this approach, as well as other concerns associated with the law-and-political-economy movement. A forthcoming article applies a distributive lens to structural constitutional arrangements, including separation-of-powers tools, in order to explore tools that impact the major political parties differently. Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3797051> [<https://perma.cc/A2NF-YT3J>]. Doing so leads Jonathan S. Gould and David E. Pozen to consider “disparate effects of structural arrangements on racial and other demographic groups indirectly,” and the need for “direct treatments” of such effects. *Id.* (manuscript at 55); see also *id.* (manuscript at 7) (noting the “central role of political parties in determining the salience and significance of structural biases”); *id.* (manuscript at 55) (calling for “direct treatments” exploring the impact of structural constitutional features on “political blocs that operate outside the party system and demographic groups of various kinds”). This Article is such a treatment.
9. Josh Chafetz raises the possibility that separation-of-powers questions might implicate fairness concerns. However, he conceptualizes such concerns as impacting government actors – presidents, senators, and so on. CHAFETZ, *supra* note 4, at 313. These individuals are not materially impacted. Professor Chafetz therefore concludes that “fairness concerns are . . . less compelling in the separation-of-powers context than in, say, the criminal-law or tort-law context.” *Id.* Curtis A. Bradley and Trevor W. Morrison directly question the relevance of equity

power among the branches involves tradeoffs between costs and benefits, separation-of-powers scholars do not ask “who benefits?” or “who pays?”. This leaves what critical-race and feminist theorists call the “subordination question” – are marginalized groups disproportionately burdened?¹⁰ – unexplored and leaves instances of subordination through separation-of-powers tools unrecognized.¹¹ This Article begins to address this oversight.¹²

considerations in the separation of powers. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 416 (2012) (“Relying on past practice in [the constitutional separation of powers] does not typically raise concerns about the oppression of minorities or other disadvantaged groups the way that it does in some individual rights areas.”). This Article disputes this premise. Questions of equity – in particular, questions of antisubordination – are essential in analyzing the allocation of power in the federal system.

10. The “subordination question” asks whether “a rule of law or legal doctrine, practice, or custom subordinates important interests and concerns” of racial minorities, women, or other marginalized groups. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 88 (1994) [hereinafter Brooks, *Critical Race Theory*]; see also MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 27 (2010) (applying the “race subordination question” to tort law); Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1073 (2005) (applying the “subordination question” to national security); Roy L. Brooks, *Feminist Jurisdiction: Toward an Understanding of Feminist Procedure*, 43 U. KAN. L. REV. 317, 340 (1995) [hereinafter Brooks, *Feminist Jurisdiction*] (applying the subordination question to civil procedure).
11. Critical theorists have for decades looked to antisubordination as an overarching goal that overcomes the limitations of antidiscrimination and essentialist approaches. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1265-66 (1991); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986). Antisubordination also captures the state’s failure to respond to residents’ vulnerability, a core concern of vulnerability theory. See Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341, 364-67 (2019). That said, incorporating a general antisubordination perspective in the separation of powers by no means fully accounts for all aspects of inequity. There is much to be said for specifically naming and targeting particular manifestations of inequity on their own terms – for example, calling racism “racism.” See ROY L. BROOKS, *THE RACIAL GLASS CEILING: SUBORDINATION IN AMERICAN LAW AND CULTURE* 1-5 (2017) (“[R]acial subordination and racism have racial implications . . . but they are not coterminous concepts.”). It may be that antiracism or other initiatives aimed at particular forms of inequity warrant explicit inclusion in the pantheon of separation-of-powers values alongside or even ahead of antisubordination. This Article aspires to open the door to these questions.
12. This Article follows in the footsteps of prior work calling for the incorporation of particular values into separation-of-powers analysis. See Levinson & Pildes, *supra* note 6, at 2312 (partisan balance); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328 (2001) (federalism); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514 (1991) (liberty); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989) (rule of law).

For the first time, this Article asks the subordination question of important separation-of-powers tools and concludes, through case studies and theoretical analysis, that they entail subordination. In other words, these tools burden marginalized groups in order to create generalized benefits for the nation as a whole.¹³ It then explains that this insight makes it desirable to incorporate anti-subordination in the separation of powers; describes how institutional analysis, doctrinal analysis, and the agenda of separation-of-powers theory can do so; and illustrates the relevance of antisubordination to separation-of-powers controversies including the debt ceiling, government shutdowns, Congress's role in foreign affairs, and legislative standing.

The Article's foundation is its descriptive contribution. It considers in depth the distribution of costs and benefits associated with three tools that are central to the modern-day functioning of the federal government: legislative appropriations,¹⁴ executive conditions,¹⁵ and constitutional (non)entrenchment.¹⁶ Proponents cite long-term institutional benefits in support of each of these tools.

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13. See *infra* Section III.A.1 (defining subordination and related terms).
 14. Appropriations are congressional enactments that the Constitution makes a prerequisite for federal expenditures. See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”); Matthew B. Lawrence, *Congress’s Domain: Appropriations, Time, and Chevron*, 70 DUKE L.J. 1057, 1072–78 (2021) (explaining that temporary appropriations empower Congress but permanent appropriations do not). For more on the importance of appropriations in the separation of powers, see Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 *passim* (2021), which emphasizes the importance of appropriations in the administrative state; Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 360 (2018), which states that “Congress’s ‘power of the purse’—its authority to deny access to public funds—is one of its most essential constitutional authorities”; and Christian I. Bale, Note, *Checking the Purse: The President’s Limited Impoundment Power*, 70 DUKE L.J. 607, 609 (2020), which states that “apportionment provides the White House with a platform to interpose itself between Congress and executive agencies.”
 15. An executive condition is a prerequisite to program implementation imposed by executive-branch actors rather than by law. See Matthew B. Lawrence, *Fiscal Waivers and State “Innovation” in Health Care*, 62 WM. & MARY L. REV. 1477, 1530–44 (2021); Pasachoff, *supra* note 6, at 2228–32 (describing how executive conditions empower the Office of Management and Budget).
 16. Entrenchment rules govern policymakers’ power to bind successors—and so successors’ power to alter the status quo established by predecessors. See Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 892–914 (2011) (describing forms of entrenchment); see also Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 408 (2015) (discussing entrenchment); David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1868–78 (2013) (discussing an entrenchment in the form of expanding the Taking Clause’s protection).

Yet each brings with it real-world harms.¹⁷ When scholars and legal policymakers weigh such conflicts between institutional benefits and real-world harms, they compare net overall harms to net overall benefits.¹⁸ But asking “who pays?” reveals a pattern: each tool’s benefits are generalized, but its costs are particularized. What’s more, those particularized costs are targeted at marginalized groups, including Native peoples, the poor (which disproportionately means Black people),¹⁹ and family caretakers (which disproportionately means women).²⁰

Three case studies centering marginalized perspectives are at the heart of this descriptive contribution. First, the story of Native peoples who rely on the Indian Health Service (IHS) showcases who pays to empower the House and Senate through the “power of the purse.” IHS patients have a saying, “don’t get sick after June,”²¹ when the fiscal year ends and budgets wane. Many felt the pain of those words during the 2019 government shutdown when they were forced to go weeks with disrupted medical services, including mental-health treatment.²² They paid, and still pay, for the power that the House and Senate derive from leaving Native-trust obligations and other programs that serve the nation’s most vulnerable to annual appropriations while insulating middle-class entitlements with permanent funding.

Second, the story of relief for Puerto Ricans left without food, housing, and electricity after Hurricanes Maria and Irma demonstrates who can pay when the Executive empowers itself by imposing conditions on the implementation of federal programs. Puerto Rico had to wait almost two years for President Trump to release legislatively provided disaster-relief funds on his condition that the territory pay its contractors less than the applicable minimum wage.²³ Its residents paid the price for the power that agencies and the Office of Management and

17. See *infra* Part II.

18. See 43 Op. Att’y Gen. 293, 307 (1981) (“Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.”); CHAFETZ, *supra* note 4, at 314 (“Conflict, tension, and tumult may be precisely what produces good government.”); Serkin, *supra* note 16, at 882 (arguing that entrenchment should be prohibited if the “costs of reduced flexibility in the future” outweigh the “benefits of private parties’ reliance on government precommitments”); cf. Huq, *supra* note 6, at 1667-68 (“The mere fact that some private parties are disadvantaged by a deal in some way is not sufficient to warrant its close scrutiny.”).

19. See *infra* notes 188-192 and accompanying text.

20. See *infra* notes 161-169 and accompanying text.

21. Tom Coburn, Opinion, *Don’t Get Sick After June*, FOX NEWS (May 7, 2015), <https://www.foxnews.com/opinion/dont-get-sick-after-june> [https://perma.cc/X3XV-GEMU].

22. See *infra* Section II.A.1.

23. See *infra* Section II.B.1.

Budget (OMB) derive from threatening to withhold funds as a source of policy control.

Third, the story of the Affordable Care Act's (ACA) ill-fated Prevention and Public Health Fund (PPHF) demonstrates the harms of nonentrenchment rules, which determine the extent to which laws and policies may be changed once set. In 2010, the ACA attempted to guarantee national public-health investment through the PPHF.²⁴ But subsequent Congresses repeatedly raided the fund in the years leading up to the coronavirus pandemic in order to raise reimbursements for doctors and lower taxes for the wealthiest Americans.²⁵ Today, all Americans—but especially Black Americans—are paying the price for the country's inability to entrench pandemic preparedness.

Each of these case studies reveals a mismatch between the generalized benefits of the laws and norms that empower institutional actors and their problematically targeted costs. Together, they also raise concern about a larger pattern: when empowering actors in the federal system has a particularized price, marginalized groups seem to be the ones who pay it.

This descriptive contribution sets up and motivates the Article's normative and prescriptive contributions, which call for the incorporation of antisubordination into separation-of-powers analysis and describe how this can be done. Incorporating antisubordination makes sense from both critical and traditional "structural" perspectives. From critical perspectives, the fact that laws and norms allocating power within government are yet another place where the law can be a barrier to equity will surely be no surprise.²⁶ That said, Part III highlights four reasons why laws and norms allocating power are a particularly promising front on which to pursue antisubordination: (1) separation-of-powers laws and norms have the distinctive potential to protect against subordination regardless of which politicians or political parties happen to win office; (2) they are controlled by untapped policy actors who may be amenable to antisubordination arguments; (3) pursuing antisubordination in the design of laws and norms that allocate power within the government would mitigate the biasing influence of economic power in the political process;²⁷ and (4) focusing on the separation of

24. See *infra* Section II.C.1.

25. *Id.*

26. See DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS 8 (1st ed. 2003) (explaining that "one of the most persistently argued themes" in critical-race theory (CRT) is "that the law . . . is constructed by the dominant group to serve its own purpose").

27. See Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1829-32 (2020) (describing the field of law and political economy); Andrias, *supra* note 6, at 437-44 (highlighting the disproportionate power of economic elites in the

powers shifts focus from individuals to the legal and social structures that shape individual behavior.

Moreover, including antisubordination among the pantheon of values considered in separation-of-powers theory makes sense even from a traditional “structural” perspective. Antisubordination should be considered a “structural” value that is protected at the level of institutional design because it tends to lose out in day-to-day choices about the exercise of power. There is also historical precedent, from the Founding through Reconstruction and the New Deal, for considering antisubordination in structuring the federal system. And even if antisubordination were not appropriately considered an independent separation-of-powers value, it is an important means of advancing other such values, especially liberty and accountability.

The Article differentiates interventions for institutional analysis, doctrinal analysis, and the agenda of separation-of-powers theory. For institutional analysis, all those involved in constructing the separation of powers, from scholars to legislative- and executive-branch policymakers, must be mindful not only of the total costs and benefits of particular arrangements but also of the distribution of those costs and benefits. The subordination question (“who pays?”) should be as familiar to separation-of-powers analysis as is the legal-process question (“who decides?”).²⁸ Asking this simple question can call into doubt prevailing practices and theories. For example, it reveals a powerful distributive argument against choosing the “least unconstitutional option” in the event of a debt-ceiling impasse, as advocated by Neil H. Buchanan and Michael C. Dorf.²⁹

political process); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1494-1506 (2016) (calling for constitutional theory to account for the outsized role of economic power in the political process).

28. E.g., Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1450 (2010) (“[The] defining feature of the Hart & Wechsler paradigm and the Legal Process school is that they . . . focus . . . on second-order questions of ‘who decides?’”).
29. See Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1177-78 (2012); David Kamin, *Legislating Crisis*, in *THE TIMING OF LAWMAKING* 34, 36-37 (Frank Fagan & Saul Levmore eds., 2017) (describing the debt limit); Richard Rubin, *Limit on U.S. Debt, Untouched in Democrats’ Covid Aid Bill, Looms Later in Year*, WALL ST. J. (Feb. 12, 2021, 2:33 PM EST), <https://www.wsj.com/articles/limit-on-u-s-debt-untouched-in-democrats-covid-aid-bill-looms-later-in-the-year-11613158396> [https://perma.cc/399P-V9HZ] (describing how the Democrats’ decision not to address the mechanism in President Biden’s COVID-19 relief package may force a debt-ceiling shutdown); Jordain Carney, *Republicans Ready to Become Deficit Hawks Again Under a President Biden*, HILL (Nov. 27, 2020, 7:02 PM EST), <https://thehill.com/homenews/news/527197-republicans-ready-to-become-deficit-hawks-again-under-a-president-biden> [https://perma.cc/7DCS-5UZC] (“The battle over spending could quickly come to a head, with fights looming over budgets, pandemic

The role of values in doctrinal separation-of-powers analysis is more limited, but courts still have an important part to play. Courts can and should consider antisubordination alongside other structural values in adjudicating separation-of-powers cases. In doing so, antisubordination's most salient effect may be as a counterweight to historical-gloss and antinovelty arguments, which tend to preserve a status quo which antisubordination seeks to replace.

More inclusive institutional and doctrinal analysis of separation-of-powers questions is only a starting point, however. The recognition that existing separation-of-powers tools entail subordination should motivate a new agenda for the separation of powers focused on creativity and compromise. Actors in the legislative, executive, and judicial branches, as well as civil society and legal scholars, should develop new, fairer alternatives to replace problematic existing arrangements while maintaining the branches' powers. For example, a "shut-down tax" would ensure the "power of the purse" threatens the nation as a whole, not only those who rely on spending programs.

The stakes are high. The specific instances of subordination described in this Article impact food, housing, health, welfare, and other life essentials for tens of millions of people. They have given rise to some of the most significant public controversies and governmental failures of the past several decades, dominating headlines and livelihoods.³⁰ But by the time disparate harms are actually threatened by particular political actors, it is often far too late to prevent or rectify them through legal processes. Only by intervening at the level of institutional design can harms to marginalized groups be forestalled, regardless of who wins the next election, or the one after that.³¹

The Article proceeds in four parts. Part I provides background on the means and ends of the separation of powers, describing how modern separation-of-powers scholarship employs a long but incomplete set of values to evaluate laws and norms that empower actors within the federal system. Part II applies the subordination question to three important means of institutional influence: legislative appropriations, executive conditions, and constitutional (non)entrenchment. It uses these case studies to reveal that each tool entails particularized harms that are disproportionately targeted at marginalized groups. In light of this insight, Part III explains that incorporating antisubordination within the separation of powers advances goals of both antisubordination advocates and

spending and the debt ceiling, which was suspended under a deal between Trump and Congress. It is set to be reinstated at the end of July."); Letter from Rick Scott, U.S. Sen., to Colleagues 1 (Jan. 26, 2021), <https://www.rickscott.senate.gov/sites/default/files/2021-01/210126%20Debt%20Ceiling.pdf> [<https://perma.cc/5M6T-PKM7>] ("While the debt limit suspension does not expire until August 1, 2021, we need to start focusing on reforms now.").

30. See *infra* Part II.

31. See *infra* Section III.A.

separation-of-powers theorists. Part IV describes specific interventions for institutional analysis, doctrinal analysis, and the agenda of separation-of-powers theory. It then turns to unanswered questions, including the generalizability of the Article’s descriptive contribution beyond the tools (appropriations, executive conditions, and (non)entrenchment) and context (resource allocation) analyzed here. It illustrates the salience of antesubordination for the separation of powers with novel prescriptions for legal controversies about the debt ceiling, foreign affairs, legislative standing, and government shutdowns.

I. THE MEANS AND ENDS OF THE SEPARATION OF POWERS

As a descriptive and theoretical field, the separation of powers is much more nuanced than the traditional conception of three independent branches empowered by the Constitution to play discrete roles.³² Indeed, a leading approach deconstructs the macronotion of “balance” and the associated focus on the relative power of the branches.³³ In order to understand how government actually operates, the modern separation of powers takes a microlevel view of the various actors that wield governmental power, the means by which those actors obtain their power, and the ends that guide the development and use of those means.³⁴

As for actors, separation-of-powers scholarship, of course, explores the overall relative power of the three branches.³⁵ Yet it also focuses on the allocation of power to various components within these branches, including the chambers of

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32. See THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961) (explaining that each branch would have a “will of its own,” and “[a]mbition [would] counteract ambition”).
33. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 605 (2001).
34. This Article uses the “simple and intuitive understanding” of “power” described by Daryl J. Levinson – namely, “the ability of political actors to control the outcomes of contested decisionmaking processes and secure their preferred policies.” Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 39 (2016).
35. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 3-17 (2010) (summarizing the push to check the President’s power and offering a competing view); Chafetz, *supra* note 5, at 778 (arguing that the House and Senate should “restor[e] constitutional equipoise”); David Schleicher, *Vermont Is a Constitutional Problem*, 61 ARIZ. L. REV. 253, 262 (2019) (arguing that the Senate’s two-senators-per-state rule allows lowly populated states to make Congress “a less useful or appealing institution for self-governance”).

Congress;³⁶ congressional committees and party leadership;³⁷ the civil servants, political appointees, and inspectors general that comprise agencies;³⁸ and executive-branch actors like OMB³⁹ and its Office of Information and Regulatory Affairs (OIRA).⁴⁰

As for means, constitutional rules, such as those governing delegation and entrenchment, are important.⁴¹ But “much – perhaps even *most* – of the ‘constitutional’ work in our legal system is in fact done by legal norms existing outside what we traditionally think of as ‘the Constitution.’”⁴² Understanding the separation of powers therefore requires looking to the “constitution outside the Constitution.”⁴³ This includes a bevy of statutory devices and institutional norms such as temporary legislation,⁴⁴ appropriations,⁴⁵ arrangements to divide power

36. See Schleicher, *supra* note 35, at 261-76.

37. See generally RICHARD F. FENNO, JR., *THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS* (1966) (providing an overview of the House and Senate Appropriations Committees’ powers).

38. See Michaels, *supra* note 6, at 530-51.

39. See Pasachoff, *supra* note 6, at 2188-89.

40. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272-81 (2001).

41. See *supra* note 16 and accompanying text (describing entrenchment).

42. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411 (2007).

43. *Id.* at 473 (“[I]f we seek to identify the set of legal norms that actually *constitute* our public legal order – then the ‘Constitution’ will include not only the canonical document but a host of statutes, regulatory materials, federal common law rules, and established practices.”).

44. See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 248 (2007).

45. See, e.g., Metzger, *supra* note 5 *passim*; Price, *supra* note 14, at 365-69; Lawrence, *supra* note 4, at 10-15; Chafetz, *supra* note 5, at 725-35.

among executive-branch actors,⁴⁶ crisis devices like the debt ceiling and sequester,⁴⁷ executive conditions on the implementation of law,⁴⁸ oversight hearings,⁴⁹ and the tradition of deference to the Senate Parliamentarian.⁵⁰ The Supreme Court plays a role in the development of these laws and norms,⁵¹ but so too do many other actors, both independently⁵² and through the interaction of “internal” and “external” rules.⁵³

In considering the means of allocating power, separation-of-powers scholarship is “functionalist”⁵⁴ in that it looks beyond and within the branches to consider specific laws and norms that allocate power (or have the ability to generate power),⁵⁵ categories of such laws and norms and the relationship among them,⁵⁶ and commonalities that cut across them.⁵⁷ It is also intertemporal, addressing how power ebbs and flows over time.⁵⁸

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46. See Kagan, *supra* note 40, at 2273; Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 386-405 (2019).
47. Professor Kamin describes a “crisis device” as any mechanism that creates power for each chamber of Congress (and perhaps for the President) by creating a crisis that can be avoided only through affirmative legislative action. See Kamin, *supra* note 29, at 36. This Article discusses the debt ceiling in Section IV.A.2.
48. Pasachoff, *supra* note 6, at 2209-24.
49. Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529, 530 (2020) (discussing congressional-oversight authorities); Chafetz, *supra* note 5 *passim* (discussing the range of congressional tools).
50. Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1952 (2020) (studying congressional rules and institutions as they relate to the separation of powers).
51. See, e.g., *INS v. Chadha*, 462 U.S. 919, 959 (1983) (invalidating the legislative veto).
52. See Michaels, *supra* note 6; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2328-31 (2006) (focusing on the role of civil servants and internal rules in foreign affairs); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1249-66 (2017).
53. See Metzger, *supra* note 5, at 426 (calling for scholarship to connect internal and external influences on agencies); see also *infra* Section IV.A (describing the thick political surround).
54. See Magill, *supra* note 33, at 608-09 (describing functionalism and formalism in separation-of-powers doctrine).
55. See, e.g., Price, *supra* note 14 *passim* (discussing funding restrictions).
56. See Gersen, *supra* note 44, at 248 n.3 (describing temporary legislation as a “cousin” of entrenchment).
57. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84-85 (2006) (discussing tools available to Congress); Chafetz, *supra* note 5, at 725-68 (same); Huq, *supra* note 6, at 1618-46 (discussing tools that involve coordinated action by the President and Congress); Kagan, *supra* note 40, at 2282-2303 (discussing tools available to the President).
58. Sometimes, as with the House’s power to impeach the President, power flows directly from the Constitution. U.S. CONST. art. II, § 4, cl. 1. Usually, however, power depends on how

As for ends, “[s]eparation of powers is not an end in itself.”⁵⁹ It is a means to several ends. The values considered in separation-of-powers scholarship—the ends it envisions the separation of powers achieving—determine its prescriptions and influence the understandings it develops.⁶⁰ In analyzing sources of power and making recommendations to courts, legislators, and executive-branch actors, separation-of-powers scholarship has considered a long list of values. Its recurring ends include (first and foremost) liberty,⁶¹ political accountability,⁶² deliberation,⁶³ the rule of law,⁶⁴ expertise,⁶⁵ transparency,⁶⁶ antityranny,⁶⁷ the general welfare,⁶⁸ and partisan balance.⁶⁹

But what of equity? Questions of equity have redefined many fields of legal scholarship.⁷⁰ Scholars of tax,⁷¹ federalism,⁷² civil procedure,⁷³ administrative

institutional actors use their constitutional authorities over time and how such uses interact with other legal, institutional, structural, social, and cultural forces. See CHAFETZ, *supra* note 4, at 314 (“[I]nstitutional authority . . . neither arises nor disappears instantaneously.”); Huq, *supra* note 8, at 1560–64 (describing “change models” of separation of powers).

59. Brown, *supra* note 12, at 1516.
60. See Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 230 (2016) (describing “spill over” between normative and descriptive accounts of the separation of powers); Brooks, *Feminist Jurisdiction*, *supra* note 10, at 320–26 (describing how goals can influence questions asked and, in turn, answers uncovered).
61. See, e.g., Brown, *supra* note 12 *passim*; Metzger, *supra* note 5, at 427–28.
62. See, e.g., Huq, *supra* note 6, at 1668.
63. See, e.g., Metzger, *supra* note 5, at 433–34.
64. See, e.g., Verkuil, *supra* note 12, at 304–07.
65. See, e.g., Michaels, *supra* note 6, at 553.
66. See, e.g., Pasachoff, *supra* note 6, at 2243–70.
67. See, e.g., Sunstein, *supra* note 6, at 433.
68. See, e.g., Gersen, *supra* note 44, at 297–98.
69. See, e.g., Levinson & Pildes, *supra* note 6, at 2312–16.
70. See Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1957 (2018) (“[T]he egalitarian anxiety has made inroads across the legal academy.”); see, e.g., CHAMALLAS & WRIGGINS, *supra* note 10, at 21–27 (tort law); Gott, *supra* note 10, at 1073 (national security law); Brooks, *Feminist Jurisdiction*, *supra* note 10, at 318 (civil procedure); Colker, *supra* note 11, at 1003–06 (equal protection).
71. DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* 3–28 (2021).
72. Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1708–14 (2017) (arguing that much federalism scholarship and pedagogy erroneously separates structural values from concern for the welfare of marginalized groups).
73. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 95–104 (1984); Brooks, *Critical Race Theory*, *supra* note 10, at 98–112.

procedure,⁷⁴ constitutional rights,⁷⁵ and campaign finance⁷⁶ have pointed out the distributive impacts of “structural”⁷⁷ rules and called for consideration of such impacts alongside traditional values. Meanwhile, scholars have called for the reconceptualization of constitutional law – or even the entire legal order – around questions of economic power and opportunity.⁷⁸

Despite their salience in other fields and this budding reconceptualization, questions of equity, including the subordination question, have been left out of the analysis of separation-of-powers tools. Problems of racism, sexism, ableism, homophobia, and classism are simply not included among the values scholars consider in analyzing them.⁷⁹ Heather K. Gerken’s observation thus continues to ring true: “If you want to study the distribution of power, you study . . . the separation of powers. If you care about equality . . . you study the First and Fourteenth Amendments.”⁸⁰

II. WHEN POWER HAS A PRICE, WHO PAYS?

It may be that scholars have assumed that the harms associated with separation-of-powers tools are generalized and so do not raise distributive questions.⁸¹ Or it may be that scholars have assumed that upstream questions about institutional influence are too attenuated from real-world outcomes to have significant,

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74. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 400 (2019) (“Many well-intentioned efforts to promote good governance can – and do – drain agencies of their legitimacy, impair their responsiveness to the public, and expose them to capture.”).
75. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1497-99 (1989) (problematizing the conditions imposed on the exercise of constitutional rights that, due to imbalance in who is in a position to reject the conditions, could lead to “constitutional caste”).
76. Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 694-96 (2014) (emphasizing the need for consideration of democratic political economy in campaign-finance cases as an illustration of the call for including an anti-oligarchy principle in constitutional construction more generally).
77. See Gerken, *supra* note 72, at 1709 (describing the essential role of “structure”).
78. See Kessler & Pozen, *supra* note 70, at 1958 nn.21-36 (collecting sources).
79. See *supra* note 8.
80. Gerken, *supra* note 72, at 1709.
81. See, e.g., Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 90-91 (1997) (positing that tax law long failed to ask about racially disparate impacts because of the assumption “that tax law is neutral and objective”).

foreseeable consequences worth considering.⁸² But both assumptions are incorrect.

Three important and destructive means of empowering institutions in the federal system entail subordination, by which I mean that they bring real-world harms that are particularized and skewed toward marginalized groups.⁸³ This Part develops this insight by introducing the subordination question and applying it to appropriations, executive conditions, and constitutional (non)entrenchment rules. All of these tools have to do with the allocation of resources, a fertile ground for the “who pays?” question due to the close connection between subordination and economic power.⁸⁴ This Article discusses generalizability to other separation-of-powers questions later in Section IV.C.3.

Building on critical-race theory’s tradition of emphasizing stories as a way to empower marginalized groups⁸⁵ and “seek[ing] multiple and diverse perspectives to illuminate the theoretical properties of emerging concepts in a given study,”⁸⁶ the center of each Section is a case study which exemplifies and contextualizes each tool’s targeted impacts. Each case study is followed by a theoretical assessment which uncovers larger patterns of harm along distributive dimensions including income, race, and gender.

A. Legislative Appropriations

Appropriations are a means of empowering Congress which “lie at the core of the administrative state.”⁸⁷ The Constitution forbids federal expenditures “but in Consequence of Appropriations made by Law.”⁸⁸ The Framers viewed this

82. See Shah, *supra* note 8 (“Administrative law scholars may enjoy abstract debates on structural constitutionalism. But too often, with tunnel vision, we engage in antiseptic discussions of the law For instance, those asserting or assuming that formalist or originalist ideologies are neutral . . . dismiss the work of grappling with the human stakes as lesser points of discussion.”).

83. Multiple lenses might be used in assessing the distribution of harms associated with separation-of-powers tools. The focus here is on subordination—that is, on distributions in which marginalized groups are burdened in order to benefit the strong. See *infra* Section III.A.1 (defining subordination).

84. On this connection, see the sources collected *supra* note 27.

85. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411-12 (1989) (describing this narrative-based method).

86. Maria C. Malagon, Lindsay Perez Huber & Veronica N. Velez, *Our Experiences, Our Methods: Using Grounded Theory to Inform a Critical Race Theory Methodology*, 8 SEATTLE J. FOR SOC. JUST. 253, 261 (2009) (describing grounded theory); BROWN, *supra* note 26, at 9 (“CRT privileges experiences.”).

87. Metzger, *supra* note 14, at 1075.

88. U.S. CONST. art. I, § 9, cl. 7.

limitation as a primary power source for Congress and its most important check on the Executive.⁸⁹ Josh Chafetz points out that Congress’s appropriations power was the Federalists’ “strongest rejoinder” to Anti-Federalist concerns that the Executive would be too powerful.⁹⁰

Today, as scholars and policymakers look for ways to reinvigorate Congress, appropriations are enjoying a renaissance. Several scholars have written detailed accounts addressing congressional control through spending in the separation of powers.⁹¹ In a blockbuster decision in the summer of 2020, the D.C. Circuit held that the House and Senate each have standing to sue in federal court to enforce the Appropriations Clause.⁹² A bipartisan collection of civil-advocacy groups – including Demand Progress, FreedomWorks, the National Taxpayers Union, the Project on Oversight and Government Reform, Protect Democracy, and the R Street Institute – has formed the “Power of the Purse Coalition,” which advocates for statutory and institutional reforms to bolster congressional control through the appropriations process.⁹³ Congress has held hearings with titles like “Protecting Congress’ Power of the Purse and the Rule of Law.”⁹⁴ And myriad

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89. See THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) (arguing that the power of the purse, including appropriations and taxation, is “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure”); THE FEDERALIST NO. 30, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions.”).
90. See CHAFETZ, *supra* note 4, at 57; see also *id.* at 55-59 (describing the history and importance of the Appropriations Clause in the constitutional debates).
91. Metzger, *supra* note 14, at 1077 (“Appropriations lie at the core of the administrative state.”); Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1729-38 (2016); CHAFETZ, *supra* note 4, at 45-77; Price, *supra* note 14 *passim*; Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1678-86 (2017); Lawrence, *supra* note 4 *passim*; Lawrence, *supra* note 14 *passim*. These works all build on Kate Stith’s foundational article, Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1386 (1988), which understood the Appropriations Clause as creating a “Principle of Appropriations Control,” which “Congress may transgress . . . if it legislates permanent or other open-ended spending authority, particularly in areas where the executive branch has significant discretion in defining the objects of expenditure.”
92. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 13 (D.C. Cir. 2020).
93. Letter from Power of the Purse Coalition to Mitch McConnell, Senate Majority Leader; Nancy Pelosi, Speaker of the House; Chuck Schumer, Senate Minority Leader; and Kevin McCarthy, House Minority Leader (July 1, 2020) [hereinafter Letter from Power of the Purse Coalition], https://s3.amazonaws.com/demandprogress/letters/7.1.20_Power_of_the_Purse_Coalition_Letter.pdf [<https://perma.cc/4H8R-NTRQ>] (“[W]e encourage you to use this opportunity to advance policies and reforms that would strengthen Congress’s primacy over federal spending and tax decisions.”).
94. *Protecting Congress’s Power of the Purse and the Rule of Law*, *supra* note 4.

bills have been introduced to increase congressional influence through appropriations, such as the Congressional Power of the Purse Act.⁹⁵

Part of the reason for this renaissance is that time-limited appropriations are the key means through which Congress influences the power it has delegated to the administrative state. Congress has delegated much of its legislative power to administrative agencies through permanent legislation. But when Congress chooses to leave a program's funding time limited, it retains for each chamber enduring influence over agencies through the threat of refusing future funding.⁹⁶ As Zachary S. Price explains, through "the ingenious practice, begun with the very first Congress, of appropriating funds only one year at a time, Congress has ensured that presidents must always come back every year seeking money just to keep the government's lights on,"⁹⁷ guaranteeing its continued influence over agencies and the policies they enforce.⁹⁸

1. *Native-Trust Obligations*

I understand the crucial role of appropriations in our separation of powers and the desire to bolster that role. In addition to my previous scholarship on the subject,⁹⁹ I recently served as special legal advisor to the House of Representatives Budget Committee, assisting in efforts to protect the power of the purse.¹⁰⁰ But as a scholar whose substantive focus is a field built around federal spending, I have become increasingly concerned about unrestrained embrace of the power of the purse. In short, the power of the purse is parasitic; it empowers Congress by hobbling spending programs. Worse still, its negative impacts are borne most heavily by marginalized groups.

95. Congressional Power of the Purse Act, H.R. 6628, 116th Cong. (2020).

96. See Price, *supra* note 14, at 367-68; Beermann, *supra* note 57, at 84 ("Congress has supervised agencies with great particularity . . . through the appropriations process.").

97. Price, *supra* note 14, at 367-68.

98. Lawrence, *supra* note 14, at 1072-75 (explaining how Congress uses appropriations to influence political outcomes). The power appropriations create does not always inure to Congress. The President's veto threat also gives her an opportunity to draw influence by threatening appropriations. See D. Roderick Kiewiet & Mathew D. McCubbins, *Presidential Influence on Congressional Appropriations Decisions*, 32 AM. J. POL. SCI. 713, 713 (1988) (finding that the presidential veto confers asymmetric influence since the President can influence Congress to spend less, but not more).

99. Lawrence, *supra* note 14; Lawrence, *supra* note 4.

100. Dickinson Law Professor Advises U.S. House of Representatives Budget Committee, PENNSTATE DICKINSON L. (Jan. 28, 2020), <https://dickinsonlaw.psu.edu/lawrence-advises-committee> [<https://perma.cc/F8JU-EV5M>].

The country's repeated breach of its trust obligations to Native peoples is a stark example.¹⁰¹ The United States has a moral and legal obligation "to provide health care to Native Americans," which "derives from the special relationship between Native Americans and the federal government" and has been memorialized by treaties.¹⁰² It has related obligations to assist Native peoples in accessing education, housing, and jobs.¹⁰³ Among other things, these "trust" obligations are "the result of Native Americans ceding over 400 million acres of tribal land to the United States pursuant to promises and agreements that included providing health care services."¹⁰⁴

Consistent with the country's trust obligations and pursuant to its plenary power through Federal Indian law,¹⁰⁵ Congress has created numerous programs through which it provides health care, education, housing, and job support for Native nations and their nearly two million members.¹⁰⁶ These include IHS, job support through rural public-administration positions,¹⁰⁷ grants through the Bureau of Indian Education and associated child-nutrition services,¹⁰⁸ Housing

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101. This Section's narrative responds to Maggie Blackhawk's call to focus on Indian law in public law. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1876-77 (2019). In light of the impact described here, the Appropriations Clause should be added to Professor Blackhawk's list of constitutional provisions problematized by Federal Indian law. See *id.* at 1806-45.
102. See U.S. COMMISSION ON CIVIL RIGHTS, *BROKEN PROMISES: EVALUATING THE NATIVE AMERICAN HEALTH CARE SYSTEM 2* (2004).
103. *Id.* at 25.
104. *Id.* at 21.
105. Aila Hoss, *A Framework for Tribal Public Health Law*, 20 NEV. L.J. 113, 121 (2019) (describing principles of Federal Indian law, including the plenary-power doctrine).
106. See generally MARK K. DESANTIS, CONG. RSCH. SERV., R45480, U.S. DEPARTMENT OF THE INTERIOR: AN OVERVIEW 6-7 (2019) (describing the Bureau of Indian Affairs's services).
107. See *Impact of the Partial Government Shutdown on Indian Country: Testimony Before the Democratic Steering and Pol'y Comm. & H. Comm. on Nat. Res.*, 116th Cong. 2 (2019) [hereinafter *Aaron A. Payment Testimony*] (statement of Aaron A. Payment, First Vice President, Sault Ste. Marie Tribe of Chippewa Indians of Michigan), <https://naturalresources.house.gov/imo/media/doc/Chairman%20Aaron%20Payment-%20Testimony.pdf> [https://perma.cc/DL96-R8QC].
108. See BUREAU INDIAN EDUC., U.S. DEP'T INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2021, at 10 (2021), <https://www.doi.gov/sites/doi.gov/files/uploads/fy2021-budget-justification-bie.pdf> [https://perma.cc/XBG9-A9BU]; T. Michael Andrews, *Continuing to Work for Indian Country in the 115th Congress*, 41 AM. INDIAN L. REV. 361, 364-65 (2017) (describing Congress's increased funding of the Indian Health Service (IHS) and the Bureau of Indian Education).

Block Grants,¹⁰⁹ and targeted social services through the Indian Child Welfare Act.¹¹⁰

Beginning with the Snyder Act, enacted in 1921, Congress has funded these Native programs through the annual appropriations process.¹¹¹ For some of those programs, that process does not give Congress any greater flexibility to change the terms of its trust obligations, which are permanent and partly codified in law.¹¹² But for others, the process markedly increases congressional flexibility to change the terms. Across the board, however, annually funding Native programs makes it possible for Congress and the President to leverage the needs of Indian country as a source of influence in the appropriations process by threatening to delay necessary funding.

Felix S. Cohen, the “father of federal Indian law,”¹¹³ notably remarked that “[l]ike the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere.”¹¹⁴ So too with appropriations as a means of congressional influence. The inclusion of trust obligations to Native peoples in the annual appropriations process has guaranteed the federal government’s repeated failure to honor those obligations, resulting in profound harms to Native peoples.

The harms of including trust obligations in the annual appropriations process have been most concrete when the government has failed to enact appropriations necessary to honor its commitments—an event that has happened with increasing frequency and severity in recent decades.¹¹⁵ The record-breaking 2018-2019 government shutdown proved particularly costly. Dragging on for weeks, the shutdown halted funding for Native programs, causing massive dis-

109. See Andrews, *supra* note 108, at 363.

110. See *id.*

111. Snyder Act, ch. 233, 42 Stat. 208 (1921) (codified at 25 U.S.C. § 13 (2018)); see Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1584 (2007) (describing IHS funding as discretionary).

112. See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 201 (2012) (describing contract support as an entitlement).

113. Blackhawk, *supra* note 101, at 1801 (citing Jill E. Martin, *The Miner’s Canary: Felix S. Cohen’s Philosophy of Indian Rights*, 23 AM. INDIAN L. REV. 165, 165 (1998)).

114. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

115. See Lawrence, *supra* note 4, at 4-10, 39-44 (describing the increasing frequency and duration of government shutdowns).

ruptions, impacting every aspect of life, and even threatening “basic human survival.”¹¹⁶ Without funding for IHS, Native nations limited hours and shut down clinics or secured costly interest-bearing loans to keep doors open.¹¹⁷ Native people were forced to forego health care, nutrition assistance, medication, and substance-use-disorder treatment and counseling.¹¹⁸ A clinic serving Native people in D.C., Delaware, Maryland, and Virginia reported having “to deny purchase of care requests [for] . . . insulin, blood pressure medication, [and] thyroid medication.”¹¹⁹

Impacts were not limited to health-care services. On the Navajo Nation reservation, “[w]hen snow socked in residents in early January, many were trapped in their homes for days after Bureau of Indian Affairs workers, furloughed during the call for snow removal, were slow to respond.”¹²⁰ Tribal-housing programs were left to choose between shutting down or reducing their services.¹²¹

116. Jenni Monet, *Federal Government Administers Many Tribal Nation Services: So What Now?*, BLOOMBERG CITYLAB (Jan. 15, 2019, 11:09 AM EST) (quoting Navajo Nation President Russell Begaye), <https://www.bloomberg.com/news/articles/2019-01-15/how-government-shutdown-affects-native-american-tribes> [<https://perma.cc/72DJ-6N9K>]; see also Matthew Tobey, Katrina Armstrong & Donald Warne, *The 2019 Partial Government Shutdown and Its Impact on Health Care for American Indians and Alaska Natives*, 31 J. HEALTH CARE FOR POOR & UNDERSERVED 75 *passim* (2020) (discussing the effect of the 2018-2019 government shutdown on IHS).

117. Tobey et al., *supra* note 116, at 75-76.

118. See Maxine Speier, *Government Shutdown Leads to Program Cuts for Native Americans*, MONT. PUB. RADIO (Jan. 15, 2019, 6:11 PM MST), <https://www.mtpr.org/post/government-shutdown-leads-program-cuts-native-americans> [<https://perma.cc/95A5-WZBF>] (“Food and medication distribution and substance abuse counseling programs for Native Americans are being put on hold . . .”); *Impact of the Partial Government Shutdown on Indian Country: Testimony Before the Democratic Steering and Pol’y Comm. & H. Comm. on Nat. Res.*, 116th Cong. 2 (2019) [hereinafter *Hawk-Lessard Shutdown Impacts Testimony*] (written testimony of Kerry Hawk-Lessard, Executive Director, Native American Lifelines), <https://naturalresources.house.gov/imo/media/doc/Kerry%20Hawk-Lessard-%20Testimony.pdf> [<https://perma.cc/4VLM-44RZ>] (describing the shutdown in behavioral-health and counseling services, including overdose response); Aaron A. *Payment Testimony*, *supra* note 107, at 4 (discussing the threat to in-patient treatment for substance-use disorder and access to Vivitrol).

119. *Hawk-Lessard Shutdown Impacts Testimony*, *supra* note 118, at 2.

120. Monet, *supra* note 116.

121. Letter from Jefferson Keel, President, Nat’l Cong. of Am. Indians; Kimberly Teehee, President, Native Am. Contractors Ass’n; Victoria Kitcheyan, Acting Chairperson, Nat’l Indian Health Bd.; Maureen Rosette, President, Nat’l Council on Urb. Indian Health; Robin Butterfield, President, Nat’l Indian Educ. Ass’n; Gary Cooper, Chairman, Nat’l Am. Indian Hous. Ass’n; Sarah Kastelic, Exec. Dir., Nat’l Indian Child Welfare Ass’n; and W. Ron Allen, Tribal Chairman, Self-Governance Commc’n & Educ. Tribal Consortium, to Donald J. Trump, U.S. President; Mitch McConnell, Senate Majority Leader; Chuck Schumer, Senate Minority

Social services, including federal payments to foster parents and income assistance, were curtailed.¹²² And Native peoples across the board were furloughed or even laid off from the public-administration jobs on which they relied.¹²³

The 2018-2019 shutdown had nothing to do with Native trusts. It was a struggle between interests represented by President Trump and Speaker Pelosi over whether to fund a border wall to keep people from immigrating to the United States.¹²⁴ Yet the cost of their struggle was paid in part by Native peoples, who have themselves suffered generations of injustice at the hand of immigrants and their descendants. This irony was not lost on Native leaders, who observed that “the Americans most affected by immigration over the last 500 years continue to be the most heavily impacted by the shuttering of multiple federal agencies that are unrelated to securing the homeland.”¹²⁵ The Cheyenne River Sioux Tribe Chairman put it more bluntly: “The President of the United States should quit trying to build a wall that would have been better served at Plymouth Rock in 1492.”¹²⁶

The 2018-2019 shutdown is exemplary, but it is far from exceptional. Prior shutdowns have seen similar acute impacts on Native peoples.¹²⁷ Moreover, it would be a mistake to assume that the dependence of Native-trust obligations

Leader; Nancy Pelosi, Speaker of the House; and Kevin McCarthy, House Minority Leader 3 (Jan. 10, 2019) [hereinafter Letter from Jefferson Keel], https://www.ncai.org/Native_Orgs_letter_to_White_House_to_re-open_gov.pdf [<https://perma.cc/5Y6R-NYW2>].

122. *Id.*

123. See Aaron A. *Payment Testimony*, *supra* note 107, at 2-3, 7 (describing how the Pawnee Nation launched a GoFundMe campaign to pay for groceries for furloughed workers and how the Kickapoo Tribe of Kansas was forced to lay off twenty-two employees).

124. See Kristina Peterson, Michael C. Bender & Rebecca Ballhaus, *Shutdown Breaks Record for Longest in Modern History*, WALL ST. J. (Jan. 13, 2019, 12:00 AM EST), <https://www.wsj.com/articles/trump-plays-down-emergency-option-to-get-wall-funding-11547238564> [<https://perma.cc/Y8XZ-NHS5>].

125. Letter from Jefferson Keel, *supra* note 121, at 1.

126. *Chairman Harold C. Frazier Statement Regarding Partial Government Shutdown*, W. RIVER EAGLE (Jan. 9, 2019), <https://www.westrivereagle.com/articles/the-chairmans-corner> [<https://perma.cc/WWK2-NDNB>].

127. See *Impact of the Partial Government Shutdown on Indian Country: Testimony Before the H. Comm. on Nat. Res.*, 116th Cong. 4 (2019) (written testimony of Mary Greene Trottier, President, National Association of Food Distribution Programs on Indian Reservations), <https://naturalresources.house.gov/imo/media/doc/Mary%20Greene%20Trottier-Testimony.pdf> [<https://perma.cc/E7WH-WJQM>] (“In the October 2013 government shutdown, we saw [distribution centers] forced to close their doors and leave food to rot in warehouses while our participants went without food.”); Aaron A. *Payment Testimony*, *supra* note 107, at 2 (testifying that Sault Ste. Marie Tribe of Chippewa Indians of Michigan lost six medical staff, including a physician, due to prior shutdowns).

on annual appropriations harms Native peoples only when the government actually fails to enact funding. Whether there is a funding lapse or not, the annual appropriations cycle means that Native nations have to “worry each day if their programs are funded” because of the ever-present threat of lapse.¹²⁸ Indeed, “[d]on’t get sick after June,” when IHS tends to run out of money as the fiscal year comes to a close,¹²⁹ “is a well known saying in Indian Country”¹³⁰ and “pretty accurate.”¹³¹

In light of the instability of IHS, it is not surprising that there has been a growing push to open pathways and divert funds for Native peoples to enroll in private health insurance through the ACA marketplaces.¹³² Privatization addresses the instability problem that IHS’s fragile funding source creates for IHS, as insurers “take on” any risk of federal disruptions. Unfortunately, privatization also impacts self-determination over Native health programs, which was a key motivation behind carving out distinctive tribal programs in the first place.¹³³

Native peoples pay a political cost, as well. They do not have the luxury of spending their limited political capital on new programs or investments. Instead, they must lobby each year both for the reenactment of appropriations that fulfill the country’s longstanding obligations and for cost-of-living increases to match inflation. This puts tribal lobbyists in competition with advocates for other spending programs just to get the government to honor its long-established

128. Letter from Jefferson Keel, *supra* note 121, at 2.

129. *See id.*

130. Coburn, *supra* note 21; *see also* Anna Lindrooth, *Discretionary Deaths in Indian Country: Ensuring Full Funding for Tribal Health*, 26 FED. CIR. BAR J. 277, 296-302 (2017) (arguing that funding for IHS should be increased).

131. Coburn, *supra* note 21 (quoting former Secretary of the Department of Health and Human Services (HHS) Kathleen Sebelius about the accuracy of the mantra).

132. *See, e.g.*, Jessica Bylander, *Using Federal Funds to Buy Obamacare for Native Americans*, 37 HEALTH AFFS. 8 *passim* (2018); Daniel Skinner, *The Politics of Native American Health Care and the Affordable Care Act*, 41 J. HEALTH POL., POL’Y & L. 41 *passim* (2016).

133. *See* Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 3(a), 88 Stat. 2203, 2203-04 (1975) (codified at 25 U.S.C. § 5302(a) (2018)) (“The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination . . .”).

commitments to them.¹³⁴ The dependence of Native-trust obligations thereby contributes to the “[s]tructural violence” that undermines tribal public health.¹³⁵

2. *The Parasitic Power of the Purse*

Native-trust obligations are not an outlier. Harm to the public is the fuel that appropriations burn to empower the House and Senate. If Congress fully funds a program in permanent law, that “permanent appropriation” limits a future Congress from credibly threatening to withdraw support unless it can muster veto-proof majorities in both chambers to repeal the measure.¹³⁶ Appropriations therefore empower the House and Senate, and especially their Appropriations Committees, only insofar as programs are made dependent on annual enactments.¹³⁷ Then, the core mechanism of legislative power is the threat of disruption—a specialty of Congress. Both the House and the Senate can *unilaterally* make this threat because both must assent to pass appropriations legislation (the President can make this threat, too, by virtue of her veto power).¹³⁸

Appropriations’ interaction with congressional power destabilizes spending programs in two ways. First, the goal of retaining influence gives Congress reason to hobble new spending programs when it creates them, providing for temporary appropriations even when substantive considerations, such as the need

134. See Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159, 1165-1220 (surveying the literature and offering original research documenting tribes’ extensive investment in lobbying); *id.* at 1170 (describing lobbying on “federal appropriations” first in a list of tribal lobbying efforts); Westmoreland, *supra* note 111, at 1583 (“Between 1980 and 2002, Medicare per capita spending grew at an average of 7.8% per year, Medicaid at 6.9% per year, and IHS at only 4.8% per year.”); Andrew Siddons, *The Never-Ending Crisis at the Indian Health Service*, ROLL CALL (Mar. 5, 2018, 5:04 AM), <https://www.rollcall.com/2018/03/05/the-never-ending-crisis-at-the-indian-health-service> [<https://perma.cc/MU4Y-KMUG>].

135. See Hoss, *supra* note 105, at 132-33 (“Structural violence ‘is invisible, embedded in ubiquitous social structures, normalized by stable institutions and regular experience[,]’ and ‘occurs whenever people are disadvantaged by political, legal, economic, or cultural traditions.’” (quoting Deborah DuNann Winter & Dana C. Leighton, *Structural Violence Section Introduction to PEACE, CONFLICT, AND VIOLENCE: PEACE PSYCHOLOGY FOR THE 21ST CENTURY* 99 (Daniel J. Christie, Richard V. Wagner & Deborah DuNann Winter eds., 2001))).

136. See Lawrence, *supra* note 14, at 1076-77 (describing how permanent appropriations reduce legislative power).

137. See *id.*

138. See *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 13 (D.C. Cir. 2020) (“To put it simply, the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys.”); RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES passim* (1973) (arguing that committees derive influence largely through threats to funding).

for stability or fiscal concerns, call for a permanent funding stream.¹³⁹ The structure of federal spending programs indicates that this consideration is often determinative.¹⁴⁰ So does the discourse among legislators,¹⁴¹ civil-society groups,¹⁴² and legal scholars,¹⁴³ who repeatedly cite the goal of empowering Congress as a reason to make appropriations temporary. Indeed, congressional rules actively discourage permanent appropriations by making such legislation harder to pass.¹⁴⁴

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139. Whether to make any particular program resistant to change is, of course, a complicated policy judgment which requires balancing reliance interests with flexibility. See David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1382 (2011) (“[P]olicymakers and scholars should move beyond their reflexive embrace of flexibility.”).
140. Two common features of legislation indicate that Congress makes programs dependent on annual appropriations to empower itself, not to provide needed flexibility. First, laws often leave spending programs dependent upon both executive discretion and annual appropriations. Compare Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, div. D, tit. II, 123 Stat. 3034, 3253 (2009) (empowering HHS to “fund medically accurate and age appropriate programs that reduce teen pregnancy”), with Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. H, tit. II, 132 Stat. 348, 733 (2018) (providing one year of funding for the Teen Pregnancy Prevention Program). Such redundancy is unnecessary to maintain the ability to adapt programs to changing circumstances. In the regulatory sphere, where permanent delegations are the norm, the discretion afforded to the Executive is justified on the ground that it provides policy flexibility. See David Kamin, *Legislating for Good Times and Bad*, 54 HARV. J. ON LEGIS. 149, 162 (2017). Second, laws often create a legally enforceable commitment to pay which is nonetheless dependent on annual appropriations. See Lawrence, *supra* note 4, at 22-23 (noting scores of permanent but temporarily funded payment commitments). These fragile “appropriated entitlements” empower future Congresses, as failure to enact annual appropriations in any given year (a disappropriation) would leave the Executive unable to pay. This would force beneficiaries to pursue their claims in court, where it has historically taken years to secure the promised funds. *Id.* at 74. But such programs do not entail extra policy flexibility; the statutory commitment in permanent law can be changed only by further legislation, not by disappropriation. Again, then, appropriated entitlements can be explained by their tendency to secure power for Congress, not by the goal of policy flexibility.
141. See, e.g., Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 314-17 (1998) (lamenting the increase in mandatory spending from the 1960s and emphasizing the benefits of congressional appropriations).
142. See Letter from Power of the Purse Coalition, *supra* note 93 (“As an ever-increasing percentage of federal spending has transitioned to the mandatory spending category, Congress has abdicated much of its responsibility for making hard decisions on the appropriation of taxpayer dollars.”).
143. See sources cited *supra* note 4.
144. See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 401(a), 88 Stat. 297, 317 (codified as amended at 2 U.S.C. § 651(b)(1) (2018)) (establishing a point of order for legislation creating new entitlement authority for fiscal years lacking budget resolution); *id.* § 303(a)(4) (codified as amended at 2 U.S.C. § 634(a)(4) (1982)) (stating a point of order for legislation creating new, current-year entitlement authority). The

Second, where a program's funding is temporary for any reason, the power of the purse allows the House, the Senate, or the President to threaten the program to gain leverage. As Representative Alexandria Ocasio-Cortez colorfully put it, any of these actors can take those who are served by a program "hostage" to gain the upper hand in negotiations on unrelated subjects.¹⁴⁵

This instability has real-world costs that are direct and obvious when funding actually lapses, as it did for Native-trust obligations and numerous other programs during the 2018-2019 shutdown.¹⁴⁶ But other costs are continuous and ongoing, whether or not a lapse occurs. Those who depend on annually funded

history of these points of order in policing the jurisdiction of congressional committees is consistent with the point that they are motivated in part by institutional considerations, not substantive ones.

145. Andrew Buncombe, *Government Shutdown: Alexandria Ocasio-Cortez Accuses Trump of 'Hostage Taking' over Border Wall Demands*, INDEP. (Jan. 6, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/government-shutdown-trump-border-wall-alexandria-ocasio-cortez-aoc-hostage-taking-a8714451.html> [https://perma.cc/MU8A-Y88W]. This is why SNAP benefits, services for Native peoples, and other critical programs lapsed in 2019. It was not because of any policy disagreements about these programs. Rather, these programs were used as leverage in the border-wall fight. See Erica Werner & John Wagner, *Trump Welcomes a Shutdown During Oval Office Squabble with Pelosi, Schumer*, WASH. POST (Dec. 11, 2018, 7:14 PM EST), https://www.washingtonpost.com/powerpost/schumer-pelosi-set-to-meet-with-trump-on-wall-but-house-gop-stands-firm/2018/12/11/2604b1ae-fd56-11e8-862a-b6a6f3ce8199_story.html [https://perma.cc/XC7J-9KMT] (quoting President Trump as saying that he is "proud to shut down the government for border security").
146. See CONG. RSCH. SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 25-35 (Dec. 10, 2018) (describing shutdown effects on health programs, law enforcement, veterans, and national parks); *Impacts and Costs of the October 2013 Federal Government Shutdown*, EXEC. OFF. PRESIDENT U.S. 4-6 (Nov. 2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/reports/impacts-and-costs-of-october-2013-federal-government-shutdown-report.pdf> [https://perma.cc/B3E9-KVA3] (describing the impacts of the 2013 shutdown on Head Start programs, home loans, food inspections, small-business assistance, veterans' disability programs, and clinical trials); Philip G. Joyce, *The Costs of Budget Uncertainty: Analyzing the Impact of Late Appropriations*, IBM CTR. BUS. GOV'T 30-33 (2012), <http://www.businessofgovernment.org/sites/default/files/The%20Costs%20of%20Budget%20Uncertainty.pdf> [https://perma.cc/E568-B6PT] (discussing harms to state and local governments); Lena H. Sun, *HIV/AIDS Funding Delay Causes Problems for D.C. Agencies*, WASH. POST (Aug. 19, 2011), https://www.washingtonpost.com/national/health-science/hivaids-funding-delay-causes-problems-for-dc-agencies/2011/08/19/gIQApe9lQJ_story.html [https://perma.cc/Z8DP-Y64T] (describing the disruption in funding for HIV treatment). This Article's epigraph evidences the harm to direct beneficiaries of spending programs that results if and when their funding is actually disrupted. Almost one in ten families rely on SNAP benefits for food each month. Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361, 385-87 (2020). The disruption of such benefits for weeks caused obvious and direct harm to the families who relied on them, including malnutrition, stress, and economic distress. See Gosliner et al., *supra* note 2, at 1877.

programs must expend political influence to maintain those programs.¹⁴⁷ Moreover, “policies that require continual legislative renewal are unlikely to survive in the long term.”¹⁴⁸ Therefore, annual funding streams are inherently limited in their ability to incentivize long-term investments.¹⁴⁹

3. *A Disproportionate Burden on the Low-Income, Caretakers, and Asset Poor*

The harms associated with annual appropriations sometimes impact everyone equally. Destabilizing a government program that serves the entire country, or a broad cross section, spreads harms generally.¹⁵⁰ And disrupting a program that employs voluntary contractors also impacts everyone relatively equally, as contractors pass on the costs of instability back to the taxpayers.¹⁵¹ But as the Native-trust obligation example illustrates, the harms associated with annual appropriations can also be deeply particularized. Focusing on who bears these particularized costs reveals three problematic patterns.

First, the harms of appropriations – or, rather, the harms of temporary legislation – are targeted almost exclusively at socially directed resource allocations like spending, not at market directed resource allocations. With rare exception, Congress empowers itself through temporary legislation by threatening only those who depend on spending programs.¹⁵² In practice, this means that Congress threatens the social supports of family caretakers (who are predominantly

147. Super, *supra* note 16, at 1875 (“If low-income people and their allies must constantly defend even their most vital interests, they will have little opportunity to seek advances and eventually will lose the programs that already exist.”); cf. *Romer v. Evans*, 517 U.S. 620, 629-31, 635 (1996) (describing the “continuing” injuries of a state law prohibiting legal protections based on “Homosexual, Lesbian, or Bisexual Orientation”).

148. John R. Brooks, Brian D. Galle & Brendan S. Maher, *Cross-Subsidies: Government’s Hidden Pocketbook*, 106 *GEO. L.J.* 1229, 1269 (2018).

149. See Lawrence, *supra* note 15, at 1528 (describing how short-term funding streams skew state-investment choices).

150. For example, during the 2013 government shutdown, the National Transportation Safety Board was delayed in investigating fifty-nine airplane accidents. *Impacts and Costs of the October 2013 Federal Government Shutdown*, *supra* note 146, at 5. The safety of air travel is important, but for the most part it impacts everyone who flies – a broad swath which skews, if at all, toward wealthier Americans.

151. This pass through is not merely an economic prediction. It has been tested and shown empirically. See I.T. Yang, *Impact of Budget Uncertainty on Project Time-Cost Tradeoff*, 52 *IEEE TRANSACTIONS ENG’G MGMT.* 167, 168 (2005) (finding that uncertainty in project budgets due to annual appropriations led contractors to increase bids, passing through costs associated with instability to taxpayers).

152. For a description of one threatened exception, see Amanda K. Chuzi, Note, *Defense Lawmaking*, 120 *COLUM. L. REV.* 995, 997-1009 (2020).

women) and impoverished communities, but not the social supports of people and communities whose needs are met by the marketplace.

Such skewed costs are not a given. Congress's power source is not "appropriations." Rather, it is time-triggered legislation. Spending programs are only one of many cultural, social, institutional, and economic supports over which Congress has authority and which could be time triggered.¹⁵³ Congress could give itself future influences by threatening to increase taxes, amend regulations, alter subsidies, and so on.¹⁵⁴ Empowering itself by making appropriations for spending programs temporary, and ignoring these various other leverage points, is Congress's choice.¹⁵⁵

This choice has profound consequences for the distribution of the burdens entailed by creating and maintaining congressional power. It leaves those who rely on market entitlements—legal entitlements to control a resource assigned through the marketplace¹⁵⁶—immune from the harms of the struggle for power within Congress and between Congress and the Executive. Instead, this burden

153. Gersen, *supra* note 44, at 248; *see also* Kamin, *supra* note 140, at 193-95 (describing automatic stabilizers and other triggers in legislation); Rebecca M. Kysar, *Dynamic Legislation*, 167 U. PA. L. REV. 809, 821-30 (2019) (describing prompting legislation and dynamic legislation).

154. One could imagine, for example, Congress empowering itself not only by threatening spending programs with disappropriation every year but also, or instead, by threatening market entitlements with reductions every year—that is, by threatening automatic tax increases. Just as Congress appropriates one year at a time, it could enact a bill with 100 distinct provisions, each increasing federal income taxes (and thereby reducing market entitlements) by a set amount (be it 1%, 10%, or 100%) in one of the next 100 future years. Then, instead of gaining power from the annual debate about "funding the government," Congress would also, or instead, gain power from an annual debate about "funding market entitlements" (i.e., lowering taxes). This Article suggests a springing tax of this type *infra* Section IV.C.2. *Cf.* Jonathan A. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1974-82 (2020) (calling for Congress to make regulatory statutes temporary in order to increase Congress's power over the regulatory state).

155. Congress has occasionally enacted tax cuts for a ten-year term that create a one-time threat of tax increases, which are reductions in market entitlements. *See* David Kamin & Rebecca Kysar, *Temporary Tax Laws and the Budget Baseline*, 157 TAX NOTES 125, 129 (Oct. 2, 2017) (discussing temporary tax cuts enacted during the George W. Bush Administration).

156. Market entitlements allocate gains from trade, labor, or investment to the trader, laborer, or investor, who automatically controls such gains and can use them to obtain and consume food, trade for resources, make investments, and so on. *See* AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* 1 (1981) (describing market entitlements); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 *passim* (1923) (providing an early legal-realist treatment of the state as creating and protecting market entitlements).

falls on those who are left behind by the market and depend on social allocations.¹⁵⁷

This lopsided pattern is particularly problematic from the standpoint of vulnerability theory, which emphasizes that “subordination exists on multiple axes.”¹⁵⁸ Vulnerability theory focuses on failures of the state to respond to the vulnerability of all residents throughout their life and the invisible burdens of dependency and care work that are exacerbated by this failure.¹⁵⁹ Vulnerability theory gives a central role not to equity among individuals or groups, but to the state’s responsibility to respond to all forms of human dependency—though it often sees the state’s failures to meet this responsibility as intertwined with inequity in the contemporary United States.¹⁶⁰

In particular, leading vulnerability theorist Martha Albertson Fineman describes the problematic role of the public/private distinction in highlighting only those laws and programs that support the derivatively dependent—those involved in caretaking for friends and family—and not the laws and norms that support others in society. As she explains, the term “dependency” was used as a talisman in the welfare-reform debates of the 1990s as part of an argument, made without evidence, that welfare programs made people “dependent” and,

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157. Policymakers in the United States tend to presume that market allocation is preferable to social ordering for a variety of reasons. See, e.g., CHARLES SILVER & DAVID A. HYMAN, *OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE* 1-22 (2018) (discussing benefits of market ordering). For a discussion of the reasons why market ordering may be preferable to social ordering, see, for example, FRIEDRICH HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (1988), which describes the difficulty of efficient ordering without price signals generated through the market. Policymakers have often found this presumption rebutted where there are market failures—such as externalities and collective-action problems—or where special interests capture the political process. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 7 (1982) (discussing market failures as a justification for regulation).
158. Aya Gruber, *Neofeminism*, 50 *HOUS. L. REV.* 1325, 1325 (2013). “As noted by historian Linda Gordon, feminism is ‘an analysis of women’s subordination for the purpose of figuring out how to change it.’” Martha Albertson Fineman, *Feminist Legal Theory*, 13 *J. GENDER, SOC. POL’Y & L.* 13, 14 (2005) (quoting Linda Gordon, *The Struggle for Reproductive Freedom: Three Stages of Feminism*, in *CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM* 107, 107 n.1 (Zillah R. Eisenstein ed., 1979)).
159. See Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 *YALE J.L. & FEMINISM* 1, 3-4 (2014) (“Vulnerability theory is rapidly gaining acceptance within the legal academy as progressively-oriented scholars rush to apply the theory to a broad range of legal problems.”).
160. See Fineman, *supra* note 11, at 342 (“[V]ulnerability theory . . . call[s] for a state that is responsive to universal human needs and for the reorganization of many existing structures, which . . . ignore[] the realities of human dependency and vulnerability.”); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 13 (2008).

therefore, unable to pull themselves out of poverty.¹⁶¹ Fineman's response was to point out that we are *all* dependent at various points in our lives,¹⁶² and that our needs are met (or not) by a web of cultural, social, institutional, and economic supports over which the state has significant control.¹⁶³ Why single out welfare beneficiaries as "dependents" when everyone is dependent in some form? Why single out welfare programs from the "webs of economic, social, cultural, and institutional relationships" on which we depend and over which the state has influence, when state subsidy is universal?¹⁶⁴ Fineman's answer was that traditional, patriarchal assumptions about the role of women in the family, and associated negative judgments about single mothers, contributed to this selective and pejorative focus on "derivative dependence."¹⁶⁵ Indeed, vulnerability theory sees the very framing of "spending" as fundamentally different from market ordering as a mistaken artifact of classically liberal paradigms that take ownership and property as natural rights.¹⁶⁶

Making only those programs that serve the needs of those who are not provided for by the market dependent on annual congressional enactments contributes to this problematic focus on a particular subset of social supports. As Martha T. McCluskey has noted, permanent state supports, like legal protections for

161. Martha Albertson Fineman, *The Nature of Dependencies and Welfare 'Reform,'* 36 SANTA CLARA L. REV. 287, 288 (1996).

162. *Id.* ("The fact of subsidy is not remarkable. The question is why we stigmatize some subsidies, but not others. . . . [W]e all are dependent on public subsidy in the United States.").

163. *Id.* at 288-94.

164. Martha Albertson Fineman, *Equality and Difference – The Restrained State,* 66 ALA. L. REV. 609, 622 (2015).

165. See Fineman, *supra* note 161, at 293 ("There is no societal consensus that the derivative dependent has a legitimate claim to social resources."); see also *id.* ("In our society, derivative dependency, while not universal or inevitable, is gendered. Caretakers, within as well as without the family, are typically women."); *id.* at 296 ("Self-induced ideological blindness blocks more pragmatic responses to poverty – responses that would articulate the collective responsibility and justify continuing and broadening subsidy, not its elimination or curtailment.").

166. See Martha T. McCluskey, *Framing Middle-Class Insecurity: Tax and the Ideology of Unequal Economic Growth,* 84 FORDHAM L. REV. 2699, 2701 (2016) (critiquing the modern conceptual framing of taxation and spending that "presumptively locates economic productivity in a distinct and underlying private sector, with government taxing and spending essentially cast as derivative and dependent on gain largely generated elsewhere"); *id.* at 2702 ("[D]isproportionate taxes on the wealthy do not risk 'distorting' otherwise normal and natural production, but rather can redirect economic production toward broader, fairer, and more sustainable economic growth and more stable, legitimate, and fair politics (for example, controlling the oligarchic political power of extreme wealth)").

market entitlements, fade into the background.¹⁶⁷ Meanwhile, the state's role in guaranteeing threatened social supports remains ever salient.¹⁶⁸ Every time that their continuation comes into question, we are reminded of the government's role in establishing and protecting them. Where the permanent protection of property and market entitlements appears necessary, spending allocations appear unnecessary – and even undeserved. It is thus much harder for us to view such allocations as equally legitimate and appropriate forms of state support as laws protecting, for example, property ownership or the right to trade.

Although abstract, this effect of annual appropriations on the relative salience and perception of government supports may have far-reaching implications, shaping the way beneficiaries see themselves and the way voters see the desirability of maintaining their supports, especially when scarcity becomes acute.¹⁶⁹ Indeed, the subordination may become self-reinforcing, as those whose support depends on the annual appropriations process take on a subordinated status by virtue of that fact alone, further destabilizing their lives while facilitating their continued dependence on the state.¹⁷⁰

Second, even among spending programs, the harms of empowering Congress through temporary enactments tend to be borne disproportionately by the lowest-income Americans. This is because not all spending programs are left entirely reliant on annual appropriations. A spending program can be funded permanently and thus be insulated from the annual appropriations process.¹⁷¹

167. *Id.* at 2701 (arguing that the conceptual privileging of taxation “presumptively locates economic productivity in a distinct and underlying private sector, with government taxing and spending essentially cast as derivative”).

168. Legal scholars have explored in a variety of contexts how changing the salience of a law affects behavioral responses thereto. *E.g.*, Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 *YALE J. ON REGUL.* 253, 261–64 (2011) (collecting sources); *id.* at 262 (“Behavioral economists refer to salience as a bias in favor of prominent or visible information that affects people’s economic behavior and responses.”).

169. See Susan C. Stokes, *Pathologies of Deliberation*, in *DELIBERATIVE DEMOCRACY* 124, 134–35 (Jon Elster ed., 1998) (discussing the relationship between the public discourse around benefit programs and beneficiaries’ self-image).

170. My thanks to Professor Fineman for this point.

171. See Lawrence, *supra* note 14, at 1071–79 (explaining that Congress often gives its power over spending away – just as it gives away its regulatory authority by delegating it in permanent law to agencies – by enacting permanent, indefinite appropriations that do not depend on re-affirmation by future Congresses).

Many important federal spending programs are not funded permanently, however. Instead, they depend to some extent on annual appropriations.¹⁷² This includes Medicaid and SNAP benefits,¹⁷³ programs targeted at rural-poverty prevention,¹⁷⁴ Native-trust obligations,¹⁷⁵ and a host of other programs that benefit communities generally, including programs funding investments in family planning,¹⁷⁶ public education,¹⁷⁷ housing,¹⁷⁸ and HIV treatment.¹⁷⁹ By contrast, the most heavily insulated programs are non-means-tested entitlement programs that primarily benefit the middle class – most prominently, Medicare and Social Security.¹⁸⁰

The odd funding structure of the ACA's insurance subsidies is perhaps the starkest example of this regressive tendency. The law has two primary insurance

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172. See generally BILL HENIFF JR., CONG. RSCH. SERV., RS20129, ENTITLEMENTS AND APPROPRIATED ENTITLEMENTS IN THE FEDERAL BUDGET PROCESS 1 (2012); *Discretionary Spending Options*, CONG. BUDGET OFF., <https://www.cbo.gov/content/discretionary-spending-options> [<https://perma.cc/JTJ3-M26Y>].
173. H.R. REP. NO. 105-217, at 1014-18 (1997) (Conf. Rep.), as reprinted in 1997 U.S.C.C.A.N. 176, 635-39 (listing “appropriated entitlements,” including “[f]ood stamp program,” “[c]hild nutrition programs,” and “[g]rants to [s]tates for Medicaid”). Such “appropriated entitlements” can still be disrupted by Congress, but ultimately beneficiaries may obtain a damages remedy in federal court. See, e.g., *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020) (allowing a damages action against the government after a congressional failure to appropriate).
174. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-518, TARGETING FEDERAL FUNDS: INFORMATION ON FUNDING TO AREAS WITH PERSISTENT OR HIGH POVERTY 48-63 (2020) (listing annual appropriations for persistent-poverty counties, including many rural counties).
175. See *supra* Section II.A.1.
176. See, e.g., *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 650 (D. Md. 2018) (describing appropriations for the Teen Pregnancy Prevention Program).
177. See, e.g., Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. B, tit. III, 132 Stat. 2981, 3097 (2018) (funding state education grants).
178. Consolidated and Continuing Appropriations Act of 2012, Pub. L. No. 112-55, div. C, tit. II, 125 Stat. 551, 680 (2011) (funding low-income housing programs administered by the Department of Housing and Urban Development).
179. Sun, *supra* note 146 (discussing appropriations for the Ryan White Act).
180. See John Harrison, *New Property, Entrenchment, and the Fiscal Constitution*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 401, 404 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008) (describing Social Security's financing structure); 2018 Annual Report, BDS. OF TRS., FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. 7 (2018), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/TrustFunds/Downloads/TR2018.pdf> [<https://perma.cc/27QQ-7P8W>] (describing Medicare's financing structure).

subsidies to help people afford health insurance: one that helps lower- and middle-income Americans afford premiums¹⁸¹ and one that helps only lower-income Americans afford cost sharing (deductibles, copays, and so on).¹⁸² The middle-income subsidy has a permanent appropriation.¹⁸³ The lower-income subsidy is left to the annual appropriations cycle.¹⁸⁴

Third, the harms of annual appropriations, even among those who depend on them, are skewed based on wealth and, thereby, race. Instability in government spending programs does not affect everyone equally. Rather, the harms depend on a person's ability to fund basic necessities without reliance on those programs. In other words, the harms depend on people's wealth or access to wealth.¹⁸⁵ A person or entity with significant liquid assets can easily make up for a temporary government shortfall by tapping into funding reserves. A person or entity without such resources, by contrast, may be rendered insolvent and forced to make severe sacrifices.¹⁸⁶ When it comes to grant programs, this disparate impact gives monied players, contractors, and localities a leg up.¹⁸⁷

The fact that a lack of wealth exacerbates the harms of instability in federal spending programs means that Black people disproportionately suffer because wealth acts as a self-reinforcing battery for inequality.¹⁸⁸ Over time, racial subordination deprived Black people of opportunities to accumulate wealth, which,

181. The premium tax-credit subsidy, which helps with monthly premiums, is available to lower- and middle-class Americans; a family of four making up to 400% of the federal poverty level is eligible for the subsidy. I.R.C. § 36B (2018).

182. The cost-sharing reduction subsidy is available only to lower- and lower-middle-class Americans; it caps at a family of four making up to 250% of the federal poverty level and primarily serves those making much less. 42 U.S.C. § 18071 (2018).

183. 31 U.S.C. § 1324 (2018) (describing funding for “refunds due from . . . [I.R.C.] . . . section . . . 36B”).

184. U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 166 (D.D.C. 2016) (describing appropriations).

185. See Matthew B. Lawrence, *The Social Consequences Problem in Health Insurance and How to Solve It*, 13 HARV. L. & POL'Y REV. 593, 609 (2019) (describing how, due to opportunity costs, financial harms are more significant for the asset poor than for those with wealth, all else being equal); Richard Lempert, Comment, *A Classic at 25: Reflections on Galanter's "Haves" Article and Work It Has Inspired*, 33 LAW & SOC'Y REV. 1099, 1099-1100 (1999) (describing the ubiquitous benefits of wealth).

186. Cf. Brief of Amicus Curiae the National Association of Insurance Commissioners in Support of Plaintiff-Appellee at 12-17, *Moda Health Plan, Inc. v. United States*, 908 F.3d 738 (Fed. Cir. 2018) (No. 2017-1994) (describing how, due to a lapse of funding and to their low liquidity, small insurers had been forced out of the marketplace).

187. Lawrence, *supra* note 4, at 49.

188. BROWN, *supra* note 71, at 18 (“White Americans have ten times the median wealth of [B]lack Americans and eight times that of Latinx Americans.”); *id.* at 26 (“From one generation to the

in turn, deprives their descendants today of access to many of the privileges necessary to generate more wealth.¹⁸⁹ The result is a stark racial wealth gap.¹⁹⁰ These disparities function intergenerationally as well. Compared to only thirty-three percent of white individuals, fifty percent of Black individuals raised at the “bottom of the family wealth ladder remain stuck there.”¹⁹¹ Thus, a critical-race perspective reveals that laws that distribute benefits or burdens based on wealth themselves propagate racial subordination.¹⁹² Appropriations are no exception.

B. Executive Conditions

Appropriations’ targeted and skewed harms alone demonstrate that separation-of-powers tools can exacerbate subordination. However, appropriations are not unique in this respect. Executive conditions, another separation-of-powers tool, are also enjoying a renaissance, although they are far more controversial than are appropriations. Executive conditions are prerequisites to the implementation of law which come not from statute but from the President’s authority over the execution of the law.¹⁹³ Thus, scholars have explored how the fact that

next, [B]lack wealth diminishes, evaporates, and is stolen by systemic racism.”); Michele Lerner, *One Home, A Lifetime of Impact*, WASH. POST (July 23, 2020), <https://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap> [<https://perma.cc/4DNR-LLFZ>] (discussing race-based disparities); Signe-Mary McKernan, Caroline Ratcliffe, Margaret Simms & Sisi Zhang, *Do Financial Support and Inheritance Contribute to the Racial Wealth Gap?*, 26 URB. INST. 1 (Sept. 2012), <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/412644-Do-Financial-Support-and-Inheritance-Contribute-to-the-Racial-Wealth-Gap-.PDF> [<https://perma.cc/UJR9-EJMW>] (discussing racial disparities in various forms of economic transfer); Abbye Atkinson, *Race, Educational Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 1 (2010) (arguing that a college degree does not insulate Black graduates from bankruptcy, as it does for white graduates); see also Super, *supra* note 16, at 1791 (“New evidence suggests that . . . historical asset deficiencies explain substantially more of the present-day differences in asset holdings than do contemporary policies.”); Super, *supra* note 16, at 1791-93 (collecting sources).

189. Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 787 (2020) (“Th[e] racial wealth gap is large and shows no sign of closing.”).

190. “Recent data from the Survey of Income and Program Participation (2014) shows that black households hold less than seven cents on the dollar compared to white households.” William Darity Jr., Darrick Hamilton, Mark Paul, Alan Aja, Anne Price, Antonio Moore & Caterina Chiopris, *What We Get Wrong About Closing the Racial Wealth Gap*, SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY 2 (Apr. 2018), <https://socialequity.duke.edu/wp-content/uploads/2020/01/what-we-get-wrong.pdf> [<https://perma.cc/GKZ2-67DF>].

191. THOMAS M. SHAPIRO, TOXIC INEQUALITY: HOW AMERICA’S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, & THREATENS OUR FUTURE 43 (2017).

192. See Harris & Pamukcu, *supra* note 189, at 786-87, 830 n.312 (collecting sources).

193. See Lawrence, *supra* note 15, at 35-45.

they empower the Executive makes this tool – which stands at the intersection of federalism and separation of powers – different from more traditional, legislative conditions on spending for states or localities.¹⁹⁴ The Executive’s threat of non-implementation – especially the threat not to dole out statutorily appropriated funds – can induce beneficiaries and other third parties who care about such programs to take actions over which the Executive otherwise would not have influence.

The Executive’s ability to empower itself in this way is a product of law and practice. The Constitution gives the President the capacity, if not the right, to create executive conditions by vesting the President with responsibility for executing laws passed by Congress.¹⁹⁵ That gives the President the ability to delay or withhold implementation, even when she lacks the authority, because obtaining relief from such a delay is difficult and time consuming (especially given limits on legislative standing).¹⁹⁶ Congress also enhances the President’s ability to create conditions by enacting discretionary programs in which aspects of implementation depend on relatively flexible statutory criteria.

The most infamous use of executive conditions took place in the summer of 2019 when OMB held up aid that Congress had provided for Ukraine to pressure the country to announce an investigation of Hunter Biden – an act which eventually resulted in President Trump’s first impeachment.¹⁹⁷ Despite its peculiarities, the Ukraine example is indicative of a larger trend toward the increasing (or, at least, increasingly public) use of executive conditions by the executive branch

194. *See id.* (observing that unlike legislative conditions, executive conditions empower agencies, can be exercised in secret, and can vary state to state or locality to locality); Douglas M. Spencer, *Sanctuary Cities and the Power of the Purse: An Executive Dole Test*, 106 IOWA L. REV. 1209, 1218–29 (2021); *see also* Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109, 142 (2021) (explaining that discretion over one decision can be expanded into other areas by means of “overreach” through which “public authorities might mix benefits and burdens in a manner that violates constitutional limitations on the government’s lawful domain”).

195. U.S. CONST. art. 2, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

196. Protecting programs from even unlawful executive disruption is extremely difficult because, even at their fastest, courts decide cases too slowly to prevent holdups from causing serious harm. Additionally, separation-of-powers doctrines limit standing in federal court to those with concrete, particularized interests, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014); limit Congress’s ability to delegate enforcement power to nonexecutive actors, *see Bowsher v. Synar*, 478 U.S. 714, 720–27 (1986); and limit judicial scrutiny of executive prioritization decisions, *see Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

197. *See* U.S. GOV’T ACCOUNTABILITY OFF., B-331564, OFFICE OF MANAGEMENT AND BUDGET – WITHHOLDING OF UKRAINE SECURITY ASSISTANCE 6 (2020), <https://www.gao.gov/assets/710/703909.pdf> [<https://perma.cc/ZL3J-8SU5>] (discussing OMB’s improper impoundment of funds designated for Ukraine).

to create leverage. Other recent examples include the delay in Puerto Rico's hurricane-relief aid discussed below,¹⁹⁸ President Trump's threat to withhold funding from schools operating virtually during the coronavirus pandemic,¹⁹⁹ the withholding of grants from "sanctuary" cities,²⁰⁰ the threatened withholding of grants from "anarchist" jurisdictions that supported Black Lives Matter protests,²⁰¹ the alleged withholding of "big waiver" approvals to states that refused to expand Medicaid,²⁰² the threat to leave the World Health Organization unless it ramped up coronavirus scrutiny on China,²⁰³ and the Mexico City Policy through which presidents have conditioned foreign aid on recipients' agreement not to refer patients for abortion services.²⁰⁴ Still, executive conditions are not a recent invention. Franklin Roosevelt, for example, reportedly threatened to hold

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198. See Arelis R. Hernández & Jeff Stein, *Dangling Disaster Relief Funds, White House to Require Puerto Rico to Implement Reforms*, WASH. POST (Jan. 15, 2020, 2:57 PM), <https://www.washingtonpost.com/business/2020/01/15/dangling-disaster-relief-funds-white-house-require-puerto-rico-implement-reforms> [https://perma.cc/GS68-DUCY] (reporting that the White House refused funding unless, among other conditions, Puerto Rico agreed to pay contractors less than the applicable minimum wage).
199. See Peter Baker, Erica L. Green & Noah Weiland, *Trump Threatens to Cut Funding If Schools Do Not Fully Reopen*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html> [https://perma.cc/8DGN-8VLF].
200. See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (labeling municipalities that failed to satisfy certain conditions regarding immigration enforcement as "sanctuary jurisdictions" and stripping their funding); *City of San Francisco v. Trump*, 897 F.3d 1225, 1232-33 (9th Cir. 2018) (describing the threat).
201. See Memorandum on Reviewing Funding to State and Local Government Recipients that Are Permitting Anarchy, Violence, and Destruction in American Cities at 2, 2020 DAILY COMP. PRES. DOC. 647 (Sept. 2, 2020) (threatening to withhold funding from New York City, Washington, D.C., Seattle, Portland, and any other "anarchist jurisdictions"); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-20-36, IMPLEMENTATION OF SECTION 2 OF MEMORANDUM ON REVIEWING FUNDING TO STATE AND LOCAL GOVERNMENT RECIPIENTS OF FEDERAL FUNDS THAT ARE PERMITTING ANARCHY, VIOLENCE, AND DESTRUCTION IN AMERICAN CITIES 1 (2020) (implementing the "anarchist" jurisdiction order).
202. See *Jindal v. U.S. Dep't of Educ.*, No. 14-CV-534, 2015 WL 854132, at *1 (M.D. La. Feb. 26, 2015) (considering a challenge to conditioning federal education funding on the implementation of Common Core standards).
203. See Teo Armus, *Trump Threatens to Permanently Cut WHO Funding, Leave Body If Changes Aren't Made Within 30 Days*, WASH. POST (May 19, 2020, 8:46 AM), <https://www.washingtonpost.com/nation/2020/05/19/who-funding-trump> [https://perma.cc/4QR5-ZR7T] (reporting that the President ordered a halt in World Health Organization funding unless and until the Organization complied with various conditions regarding its policy towards China).
204. Abigail Abrams, *Biden Is Rescinding the 'Global Gag Rule' on Abortions Abroad. But Undoing Trump's Effects Will Take Time.*, TIME (Jan. 28, 2021), <https://time.com/5933870/joe-biden-abortion-mexico-city-policy> [https://perma.cc/W3N8-X5N2].

back federal support for New York City public-works projects unless and until Mayor LaGuardia fired the infamous Commissioner Robert Moses.²⁰⁵

Although some of these executive conditions have grabbed headlines, the tool's most momentous function in day-to-day affairs of government continues to fly under the radar. As Eloise Pasachoff has demonstrated, OMB itself has a statutory role in the implementation of spending programs through "apportionment." If it refuses to play that role, funds cannot flow – even if the agency that Congress empowered to administer a program wants to release the money.²⁰⁶ OMB's Resource Management Offices have used this authority to develop a pivotal role in overseeing and directing agency decision-making that spans administrations²⁰⁷ – a role that rivals, if not exceeds, the influence that OIRA exercises through regulatory review.

1. *Hurricane Relief*

Already reeling from Hurricane Irma, Puerto Rico was devastated by a direct hit from a Category 4 hurricane, Hurricane Maria, in 2017.²⁰⁸ Heavy rainfall, winds, and flooding wiped out entire neighborhoods in San Juan,²⁰⁹ destroyed the territory's power grid,²¹⁰ damaged tens of thousands of homes,²¹¹ and killed 2,975 people.²¹²

205. See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 426 (1974).

206. Eloise Pasachoff, *The President's Budget Powers in the Trump Era*, in *EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY* 69, 73-76 (Meena Bose & Andrew Rudalevige eds., 2020).

207. James P. Pfiffner, *OMB, the Presidency, and the Federal Budget*, in *EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY*, *supra* note 206, at 11, 11-12.

208. *Major Hurricane Maria – September 20, 2017*, NAT'L WEATHER SERV., <https://www.weather.gov/sju/maria2017> [<https://perma.cc/M63B-8PD5>].

209. Laura Diaz-Zuniga, *'Despacito' Made This Neighborhood Famous. Hurricane Maria Left It in Ruins*, CNN (Sept. 22, 2017, 5:36 PM), <https://www.cnn.com/2017/09/21/us/despacito-puerto-rico-video-damage-trnd/index.html> [<https://perma.cc/4CJY-L8PU>].

210. *Hurricane Maria Updates: In Puerto Rico, the Storm 'Destroyed Us.'* N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/hurricane-maria-puerto-rico.html> [<https://perma.cc/SU3Z-NVJS>].

211. Dánica Coto, *Thousands in Puerto Rico Still Without Housing Since Maria*, WASH. POST (July 24, 2020, 12:10 AM), https://www.washingtonpost.com/world/the_americas/thousands-in-puerto-rico-still-without-housing-since-maria/2020/07/24/9f79ee6c-cd63-11ea-99b0-8426e26d203b_story.html [<https://perma.cc/PKT8-66FA>].

212. Carlos Santos-Burgoa, Ann Goldman, Elizabeth Andrade, Nicole Barrett, Uriyoan Colon-Ramos, Mark Edberg, Alejandra Garcia-Meza, Lynn Goldman, Amira Roess, John Sandberg &

In Maria's aftermath, Puerto Rico desperately needed aid to rebuild housing and other infrastructure.²¹³ Congress quickly responded by appropriating \$19.9 billion in relief through the Community Development Block Grants (CDBG) Disaster Recovery Program.²¹⁴ But the money was slow to arrive. The Department of Housing and Urban Development (HUD), the agency responsible for administering CDBG, refused to release the funds.²¹⁵ It provided only \$1.5 billion to the island, holding back the rest.²¹⁶ The delay was reportedly instigated by President Trump and connected to his feud with political leaders in Puerto Rico about the disaster's death count, although the Administration cited longstanding corruption concerns.²¹⁷

In 2019, Congress included language in an appropriations act mandating that HUD begin disbursing Puerto Rico's undelivered aid within ninety days.²¹⁸

Scott Zeger, *Ascertainment of the Estimated Excess Mortality from Hurricane Maria in Puerto Rico*, MILKEN INST. SCH. PUB. HEALTH at iii (Aug. 27, 2018), https://hsrc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?article=1287&context=sphhs_global_facpubs [<https://perma.cc/KUP9-NCBA>].

213. See Hernández & Stein, *supra* note 198.
214. Erica Werner, *Hit by Devastating Earthquakes, Puerto Rico Still Waiting on Billions for Hurricane Relief*, WASH. POST (Jan. 9, 2020), <https://www.washingtonpost.com/us-policy/2020/01/09/hit-by-devastating-earthquakes-puerto-rico-still-waiting-billions-hurricane-relief/> [<https://perma.cc/2CDL-DSTM>]. This is the same program through which Congress provided disaster relief to Texas and Florida after Hurricanes Harvey and Irma. Allocations, Common Application, Waivers, and Alternative Requirements for 2017 Disaster Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 5844 (Feb. 9, 2018).
215. U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF INSPECTOR GEN., 2019SU0089451, REVIEW OF HUD'S DISBURSEMENT OF GRANT FUNDS APPROPRIATED FOR DISASTER RECOVERY AND MITIGATION ACTIVITIES IN PUERTO RICO 41-42 (2021).
216. *Id.*
217. Jeff Stein & Josh Dawsey, *Puerto Rico Faces Food-Stamp Crisis as Trump Privately Vents About Federal Aid to Hurricane Maria-Battered Island*, WASH. POST (Mar. 25, 2019, 2:10 PM), https://www.washingtonpost.com/business/economy/puerto-rico-faces-food-stamps-crisis-as-trump-privately-vents-about-federal-aid-to-hurricane-maria-battered-island/2019/03/25/ade500fe-4cb3-11e9-b79a-961983b7e0cd_story.html [<https://perma.cc/D9F3-48UV>]; see also Adam Edelman, *Trump Says 3,000 Did Not Die in Puerto Rico Hurricane, Claims Democrats Manipulated Numbers*, NBC NEWS (Sept. 13, 2018, 1:01 PM), <https://www.nbcnews.com/politics/donald-trump/trump-claims-3-000-did-not-die-puerto-rico-hurricane-n909221> [<https://perma.cc/2PXS-JZHQ>] (detailing President Trump's tweet that the death count was deliberately increased "to make [him] look as bad as possible").
218. Additional Supplemental Appropriations for Disaster Relief Act, Pub. L. No. 116-20, § 1102, 133 Stat. 871, 900 (2019).

HUD refused to comply.²¹⁹ It was only in January 2020, more than two years after Hurricane Maria made landfall and amid mounting pressure from members of Congress, that HUD released the funds.²²⁰ In the meantime, the Agency had publicly used the threat of further delays to push Puerto Rico to take Administration-desired actions that the law did not explicitly require as a prerequisite to funding. Specifically, Puerto Rico was pressured into paying federal contractors involved in recovery projects less than the applicable minimum wage, creating a new property-registration system, and allowing its Fiscal Control Board to review projects.²²¹ Concerned observers lamented that these unrelated and onerous conditions would further delay disbursement.²²²

Meanwhile, years after the hurricane, Puerto Ricans were still waiting for home construction, new schools, and other infrastructure repairs. “They talk about billions of dollars, but we’re not seeing it,” lamented the mayor of Corozal, where “homes with blue tarps as roofs” and families “living in school shelters” had become “a way of life.”²²³ Officials estimated that, across the island, thirty thousand families were “still living under blue tarps two years after Maria.”²²⁴ Reinaldo Gómez Rivas and Silvia Soto Ortiz, a married couple whose home in Barrio Ceiba Sur was devastated by the hurricane, had to live in a storage room for three years while they waited for the release of CDBG funds.²²⁵ And when the coronavirus struck years later, the city of Vieques still lacked a hospital.²²⁶

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219. See Letter from Sens. Elizabeth Warren, Edward Markey, Richard Blumenthal, and Bernie Sanders to Rae Oliver Davis, Inspector Gen., U.S. Dep’t of Hous. and Urb. Dev. 4 (Feb. 7, 2020), <https://www.warren.senate.gov/imo/media/doc/2020.02.07%20Letter%20to%20HUD%20IG%20re%20inquiry%20for%20delayed%20Puerto%20Rico%20ofunds.pdf> [<https://perma.cc/G62M-7PMG>].
220. *Months After Blowing Deadline, Trump Administration Lifts Hold on Puerto Rico Aid*, NPR (Jan. 15, 2020, 4:39 PM EST), <https://www.npr.org/2020/01/15/796658767/months-after-blowing-deadline-trump-administration-lifts-hold-on-puerto-rico-aid> [<https://perma.cc/BLU3-T3CS>].
221. See Hernández & Stein, *supra* note 198.
222. *Id.*
223. Coto, *supra* note 211.
224. Adrian Florido, *Two Years After Hurricane Maria, Blue Tarps Are Symbol of Island’s Slow Recovery*, NPR (Sept. 20, 2019, 7:23 AM EST), <https://www.npr.org/2019/09/20/762662675/blue-tarps-are-an-indicator-of-hurricane-marias-long-lasting-damage> [<https://perma.cc/RAE3-ABNE>].
225. Pedro Correa Henry, *1,016 Days After Hurricane Maria, Housing Dept. Starts Rebuilding Project*, SAN JUAN DAILY STAR (July 3, 2020), <https://www.sanjuandaily.com/post/1-016-days-after-hurricane-maria-housing-dept-starts-rebuilding-project> [<https://perma.cc/HJ6M-9E7E>].
226. Nicole Acevedo, *FEMA Acknowledges Puerto Rico Lacks Rebuilt Homes and a Hospital to Survive Covid-19*, NBC NEWS (July 24, 2020), <https://www.nbcnews.com/news/latino>

When the Administration eventually released the bulk of the funds, President Trump claimed—and newspapers reported—that he, not Congress or his fellow Americans, was providing support for the people of Puerto Rico.²²⁷ On September 18, 2020, President Trump issued a “fact sheet” clearing the way for the delivery of the remaining aid. It announced that “President Donald J. Trump and the Trump Administration are awarding major new infrastructure grants to aid Puerto Rico’s recovery.”²²⁸ The President held a press conference that day taking credit for the aid. “I’m the best thing that ever happened to Puerto Rico,” he said. “[N]o one even [comes] close.”²²⁹ Representative Nina M. Velazquez speculated that the announcement was timed to generate support for President Trump’s reelection among Puerto Rican and other Hispanic voters in Florida.²³⁰ When President Biden took over in 2021, his Administration released the conditions on the remaining aid.²³¹

[/fema-acknowledges-puerto-rico-lacks-rebuilt-homes-hospital-survive-covid-n1234810](https://perma.cc/6EJR-GUDE) [https://perma.cc/6EJR-GUDE] (reporting testimony in which FEMA’s Director acknowledged that Vieques was without a permanent hospital during the coronavirus pandemic).

227. See *Fact Sheet: President Donald J. Trump Is Supporting the People of Puerto Rico as They Continue to Rebuild Following Natural Disasters*, WHITE HOUSE (Sept. 18, 2020) [hereinafter *Fact Sheet*], <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-supporting-people-puertov-rico-continue-rebuild-following-natural-disasters> [https://perma.cc/YKZ9-WFKT]; see also Rachel Treisman, *Trump Administration Announces \$13 Billion in Aid for Puerto Rico*, NPR (Sept. 18, 2020, 4:37 PM EST), <https://www.npr.org/2020/09/18/914466896/trump-administration-announcesv-nearly-13-billion-in-aid-for-puerto-rico> [https://perma.cc/2DSF-E8RH] (“[FEMA] plans to award two separate grants to help rebuild Puerto Rico . . .”).
228. *Fact Sheet*, *supra* note 227.
229. Ben Fox, *Trump Shifts on Puerto Rico, Releases Aid as Election Nears*, ASSOCIATED PRESS NEWS (Sept. 18, 2020), <https://apnews.com/article/puerto-rico-storms-politics-joe-biden-hurricanes-02c9eba973414d44f2f24cco6a2871da> [https://perma.cc/AJ57-G697].
230. See *id.*; Carmen Sesin, *Trump Cultivated the Latino Vote in Florida, and It Paid Off*, NBC NEWS (Nov. 4, 2020), <https://www.nbcnews.com/news/latino/trump-cultivated-latino-vote-florida-it-paid-n1246226> [https://perma.cc/WDK4-QYM3].
231. Christopher Flavelle & Patricia Mazzei, *Biden to Free Up Billions in Delayed Puerto Rico Storm Aid*, N.Y. TIMES (Apr. 8, 2021), <https://www.nytimes.com/2021/02/01/climate/puerto-rico-maria-federal-aid.html> [https://perma.cc/PZZ6-QGY5].

2. “Do me a favor, though.”

Scholars addressing executive conditions have noted, as possible benefits, their potential to improve efficiency and welfare by circumventing partisan gridlock in Congress – which might well be done to benefit marginalized groups.²³² Yet this perspective overlooks skewed patterns of harms associated with executive conditions similar to those associated with threats to refuse appropriations.

First, executive conditions encourage instability in program design that is not justified by the need for policy flexibility. Agencies are often in a position to make decisions about whether to implement broad delegations through entrenched, stable programs or fragile, flexible ones. Just as Congress prefers annual appropriations to retain leverage, executive-branch actors have an incentive to build room into programs for discretion – and so conditions – even when substantive considerations, such as the need for reliance, call for stability.²³³

Second, the temptation to aggrandize through executive conditions can lead executive-branch actors to abuse even desirable flexibility. Where a program’s implementation is subject to executive discretion for any reason, executive-branch actors can disrupt programs not for policy reasons but to force the program’s beneficiaries to take some action unrelated to, or even inconsistent with, the program’s objectives. The delay in disaster relief suffered by Puerto Rico is just one example.

As with appropriations, the harms associated with excess instability and abuse are not limited to the direct harms that materialize when a program’s implementation is actually delayed.²³⁴ They are also continuous. Recipients are forced to design their lives and programs around the possibility of arbitrary cut-offs and devote their time and political power to maintaining programs on which they depend.²³⁵

232. See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 977-78 (2016) (noting the benefits of executive-branch negotiations with states, which depend on executive power to impose conditions on waiver approvals); Bale, *supra* note 14, at 611-12 (offering a partial defense of inherent executive authority to impound based on the need for flexibility).

233. See Lawrence, *supra* note 15, at 35-44 (discussing this incentive).

234. *E.g.*, *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 651-52 (D. Md. 2018) (halting funds for a successful Baltimore teen-pregnancy program).

235. Political scientists have found that agency-spending judgments are swayed by the President, giving recipients reason to lobby the executive branch to maintain or increase funding even after it is authorized by Congress. See D.E. Lewis, *Political Control and the Presidential Spending Power* 25-30 (Ctr. for the Study of Democratic Insts., Working Paper No. 1-2017, 2017), https://www.vanderbilt.edu/csdi/research/WP_1_2017_final.pdf [https://perma.cc/V938-FGVX]; Christopher R. Berry, Barry C. Burden & William G. Howell, *The President and the*

3. *The Subordination Seesaw*

Whom do executive conditions harm? Members of Congress and scholars have noted that we currently lack a complete accounting of government programs that entail executive discretion and have called for greater transparency surrounding executive conditions.²³⁶ Given this lack of clarity, it is impossible to comprehensively survey who is affected by such conditions and who is not.²³⁷ It is nonetheless possible to observe several problematic patterns in the harms of executive conditions.

First, from “anarchist jurisdictions” to fiscal waivers in health care, public examples of the Executive refusing to implement programs to gain leverage all involve states, countries, or municipalities.²³⁸ To be sure, it may be that threats to individuals are less likely to become public. But communities are also more susceptible to leverage because community leaders are valuable targets of leverage; a governor or mayor can make many changes that an individual cannot, especially politically relevant ones.²³⁹ It may also be easier to threaten larger groups through their representatives, whose performance may be evaluated on whether they are able to access federal funds or not, regardless of the reasons.

These communities not only face a risk of disruption in programs on which they depend, but executive discretion in administering those programs means increased salience for the collective support they receive. As President Trump’s boasting about being the “best thing” to happen to Puerto Rico illustrates, presidents and agencies can ostentatiously claim credit for programs that benefit states and localities,²⁴⁰ even though such programs are provided for by statute. They can claim credit even though, from the standpoint of vulnerability theory, such programs are no different than laws protecting property or income in that

Distribution of Federal Spending, 104 AM. POL. SCI. REV. 783, 783 (2010) (“[T]here are strong reasons to believe that the [P]resident plays a central role in determining which jurisdictions get what, when, and how.”); Berry et al., *supra*, at 787-88 (hypothesizing that presidents steer funds to those with political sway over them); Dino P. Christenson, Douglas L. Kriner & Andrew Reeves, *All the President’s Senators: Presidential Copartisans and the Allocation of Federal Grants*, 42 LEG. STUD. Q. 1, 2 (2016) (“[T]he White House influences the distribution of federal resources to aid the re-election prospects of their political allies in Congress.”).

236. See Pasachoff, *supra* note 206, at 90; Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 229-30, 308 (2006).

237. See *infra* Section IV.C.3 (calling for sustained scholarly inquiry into the subordination impacts of separation-of-powers tools).

238. See *supra* notes 198-205 and accompanying text.

239. Cf. Michael Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 654-66 (2017) (describing the symbiotic relationship between state policy reforms and partisan political priorities at the federal level).

240. See *supra* notes 227-230 and accompanying text.

both are examples of people collectively supporting each other through government.²⁴¹

Second, the influence actually entailed in the threat of nonimplementation is inversely correlated with the political and economic power of the targeted entity.²⁴² Executive conditions thus amplify extant subordination. Like a seesaw, the less economic or political power a group has to fight back, raise the alarm, or “go without” the program, the more potent the threat is as a tool of influence. Therefore, executive discretion to impose conditions on program implementation disproportionately impacts those who lack economic or political power. This, of course, means historically marginalized groups such as Black communities.²⁴³ Executive conditions thus raise a concern in the structural context analogous to the worry about a “constitutional caste” which, in the rights context, has helped shape constitutional-conditions scholarship and doctrine.²⁴⁴

Third, and relatedly, executive conditions make it easier for coalitions of groups to form and use political power to take advantage of groups who lack it. In Federalist No. 51, James Madison described his concern that states had seen such coalitions seize power and use it to enrich themselves at the expense not only of individuals but also of weaker factions.²⁴⁵ He argued that the large federal government would mitigate this danger – that it would pose “less danger to a minor from the will of a major party”²⁴⁶ – because the large federal government would include “so many parts, interests and classes of citizens, that the rights of

241. See Fineman, *supra* note 158, at 21 (explaining that the concepts of “public” and “private” “interact as ideological channels for the allocation of societal resources” with “tremendous political and practical implications,” including for “perceived legitimacy of collective subsidy”).

242. Thanks to Nicholas Bagley for this point.

243. See *supra* notes 188–192 and accompanying text.

244. Cf. Sullivan, *supra* note 75, at 1497–98 (recharacterizing the unconstitutional-conditions doctrine as protecting against the concern that “background inequalities of wealth and resources necessarily determine one’s bargaining position in relation to government, and . . . the poor may have nothing to trade but their liberties”). See generally PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM (2021) (discussing Sullivan in the context of the broader analysis of conditions as a tool of federal power).

245. THE FEDERALIST NO. 51, *supra* note 32, at 323 (James Madison) (“If a majority be united by a common interest, the rights of the minority will be insecure.”). To Madison, “factions” could come from many sources, but the “most common and durable source of factions” was the “unequal distribution of property,” which set up numerous discrete interest groups including “creditors,” “debtors,” “landed,” “manufacturing,” “mercantile,” and “moneyed.” THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961); see also *id.* at 80 (“Every shilling with which they [the predominant party] overburden the inferior number is a shilling saved to their own pockets.”).

246. THE FEDERALIST NO. 51, *supra* note 32, at 325 (James Madison).

individuals, or of the minority, will be in little danger from interested combinations of the majority.”²⁴⁷ In other words, transaction costs inhibiting collective action for selfish purposes would be higher in a government over a larger and more diverse population. Given the “great variety of interests, parties, and sects . . . a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.”²⁴⁸

Madison’s argument that transaction costs prevent coalitions of groups from coming together to use their political power to take advantage of weaker groups—that they prevent subordination, broadly defined²⁴⁹—explicitly assumed that federal policy would be made through a Congress with a large number of representatives among whom it would be difficult to form a coalition on grounds other than public interest.²⁵⁰ Executive power to impose conditions on or otherwise disrupt the flow of federal funds that have been appropriated by Congress disrupts this assumption. However difficult it actually is in the modern government for coalitions to form and press legislative change through Congress, the examples discussed above reveal that it is relatively easy for a President to decide what policies or actions will benefit her coalition on the whole and then advocate or effectuate those actions.

A last problematic pattern stems from whom executive conditions do *not* affect. Here, the harms of executive conditions are skewed in the same way as are the harms of legislative appropriations: such conditions impact only those who rely on government services and supports, not those whose needs are met by the market. This overlap is the byproduct of an asymmetry in executive authority in the Constitution and in laws. The Executive may refuse to spend funds appropriated by Congress or to enforce a regulatory command created by Congress,²⁵¹ but she may not spend funds without an appropriation,²⁵² threaten market enti-

247. *Id.* at 324.

248. *Id.* at 325.

249. See *infra* Section III.A.1 (discussing the meaning of subordination); *infra* Section III.B.2 (noting the conceptual connection between Madison’s understanding of the problem of faction and subordination).

250. THE FEDERALIST NO. 10, *supra* note 245, at 82 (James Madison) (“[T]he representatives must be raised to a certain number, in order to guard against the cabals of a few . . .”); *id.* at 83 (“[T]he smaller the compass within which they are placed, the more easily will they concern and execute their plans of oppression.”).

251. See *supra* Section II.B.

252. 31 U.S.C. § 1350 (2018) (making it a felony for federal officials to authorize expenditure or obligation without statutory authorization); Sohoni, *supra* note 91, at 1681-83 (describing the default limitations on executive authority to spend without appropriation).

tlements (such as by raising taxes unilaterally), or create new regulatory requirements.²⁵³ That means the executive branch is largely a one-way ratchet, with discretion only to threaten social supports created by Congress, not to create such supports where Congress declines to do so.²⁵⁴

C. *Constitutional Entrenchment*

Legislative appropriations and executive conditions are visible in that they both involve a break from expectations. A third means of allocating power in the federal system is more hidden. Constitutional (non)entrenchment may fade into the legislative background, but it frames day-to-day government choices.

“Entrenchment” describes the difficulty of changing laws once enacted.²⁵⁵ A law’s entrenchment comes in degrees that depend on several variables. The most fundamental, and the focus here, are the constitutional rules for legal change studied in the literature on entrenchment.²⁵⁶ Constitutional entrenchment rules empower present-day policymakers against those in the future, cementing present-day choices. Constitutional nonentrenchment rules empower future majorities by providing that decisions made today are changeable tomorrow.

Their contrasting effects have led scholars to treat constitutional entrenchment and nonentrenchment rules as a critical aspect of the separation of powers,

253. *But cf.* Daniel J. Hemel, *The President’s Power to Tax*, 102 CORNELL L. REV. 633, 650-73 (2017) (starting from the baseline that authority to tax must be granted by Congress and describing the power of executive-branch actors to increase or decrease taxes through regulation).

254. An exception to this point is the executive power under the International Emergency Economic Powers Act to impose tariffs on foreign commerce. *See* Ana Swanson, *Trump’s Tariff Threat Sends Mexico, Lawmakers and Businesses Scrambling*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/business/mexico-tariffs-donald-trump.html> [<https://perma.cc/4JN9-KQT4>] (describing President Trump’s threat to impose a five-percent tariff on goods from Mexico unless the country restrained the flow of migrants across the U.S. border). The Executive is not a one-way ratchet wherever statute authorizes them to increase federal financial commitments, as do statutes authorizing student-loan forgiveness. *See* Sohoni, *supra* note 91.

255. *See* Levinson & Sachs, *supra* note 16, at 408 (“At the most general level, ‘entrenchment’ means that political change has been made more difficult than it otherwise would (or should) be.”); *see also* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666-67 (2002) (offering a definition of entrenchment).

256. Levinson & Sachs, *supra* note 16, at 408. Other examples of entrenchment include political entrenchment, *see id.*, and entrenchment through private-law arrangements, *see* Serkin, *supra* note 16, at 936 (summarizing the means of entrenchment through private law).

even though they are sometimes conceptualized as “property” law.²⁵⁷ As a growing body of scholarship reveals, it is impossible to understand the actual allocation of power across and within government without acknowledging that laws and norms increasing, decreasing, or shifting power often operate across time.²⁵⁸

Unsurprisingly, given entrenchment rules’ importance and constitutional pedigree, a robust body of scholarship debates whether and when entrenchment should be permitted or forbidden.²⁵⁹ Nonentrenchment advocates point to institutional concerns, such as ensuring that law is accountable to future electoral majorities and not controlled by the “dead hand” of the past. Most scholars come out on this side of the debate.²⁶⁰ At the same time, entrenchment proponents point out that forbidding entrenchment means forbidding stability with potentially serious consequences for social welfare.²⁶¹

Whatever entrenchment’s wisdom, the default rule in the United States federal system is that entrenchment is forbidden. Congress cannot pass statutes that are resistant to future change and can ordinarily amend previously enacted law.²⁶² This default can be rebutted, however, in a specific category of cases —

257. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1627, 1807 (2012) (conceptualizing due-process doctrines traditionally conceptualized as “property law” as an important aspect of the separation of powers).

258. Time is a fundamental, if sometimes forgotten, dimension of the separation of powers. Scholarship adopting an explicitly intertemporal lens includes Adler & Walker, *supra* note 154; Lawrence, *supra* note 14; Gersen, *supra* note 44; and Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 318 (2005), which conceptualizes the stare decisis rule entrenching judicial decisions across time from the standpoint of the separation of powers.

259. See Posner & Vermeule, *supra* note 255, at 1693-1705; Levinson & Sachs, *supra* note 16, at 456-77; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 528-51 (1997); John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 417-45 (2003) [hereinafter McGinnis & Rappaport, *Symmetric Entrenchment*]; John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 503-07 (1995); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1782-1812 (2003); Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231, 236-52 (2003).

260. Sterk, *supra* note 259, at 231 (noting that “a host of eminent legal scholars” believe that Congress should not be able to “preclude future Congresses from repealing a new or existing statute”); see, e.g., McGinnis & Rappaport, *Symmetric Entrenchment*, *supra* note 259, at 445 (defending “the symmetric theory of entrenchment from both a positive and normative perspective”).

261. See Posner & Vermeule, *supra* note 255, at 1671-72.

262. See McGinnis & Rappaport, *Symmetric Entrenchment*, *supra* note 259, at 445.

namely, constitutional property. Resource allocations that give individuals entitlements satisfying the constitutional definition of “property”²⁶³ become entrenched because they trigger the protection of the Takings Clause, Contracts Clause, or Due Process Clause, severely curtailing the possibility of subsequent revocation.²⁶⁴ Such protection is available for resource allocations associated with land²⁶⁵ and for certain government contracts and public-employee collective-bargaining agreements, but not for other government commitments.²⁶⁶

1. *Prevention and Public Health Fund*

The United States failed to prepare for the foreseeable coronavirus pandemic. That failure had tragic, racially disparate consequences.²⁶⁷ The country’s failure had many causes, but constitutional nonentrenchment rules were among them.

Public-health scholars and policymakers saw the coronavirus coming. They repeatedly predicted a global pandemic and called for greater federal investment in preventive measures.²⁶⁸ Their calls were part of an ongoing chorus that recognized that public health is a public good which the market alone cannot be

263. Federal and state governments create market entitlements by establishing and protecting property and other common-law rights. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .”). Their ability to do so is limited to resource allocations that satisfy the individualized, real-property-focused tests for constitutional property. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 960-85 (2000) (describing and analyzing the doctrinal preconditions to labeling an interest “property” for purposes of Takings Clause, procedural due-process, and substantive due-process jurisprudence).

264. See Merrill, *supra* note 263, at 960-85. Property protected by the Takings Clause may not be revoked without just compensation, which means the value of a protected resource allocation is permanently entrenched even if the specific resource allocated may be changed. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); see also Michael C. Pollack, *Taking Data*, 86 U. CHI. L. REV. 77, 99-100 (2019) (describing Takings Clause doctrine). A resource allocation protected by the Due Process Clause may be revoked through the process that it is due.

265. See Merrill, *supra* note 263, at 971-72 (explaining that the right to exclude from land is pivotal to the applicability of the Takings Clause).

266. See Serkin, *supra* note 16, at 892, 910-11.

267. See Lindsay F. Wiley, Elizabeth Y. McCuskey, Matthew B. Lawrence & Erin C. Fuse Brown, *Health Reform Reconstruction*, 55(2) U.C. DAVIS L. REV. (forthcoming 2022) (manuscript at 14-17), <https://ssrn.com/abstract=3760086> [<https://perma.cc/GBK4-B6MQ>].

268. See HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA 1 (2005) (“Although the timing cannot be predicted, history and science suggest that we will face one or

trusted to provide.²⁶⁹ They demanded greater investment in prevention and social services to keep people and communities healthy.²⁷⁰ They were also largely motivated by a recognition that disparities in historically marginalized communities' access to resources make them particularly susceptible to illness.²⁷¹

Despite the obvious need for investment, the country consistently fails to devote sufficient resources to public health due in part to political impediments, including public-choice pathologies and racism.²⁷² Indeed, the federal government spends two orders of magnitude more on treating sick Americans than it does on preventing residents from getting sick in the first place.²⁷³

Entrenchment rules came into the picture in 2010 with the enactment of the ACA. A consensus developed in the lead-up to the passage of the once-in-a-generation reform that the country's consistent failures to build public-health infrastructure put its people's health and welfare at risk. This consensus bred a commitment to devote long-term resources to invest in public-health prevention.²⁷⁴

more pandemics in this century.”); INST. OF MED., GUIDANCE FOR ESTABLISHING STANDARDS OF CARE FOR USE IN DISASTER SITUATIONS: A LETTER REPORT 10 (2009) (describing the “immediate and critical need to prepare for a public health emergency”).

269. Len M. Nichols & Lauren A. Taylor, *Social Determinants as Public Goods: A New Approach to Financing Key Investments in Healthy Communities*, 37 HEALTH AFFS. 1223, 1223 (2018) (“There is growing awareness that funding for interventions related to social determinants of health has long been inadequate . . .”).
270. See, e.g., *Public Health Funding*, AM. HEALTH RANKINGS (2018), https://www.americashealthrankings.org/explore/annual/measure/PH_funding/state/ALL?edition-year=2018 [<https://perma.cc/2W9E-3XNL>] (finding potential savings of \$5.60 for every \$1 invested in public health through evidence-based programs).
271. See, e.g., Harris & Pamukcu, *supra* note 189, at 763 (“Recognizing subordination as a driver of health is essential to solving the puzzle of persistent health disparities linked to group status.”).
272. See, e.g., DANIEL E. DAWES, THE POLITICAL DETERMINANTS OF HEALTH 8 (2020) (connecting underinvestment to racism); Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1243-47 (2014) (connecting interest-group opposition to underinvestment at the federal level, as public-choice theory predicts); Clark C. Havighurst & Barak D. Richman, *Distributive Injustice(s) in American Health Care*, 69 LAW & CONTEMP. PROBS. 7, 53-54 (2006) (discussing the impact of interest groups on health policy); Jessica Mantel, *Tackling the Social Determinants of Health: A Central Role for Providers*, 33 GA. ST. U. L. REV. 217, 220-22 (2017) (noting that the United States overspends on health care and underspends on public health).
273. See Kyle Kinner & Cindy Pellegrini, *Expenditures for Public Health: Assessing Historical and Prospective Trends*, 99 AM. J. PUB. HEALTH 1780, 1787 (2009) (stating that federal public-health expenditures represented 1.1% of federal expenditures on health care).
274. See Michael R. Fraser, *A Brief History of the Prevention and Public Health Fund: Implications for Public Health Advocates*, 109 AM. J. PUB. HEALTH 572, 572 (2019) (“Public health advocates had

President Obama, working with Congress, set about to establish a reliable and generous funding source for such investment. With the express purpose of creating “expanded and sustained national investment in prevention and public health programs,” section 4002 of the ACA established the \$18.75 billion PPHF.²⁷⁵

Although Congress and the President could put the PPHF in permanent law, thereby insulating it from the vicissitudes of the annual appropriations process, they could not actually make it permanent. Their goal of guaranteeing sustained investment was limited by constitutional nonentrenchment rules. As a collective investment in a public good rather than an entitlement “owned” by any individual – not “old” property or even “new” property,²⁷⁶ but perhaps “new new property”²⁷⁷ – the PPHF was not constitutionally protected. Therefore, no statutory language or statement of purpose could protect it against alteration by future Congresses.²⁷⁸ This rendered the PPHF a sitting duck. When Congress wants to create a new program that increases spending or reduces taxes, it is under tremendous pressure to “find” the money by cutting existing programs.²⁷⁹ The

long sought such a guaranteed investment in preventive health services . . .”). The Prevention and Public Health Fund (PPHF) built on the “wellness trust” proposed by then-Senator Hillary Clinton and Jeanne M. Lambrew. See Jeanne M. Lambrew, *A Wellness Trust to Prioritize Disease Prevention*, BROOKINGS INST. 21 (Apr. 2007), https://www.brookings.edu/wp-content/uploads/2016/06/04useconomics_lambrew.pdf [<https://perma.cc/25XE-WTW6>] (proposing a permanent prevention fund indexed to national health-care expenditures); 21st Century Wellness Trust Act, S. 3674, 110th Cong. § 399OO(c)(3)(A) (2008) (increasing appropriation for Wellness Trust Fund “by the annual percentage increase in the medical care component of the consumer price index”).

275. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4002(a), 124 Stat. 119, 541 (2010) (codified at 42 U.S.C. § 300u-11(a) (2018)).

276. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

277. Super, *supra* note 16.

278. Congressional commitment of funds for general public purposes – obligations, rather than entitlements – are excluded from constitutional protection as property; existing tools of entrenchment do not work on such commitments. See Super, *supra* note 16, at 1773, 1871-73 (noting the absence of constitutional protection for, and calling for constitutional protection of, subsistence benefits).

279. See *FAQs on PAYGO*, HOUSE BUDGET COMM. (July 13, 2020), <https://budget.house.gov/publications/report/faqs-paygo> [<https://perma.cc/Y2CP-DFFL>] (“Pay-As-You-Go . . . is a rule requiring that new legislation not increase the federal budget deficit or reduce the surplus.”); William M. Sage & Timothy M. Westmoreland, *Following the Money: The ACA’s Fiscal-Political Economy and Lessons for Future Health Care Reform*, 48 J.L. MED. & ETHICS 434, 440 (2020) (describing fiscal pressures).

same pathologies that ordinarily stifle public-health investment made the PPHF a desirable target for such cuts.²⁸⁰

As a result, Congress repeatedly raided the PPHF in the years following the ACA's enactment.²⁸¹ Money for public health was redirected to offset costly new programs that benefitted concentrated interests, including a pay raise for Medicare doctors (associated with making the “doc fix” permanent) and tax cuts for the wealthy.²⁸² Onlookers warned that raiding the PPHF would undermine the ability of the Centers for Disease Control and Prevention (CDC) to avoid and mitigate a pandemic. “[W]ithout funding, the CDC won’t be able to protect us,” former CDC Director Tom Frieden observed in 2018.²⁸³ Because the funds had been redirected to other purposes, he prophesied, “[w]e’re more likely to have to fight dangerous organisms here in the U.S.”²⁸⁴

Director Frieden’s worst fears were realized. CDC was slow to respond to the coronavirus pandemic.²⁸⁵ This forced the public-health response to move from control to mitigation, resulting in nationwide lockdowns that crushed the economy, inflamed social and political tensions, and slowed but did not stop the spread.²⁸⁶ Casualties ballooned. Initial predictions of deaths in the tens of thousands were wrong by orders of magnitude.²⁸⁷ Over 700,000 Americans have

280. Public health has difficulty mustering powerful interest groups to object to cuts because its funding benefits the public generally, especially the most vulnerable. See Diller, *supra* note 272, at 1244 (“Since the benefits to the general population from government regulation are diffusely spread, support for public health regulation will often be weak.”).

281. See Sage & Westmoreland, *supra* note 279, at 440.

282. *Id.*

283. Ashley Yeager, *Cuts to Prevention and Public Health Fund Puts CDC Programs at Risk*, SCIENTIST (Feb. 9, 2018), <https://www.the-scientist.com/daily-news/cuts-to-prevention-and-public-health-fund-puts-cdc-programs-at-risk-30298> [<https://perma.cc/T8VU-29FE>].

284. *Id.*

285. Michael D. Shear, Abby Goodnough, Sheila Kaplan, Sheri Fink, Katie Thomas & Noah Weiland, *The Lost Month: How a Failure to Test Blinded the U.S. to Covid-19*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/03/28/us/testing-coronavirus-pandemic.html> [<https://perma.cc/8DHF-JAG6>].

286. See Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL’Y, L. & ETHICS 50, 69-81 (2020) (documenting the United States’s response to the 2020 coronavirus pandemic).

287. Bill Chappell, *Fauci Says U.S. Coronavirus Deaths May Be ‘More Like 60,000’; Antibody Tests on Way*, NPR (Apr. 9, 2020, 11:12 AM EST), <https://www.npr.org/2020/04/09/830664814/fauci-says-u-s-coronavirus-deaths-may-be-more-like-60-000-antibody-tests-on-way> [<https://perma.cc/724S-A2ML>] (quoting Dr. Anthony Fauci, who estimated that “[t]he final total currently ‘looks more like 60,000’”).

died, a death rate far higher than that of any other developed nation.²⁸⁸ Moreover, these statistics reflect inexcusable disparities. Early studies showed that Black people were 3.5 times more likely to die of coronavirus than whites; Native people were about twice as likely to die than whites; and Latinx people were eighty-eight percent more likely to die than whites.²⁸⁹ Early estimates are that hundreds of thousands of American lives, and tens of thousands of Black American lives, could have been saved had the government better prepared for and managed the crisis.²⁹⁰

In the years to come, we will surely learn more about the early testing missteps that first set back the United States's coronavirus response and the missteps that continued at every stage of the pandemic, including vaccine distribution.²⁹¹

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288. Shaina Ahluwalia & Lasya Priya M, *U.S. COVID-19 Death Toll Hits 700,000*, REUTERS (Oct. 2, 2021, 12:00 AM EDT), <https://www.reuters.com/world/us/us-covid-19-death-toll-hits-700000-2021-10-01> [<https://perma.cc/S6EV-K5RU>]; *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days [<https://perma.cc/9CEV-Z3QU>].
289. Cary P. Gross, Utibe R. Essien, Saamir Pasha, Jacob R. Gross, Shi-yi Wang & Marcella Nunez-Smith, *Racial and Ethnic Disparities in Population-Level Covid-19 Mortality*, 35 J. GEN. INTERNAL MED. 3097, 3097 (2020) (finding that Black people were more than three times as likely to die from COVID-19 than were white people, while Latinx people were eighty-eight percent more likely); *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Mar. 5, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/FD3S-KASL>] (reporting that Indigenous populations face the highest death rate from COVID-19). These disparities persisted through 2021, though they narrowed somewhat. Samantha Artiga, Latoya Hill & Sweta Haldar, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and Changes Over Time*, KFF (Oct. 8, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-cases-and-deaths-by-race-ethnicity-current-data-and-changesv-overv-time> [<https://perma.cc/T3LL-AWKA>].
290. See Dr. Anthony Fauci: *Divisiveness Has Failed America “in Every Single Way,”* CBS NEWS (Jan. 24, 2021, 10:09 AM), <https://www.cbsnews.com/news/dr-anthony-fauci-divisiveness-has-failed-america-in-every-single-way> [<https://perma.cc/9KHE-EQGE>] (stating that if the United States's death rate corresponded to the worldwide death rate, around 320,000 fewer Americans would have died); David Leonhart, *America's Death Gap*, N.Y. TIMES (Sept. 1, 2020), <https://www.nytimes.com/2020/09/01/briefing/coronavirus-kenosha-massachusetts-your-tuesday-briefing.html> [<https://perma.cc/2RQ8-7Yaq>]; Sarah Mervosh, Mike Baker, Patricia Mazzei & Mark Walker, *One Year, 400,000 Coronavirus Deaths: How the U.S. Guaranteed Its Own Failure*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/2021/01/17/us/covid-deaths-2020.html> [<https://perma.cc/YW5B-7PLS>] (noting that 220,000 fewer Americans would have died if the national death rate corresponded to that in Washington State).
291. See Noah Higgins-Dunn, *Operation Warp Speed Chief Says Covid Vaccine Distribution ‘Should Be Better’ as U.S. Misses Goal*, CNBC (Dec. 30, 2020, 5:34 PM), <https://www.cnbc.com/2020/12/30/covid-vaccine-operation-warp-speed-chief-says-distribution-should-be-better-.html> [<https://perma.cc/8LX9-WYKY>]; John Pacenti, *‘Time Is of the Essence’ for COVID Vaccine: Gov. DeSantis Frustrated with CVS and Walgreens*, PALM BEACH POST (Dec. 16, 2020, 5:47 PM),

It is already clear that many factors contributed, including political-leadership challenges.²⁹² But there is every reason to believe experts' predictions that years of cuts to the PPHF played a role.

2. *Stability Versus Flexibility*

Raiding the PPHF was possible because policymakers cannot entrench laws that devote resources to public purposes against subsequent redirection. It thereby illustrates the major cost of nonentrenchment rules: they impede reliance and undermine stability.²⁹³ A commitment subject to revocation is inherently limited in its ability to engender investment, whether that investment be financial,²⁹⁴ political,²⁹⁵ or personal.²⁹⁶ On the other hand, entrenchment scholarship has noted that permitting entrenchment carries costs of its own, denying future electoral majorities the ability to govern themselves and the flexibility to adapt policy based on changing circumstances.²⁹⁷

Recognizing that nonentrenchment rules sacrifice reliance in favor of flexibility and accountability, a leading normative approach prescribes a straightforward utilitarian balancing test to determine where constitutional entrenchment should be permitted. Christopher Serkin, for example, proposes that this decision depends on weighing “the benefits of private parties’ reliance on government precommitments against the costs of reduced flexibility in the future.”²⁹⁸ Yet this cost-benefit approach to entrenchment ignores the fact that, in most cases, the “cost” of foregone reliance and the “benefit” of increased flexibility are borne by different groups.

<https://www.palmbeachpost.com/story/news/coronavirus/2020/12/16/covid-desantis-expresses-frustration-cvs-and-walgreens/3925203001> [<https://perma.cc/NTY5-3PKJ>].

292. See David E. Pozen & Kim Lane Scheppele, *Executive Underreach*, in *Pandemics and Otherwise*, 114 AM. J. INT’L L. 608, 613 (2020) (describing the Trump Administration’s “anemic response to COVID-19”).

293. See Serkin, *supra* note 16, at 882.

294. See *supra* text accompanying note 149.

295. See Super, *supra* note 16, at 1794 (“When many members of society hold their interests only ‘conditionally, subject to confiscation in the interest of the paramount state,’ the result is a ‘new feudalism?’” (quoting Reich, *supra* note 276, at 768)).

296. See *id.* at 1871 (“Low-income people who know that they and their neighbors can be scattered at any time as a result of the termination of a key subsistence benefit program may invest less effort in developing relationships that bind them together.”); Reich, *supra* note 276, at 772, 787 (“If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach.”).

297. See, e.g., Sterk, *supra* note 259, at 240-42 (describing such benefits).

298. See Serkin, *supra* note 16, at 882.

3. *The Dead Hand of Privilege*

In the PPHF case, the “cost” of the fund’s lack of constitutional protection was borne by those who pay for the lack of investment in public health. This included all Americans, but historically marginalized groups who live in neighborhoods and work in jobs that leave them particularly vulnerable to infectious and chronic disease shouldered a disproportionate burden.²⁹⁹ The abstract “benefit” of greater flexibility initially accrued to all Americans, but it ultimately inured in those to whom the funds were diverted: medical doctors who benefitted from a pay raise and wealthy Americans who saw their taxes go down after the 2017 tax cuts.³⁰⁰

The PPHF experience is indicative of a larger pattern. In any context, the costs of the government’s inability to entrench precommitments are targeted at the recipients of those precommitments and the associated benefits in increased flexibility are generalized to the population as a whole until they are targeted toward whomever future policymakers ultimately direct the free resources. One group pays, another benefits. When the group that pays is historically marginalized, as in the PPHF case, nonentrenchment subordinates their interests in the present to benefit future recipients.³⁰¹

This group selection is not random. The constitutional entrenchment of resource commitments that satisfy constitutional tests for “property” means that the costs of nonentrenchment are borne disproportionately by the asset poor. Recall that constitutional entrenchment is possible only for government commitments that trigger the protections of the Takings Clause, the Due Process Clause, or the Contracts Clause (the “old” property and then some).³⁰² This means that those with significant legal rights to real property, government or private contracts, or public-employee collective-bargaining agreements benefit from the entrenchment of such commitments. Those without accumulated wealth (again, disproportionately Black people³⁰³) whose wellbeing depends largely on other forms of commitments (“new” property” and “new new” property) – like commitments for public health, education, nutrition assistance, or

299. See Ruqaiijah Yearby & Seema Mohapatra, *Systemic Racism, the Government’s Pandemic Response, and Racial Inequities in COVID-19*, 70 EMORY L.J. (forthcoming 2021) (manuscript at 15-20, 40-43), <https://ssrn.com/abstract=3763532> [<https://perma.cc/F8DU-ET68>].

300. Chye-Ching Huang, *Fundamentally Flawed 2017 Tax Law Largely Leaves Low- and Moderate-Income Americans Behind*, CTR. ON BUDGET & POL’Y PRIORITIES 2 (Feb. 27, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/2-27-19tax.pdf> [<https://perma.cc/9F7N-TQ7T>] (describing the 2017 tax law’s regressive effects).

301. See *infra* Section III.A.1 (discussing definitions of subordination).

302. See *supra* note 264 and accompanying text.

303. See *supra* notes 188-192 and accompanying text (describing the racial wealth gap).

community support—are forced to bear all the risks of instability so that the nation as a whole can retain flexibility and accountability.

Entrenchment is therefore possible in the United States, but it is pay to play. The cost of preserving flexibility for the future is imposed on those who cannot afford to avoid it. If a person inherits wealth, she can build her life on a stable foundation of constitutionally insulated market and property entitlements. If she does not, then what public commitments exist to support her needs will be unstable. It is a price she must pay for the sake of the nation's future flexibility. The dead hand of privilege reaches far into the future; the dead hands of equity, charity, and solidarity are cut off at the wrist.

None of this is to say that entrenchment should not be available for traditional real-property rights or that it should be available for public-good investments—both controversial issues. The more modest point is that the costs associated with entrenchment, insofar as it is a tool for allocating power across time, are in federal law skewed toward marginalized groups. The next two Parts take up the questions of whether and how such skewed distributions should matter.

III. ANTISUBORDINATION UPSTREAM

Each of the harms described in Part II has what tort law calls an “intervening cause.”³⁰⁴ Take President Trump's conditioning of relief funds for Puerto Rico. The discretion that governing law and norms give the Executive over program implementation made the holdup possible, but someone in the Trump Administration had to pull the trigger. By their nature, separation-of-powers rules determine who has control and when, but not what those people actually do with that control.

At first glance, the fact that the separation of powers and subordination interact at a point on the causal chain “upstream” from the actual decisions of politicians and agency officials who make headlines may seem to justify leaving subordination questions out of the separation of powers. But such a conclusion would be too hasty. In light of the patterns of problematically targeted harms developed in Part II, this Part addresses the relevance of subordination in the separation of powers from the standpoint of critical theories in addition to traditional separation-of-powers law and scholarship. Section III.A describes the benefits, from a critical perspective, of viewing the separation of powers as a “means” in efforts to combat subordination. Section III.B describes the benefits,

304. RESTATEMENT (SECOND) OF TORTS § 441(1) (AM. L. INST. 1965) (“An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.”).

from a “structural” separation-of-powers perspective, of viewing antisubordination as an “end” to be considered in institutional analysis. From either standpoint, it is important and useful to consider antisubordination in evaluating the laws and norms that allocate power within the government.

A. *The Separation of Powers as a Means of Antisubordination*

1. *Dimensions of Subordination*

The last Part’s mapping of the harms of appropriations, executive conditions, and constitutional nonentrenchment found reason for concern in burdens targeted at a myriad of groups, including Black people, Native Americans, and family caretakers. It used the word “subordination” to describe all of these distributional patterns, regardless of which group was impacted. Before we turn to normative implications, a brief introduction to the key terms and considerations in a rich body of legal scholarship developing antisubordination theory is warranted.

“Subordination” means imposing costs on groups that are marginalized economically, politically, or socially.³⁰⁵ Most broadly understood, subordination is a concern any time a less powerful group is burdened because of its lack of power, or a more powerful group is privileged because of its strength.³⁰⁶

Subordination concerns are heightened when burdens track historical intergroup hierarchies like Black/white or male/female because the existence of those

305. See Harris & Pamukcu, *supra* note 189, at 762 n.4 (defining subordination as “hold[ing] down one social group to the benefit of another social group” (quoting ROBIN DIANGELO, *WHAT DOES IT MEAN TO BE WHITE? DEVELOPING WHITE RACIAL LITERACY* 61 (2012))); Darren Leonard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1, 65 (2015) (explaining that subordination means “impos[ing] or reforc[ing] the social and economic vulnerability of classes of persons”); Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 135 (1998) (“[S]ubordination is the web of interlocking discourse and practice that privileges one group over another in de jure and de facto, formal and informal, ways.”); see also Colker, *supra* note 11, at 1007 (“Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole.”).

306. See Colker, *supra* note 11, at 1013 n.29 (“Professor Sunstein has engaged in a similar inquiry . . . [.] characteriz[ing] the fundamental constitutional aspiration as an aspiration to overcome ‘naked preferences’—to prevent ‘the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.’” (citing Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984))).

hierarchies is itself a strong reason to suspect invidious discrimination.³⁰⁷ Furthermore, people can be members of multiple subordinated groups. “Intersectionality” refers to the interaction of membership in multiple oppressed groups, including cumulative burdens which can compound one another (in economic speak, burdens from subordination carry increasing marginal cost).³⁰⁸ Indeed, a pattern of subordination against a group based on a readily observable characteristic (like skin color) creates the risk of a “caste” system in which subordinating choices snowball across contexts.³⁰⁹

That said, it would be incorrect to infer that the groups relevant to a subordination analysis are fixed. As Darren Leonard Hutchinson points out, “privileged and subordinate categories . . . are . . . contextual and shifting,”³¹⁰ along with evolving legal, social, and economic contexts. An analysis that evaluates the distribution of benefits and burdens across society mindful of the possibility of myriad, shifting, interrelated, and potentially intersectional categories is said to be multidimensional.³¹¹ This Article has followed such an approach, leaving the possibility of distinctive issues raised by race, sex, class, and other essentialist perspectives to future work.

From the antisubordination perspective, anticlassification laws, such as those prohibiting explicit discrimination on the basis of race, are useful but imperfect tools as they are both under and overinclusive. Anticlassification laws are underinclusive because, by focusing on a particular action as either discriminatory or not, they miss its interaction with social, economic, and political context in which subordination may already be latent. A law that provides favorable tax treatment to single-earner households, for example, is unobjectionable under an anticlassification approach because it does not employ any suspect classifications. But it may nevertheless be objectionable from an antisubordination approach insofar as single-earner households are disproportionately white due to historical imbalances in the distribution of assets.³¹² Anticlassification laws are also overinclusive insofar as they limit or prohibit category-based classifications

307. See *id.* at 1013 (“We only prohibit distinctions that we have good reason to believe are biased or irrational, and it is group-based experiences that primarily inform us as to which kinds of distinctions are biased or irrational.” (footnote omitted)).

308. See Crenshaw, *supra* note 11, at 1244 (discussing the intersection of race and gender); see also Darren Leonard Hutchinson, *Identity Crisis: ‘Intersectionality,’ ‘Multidimensionality,’ and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 307-09 (2001) (discussing insights from the intersectionality critique).

309. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411-12 (1994).

310. Hutchinson, *supra* note 308, at 312.

311. *Id.*

312. BROWN, *supra* note 71, at 29-63.

even when those classifications are justified from an antisubordination perspective, such as affirmative-action policies.³¹³

2. *Antisubordination and the Distribution of Power*

Antisubordination scholars, recognizing the limitations of an anticlassification approach, have advocated a more nuanced, contextual understanding of the Equal Protection Clause’s guarantee of “equal protection of the laws.” But they have been frustrated by courts’ reluctance to adopt such an understanding.³¹⁴ This has contributed to a focus on other constitutional rights as potential fronts in advancing antisubordination, especially those in the First Amendment.³¹⁵ Again, however, these efforts have seen limited success.³¹⁶

The separation of powers offers a promising additional domain in which to pursue antisubordination. Discrimination law and substantive rights are today focused downstream at results, injuries, and outcomes. The separation of powers, by contrast, is inherently focused upstream at causes, structures, and determinants – at the generation or allocation of power, not its use. It is therefore well suited to combat the thorniest instances of subordination.

Four particular reasons to pursue antisubordination through the separation of powers bear emphasis. First, changing separation-of-powers laws and norms has the distinctive potential to protect against subordination regardless of which politicians or political parties happen to win office. To invoke another torts concept, the patterns developed in Part II reveal the potential for “foreseeable misuse.”³¹⁷ Separation-of-powers rules may be upstream from ultimate decisions harming marginalized groups, but the tenor of the harms they permit are nonetheless predictable. Some might blame President Trump for taking Native peoples hostage in the 2019 shutdown. But Native peoples have to worry about those

313. Colker, *supra* note 11, at 1006-11.

314. *E.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1473 (2004) (“[M]ost [scholars] would agree that American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century.”).

315. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2121-22 (2019) (describing anticlassification and antisubordination approaches to equality); Kessler & Pozen, *supra* note 70, at 1994-2000.

316. *See* William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1072 (2021) (“The Supreme Court has paid relatively little attention to the substantive meaning of the Second Founding in interpreting the Bill of Rights generally and the First Amendment specifically.”).

317. MARSHALL S. SHAPO, *SHAPO ON THE LAW OF PRODUCTS LIABILITY* § 21.02(C)(1) (7th ed. 2017) (“For many courts, ‘foreseeability’ of ‘misuse’ is sufficient to overcome defenses constructed on the foundation that a plaintiff did not use a product in the intended way.”).

harms only because Congress continues to choose to give itself and the President the ability to threaten funding for IHS in the first place.³¹⁸

Reforming separation-of-powers tools may be the only way to prevent some of the most serious instances of subordination in recent years from recurring. As of this writing, all three branches of government are controlled by the same party, so the worst forms of “hostage taking” by one branch may seem remote. But if history is any guide, the country will soon have a divided government once again.³¹⁹ Now is the time to insulate marginalized communities from becoming collateral damage in future struggles. Once the harms manifest downstream, it will likely be too late.

Second, separation-of-powers laws and norms are themselves controlled by untapped policy actors who may be more amenable to antisubordination arguments. Scholars have repeatedly expressed concern that courts and traditional civil-rights suits are inherently limited tools for effectuating structural reforms.³²⁰ As described in Part I, the modern separation of powers is controlled by a diverse array of actors, laws, and institutions. To be sure, rules like constitutional nonentrenchment are codified in the Constitution and interpreted by courts.³²¹ But other separation-of-powers tools are shaped by different actors.

For example, congressional committees and unicameral rules largely shape decisions about annual appropriations.³²² Today, these are controlled by Democrats who, recognizing the importance of structure, recently amended their procedures to reduce budgetary barriers to future legislation fighting coronavirus or

318. President Biden’s first budget proposed advance appropriations for IHS, which would reduce this risk. See Matthew B. Lawrence, *Congress Should Insulate the Indian Health Service from the Next Government Shutdown*, BILL HEALTH (June 3, 2021), <https://blog.petrieflom.law.harvard.edu/2021/06/03/indian-health-service-biden-congress> [https://perma.cc/R6BE-6S58] (arguing that Congress should adopt the President’s proposal).

319. See Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 771-72 (2016) (describing several shifts to divided government after midterm elections).

320. See, e.g., Olatunde C.A. Johnson, *Equality Law Pluralism*, 117 COLUM. L. REV. 1973, 1977 (2017) (“The limitations of the antidiscrimination project have been bare for several decades.”); Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equity*, 92 B.U. L. REV. 1713, 1720-23 (2012) (describing the failure of the Constitution to provide for “second-generation [human] rights” (alteration in original)).

321. See Johnson, *supra* note 320, at 1979-89 (describing the legacy of civil-rights debates and the limitations of an antidiscrimination approach); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363-68 (1992) (describing the long struggle by Black individuals to “obtain freedom, justice, and dignity”); see also Johnson, *supra* note 320, at 1977 (discussing advantages of alternative avenues, beyond courts, for reform).

322. See Gould, *supra* note 50, at 1959-61 (describing sources of law governing agency procedures); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593, 625 (1988) (describing the budget process established by the Gramm-Rudman-Hollings Act).

climate change.³²³ Representative Ocasio-Cortez described the rule change as “a big deal – and not only on health care. They are structural changes in the House that level the playing field for a full SUITE of flagship legislation.”³²⁴ The House’s interest in structural changes indicates a potential openness to efforts aimed at reducing subordination through the appropriations process. Similarly, the rules and practices of presidential administration, including executive conditions, are determined largely by the Government Accountability Office (GAO) and OMB.³²⁵ Again, these actors may be more open to reforms that advance antisubordination goals. In fact, OMB General Counsel Samuel Bagenstos was responsible as an academic for introducing antisubordination to disability law.³²⁶ Other separation-of-powers rules and tools beyond those discussed here are also shaped by a diverse array of institutional actors, presenting new opportunities for antisubordination efforts.³²⁷

Third, pursuing antisubordination in the design of laws and norms that allocate power within the government would mitigate the biasing influence of economic power in the political process. Critical-race theory’s and feminist-legal theory’s decades-long emphasis on the outsized influence of economic elites in the political process is burgeoning within the nascent “law-and-political-economy” movement.³²⁸ From this perspective, we should assume that economic interests are already well aware of the potential for separation-of-powers tools to

323. See H.R. Res. 8, 117th Cong. § 3(v) (2021) (“The chair of the Committee on the Budget may adjust an estimate . . . to . . . exempt the budgetary effects of measures to prevent, prepare for, or respond to economic or public health consequences resulting from the COVID-19 pandemic; and . . . economic, environmental, or public health consequences resulting from climate change.”).

324. Alexandria Ocasio-Cortez (@AOC), TWITTER (Jan. 1, 2021, 9:19 PM), <https://twitter.com/AOC/status/1345190548815142918> [<https://perma.cc/S8HX-H6LC>].

325. See Pasachoff, *supra* note 206, at 73-86; Bridget C.E. Dooling, *Into the Void: The GAO’s Role in the Regulatory State*, 70 AM. U. L. REV. 387, 389-94 (2020) (describing the role of the Government Accountability Office (GAO)).

326. See Melissa Nann Burke, *UM Prof Bagenstos Hired as White House Budget Office Lawyer*, DETROIT NEWS (Jan. 21, 2021, 2:06 PM EST), <https://www.detroitnews.com/story/news/politics/2021/01/21/bagenstos-appointed-white-house-budget-office-lawyer/6656338002> [<https://perma.cc/3B65-H877>]; Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 418-45 (2000) (setting forth a subordination-based understanding of disability-rights law).

327. See, e.g., Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 654-63 (2020) (describing the role of the Department of Justice (DOJ) and other executive-branch actors in influencing the behavior of independent agencies).

328. See sources cited *supra* note 27; see also, e.g., Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, and the Constitution of Opportunity*, in WEALTH: NOMOS LVIII 45, 60 (Jack

impose targeted harms and are already intervening in their design to skew those harms in their favor. Reducing economic elites' political influence would address this bias, but law-and-political-economy scholars are pessimistic about the prospects of doing so.³²⁹ In the face of a biased political process, antisubordination advocates have little hope of counteracting economic influence in the design of separation-of-powers tools if they do not actively engage in the processes of that design, do the hard work of tracing separation-of-powers tools' harms, and, where such tools disproportionately burden marginalized groups, highlight that fact while pressing reforms to address it.

Fourth, and relatedly, focusing on the separation of powers would respond to the calls of vulnerability theory to shift the focus from individuals to the legal and social structures that allocate power and shape state action aimed at responding to residents' dependence. Scholars, from Jacob S. Hacker and Heather McGhee going back to Charles A. Reich, have problematized overarching instability and underinvestment in public-health and poverty programs.³³⁰ As Part II explained, laws and norms that contribute to this instability play an important role in allocating power within the government. Engaging with these laws and norms at the point of their creation – and contesting the terms of the debate that label them “valuable” by reference to values *other* than subordination – offers a concrete path to changing them and, ultimately, to addressing the instability to which they contribute.

B. Antisubordination as an End of the Separation of Powers

The fact that the separation of powers plays a role in creating or propagating subordination may, for many readers, be reason enough to conclude that anti-subordination should be an important consideration in decision-making about the distribution of power among and within the branches of the federal government. For others, however, this proposition may not speak for itself.

Knight & Melissa Schwartzberg eds., 2017) (calling for the recognition of “anti-oligarchy, inclusion, and the constitutional necessity of a broad and open middle class” as constitutional principles).

329. See Sitaraman, *supra* note 27, at 1498-1500 (explaining the “hydraulic problem” that “applies . . . to any effort to cabin the influence of money in politics”); *id.* (“[A] constitutional system might incorporate multiple design strategies that each fail to effectively restrict the influence of wealth over policy but that together do so relatively well.”).

330. JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* 23-49 (2d ed. 2019); HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* 255-90 (2021); Reich, *supra* note 276, at 734-39.

What counts as a “separation of powers value”³³¹ or “structural value”³³² that should be considered in the design of a separation-of-powers tool or resolution of a separation-of-powers question? The answer is unclear and contested. Indeed, Aziz Z. Huq has rightly pointed out that separation-of-powers theory lacks a consensus normative framework.³³³ It is difficult to find a perspective, however, on which antisubordination should not be an important consideration in any analysis.

1. *Neutral Principles*

One possible objection that can be associated with a “systemic”³³⁴ perspective on institutional design is that separation-of-powers judgments should be based only on “neutral principles.” On a version of this view, separation of powers should seek to advance values that might “win” in decision-making about the structure of government when implementation is years away and highly uncertain but would tend to “lose” in immediate decisions assigning benefits or burdens.³³⁵

This objection falters in its assumption that antisubordination is itself not a neutral principle warranting structural protection. Equal-protection scholars have argued otherwise.³³⁶ Like the rule of law—a classically neutral principle thought to be deserving of structural protection—antisubordination is likely to be given insufficient weight by political actors making choices in the heat of the

331. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 463 (2012) (describing a “core constellation of separation of powers values” while noting ambiguities about the boundaries of this category).

332. See *In re Sealed Case*, 838 F.2d 476, 524 (D.C. Cir. 1988) (Ginsburg, J., dissenting) (advocating for a doctrinal approach to independent counsel that aims “to preserve the full range of structural values encompassed under the heading of separation of powers”), *rev’d sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

333. Huq, *supra* note 8, at 1518 (describing separation-of-powers theory as a “cacophony” resulting in part “from the fact that scholars disagree about the basic terms of the debate”).

334. Adrian Vermeule has called for separation-of-powers scholarship to adopt a systemic perspective, looking at how actors, institutions, laws, and norms that make up the government interact and evolve over time. ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 3-13 (2011).

335. Cf. Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 403-05 (2001) (describing the need to replace motives of self-interest with those of impartial rationality by “introducing uncertainty about the distribution of benefits and burdens”).

336. Herbert Wechsler famously argued that protection of marginalized groups is not a “neutral principle.” Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959). His contemporaries, however, disputed that assumption. See Siegel, *supra* note 314, at 1494 (“[S]cholars who defended antisubordination values as a legitimate ground on which to choose between the welfare claims of whites and blacks were contesting Wechsler’s conception of neutrality.”); *id.* at 1489-94 & nn.71-88 (collecting sources).

moment because such decisions are, by definition, made by stronger groups in a position to take advantage of those without power. At the point at which future decisions are structured, however, the interests of marginalized groups have greater hope of prevailing for the reasons discussed above. Behind the “veil of ignorance,”³³⁷ the temporal and epistemological distance from direct substantive impacts diminishes the role of interest groups and, so, increases the sway of actors motivated by the public good, broadly defined. Thus, whether separation-of-powers values are limited to those as to which the allocation of power has a comparative advantage or those as to which a veil of protection from “substantive” interests is needed, antisubordination should count.

Another related theoretical objection could be that separation-of-powers theory should focus on values that are distinctively served by the allocation of power.³³⁸ Although not speaking specifically to separation of powers, Louis Kaplow and Steven Shavell have influentially questioned whether fairness considerations are better addressed through external redistributive tools, as opposed to internal changes within a policy domain.³³⁹ This position assumes, however, a first-best world in which fairness considerations are fully addressed through a collateral system, such as the tax code.³⁴⁰ We live in a second-best world without an effective and fair back-end source of redistribution.³⁴¹ Moreover, even on the Kaplow and Shavell view, it would still be necessary to measure and account for skewed impacts associated with separation-of-powers tools. Their argument would simply mean that rather than shun tools with such impacts, we could compensate those they harm.

2. *History*

Another category of objections might look to history rather than theory to define and delimit values worthy of consideration in separation-of-powers analysis. From this perspective, it might be argued, antisubordination should not be considered a separation-of-powers value because antisubordination lacks histor-

337. Vermeule, *supra* note 335, at 399 (“A veil of ignorance rule . . . is a rule that suppresses self-interested behavior on the part of decisionmakers; it does so by subjecting the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision.”).

338. *See supra* notes 6, 60-69 and accompanying text (discussing values ordinarily considered in separation-of-powers discussions).

339. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 79-81 (2002) (arguing for an exclusive focus on welfare economics in many fields of normative legal analysis).

340. *See id.* at 3-4.

341. *See generally* BROWN, *supra* note 71 (describing racial bias in the tax system).

ical precedent as a consideration in separation-of-powers theory and jurisprudence. History is replete with examples of actors making choices to subordinate marginalized groups, not combat subordination, so is not the novelty of anti-subordination a potential objection to its consideration?

This objection based on history makes the most sense from the standpoint of a court deciding a separation-of-powers case because some judicial precedents and interpretive theories give weight to historical practice,³⁴² though scholars have forcefully argued that novelty alone should not count as an objection even from a doctrinal standpoint.³⁴³ As for scholars, members of Congress (or their staffs), or executive-branch officials, it is not at all apparent why they should be limited by history in deciding what values to consider in assessing separation-of-powers questions they confront.

In any event, this objection assumes, incorrectly, that antisubordination lacks historical precedent as a constitutional value. To the contrary, antisubordination featured as a structural value in the design of the U.S. Constitution and the ratification debates. As James S. Liebman and Brandon L. Garrett explain, James Madison “belie[ved] in the need for the carefully structured daily interaction and competition among the organs of government to provide ongoing protection of minorities against majority oppression.”³⁴⁴ In other words, Madison believed that the framework of government should be designed to protect against subordination. And Madison relied on that goal of protecting weaker factions from being dominated by stronger factions in defending the Constitution during the ratification debates.³⁴⁵ To be sure, Madison did not use the word “antisubordination,” and in a later application of this point the “minority” whose rights he sought to “safeguard” through the “basis [and] structure of the Government itself” was slaveholders.³⁴⁶ Still, he defended and employed the general concept that government should protect weak groups from being taken advantage of by

342. See *infra* Section IV.B.1 (discussing the doctrinal basis for judicial consideration of antisubordination).

343. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1412 (2017).

344. James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 840 n.3 (2004); see also *id.* at 862 (“What Madison meant by ‘justice’ was the protection of ‘minority’ groups against systematic ‘oppression’ or ‘tyrannization’ by more powerful groups acting through the political process and the government.”); cf. Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1215 (1992) (noting that Madison viewed “liberty” as “liberty against popular majorities”).

345. Liebman & Garrett, *supra* note 344, at 840 n.3.

346. In discussing state representation, Madison argued that the rights of slaveholders could be protected against interference by a majority not itself interested in slaveholding by structuring government to increase slaveholders’ power. James Madison, Speech to Virginia Convention of 1829 (Dec. 2, 1829), in *SELECTED WRITINGS OF JAMES MADISON* 355 (Ralph Ketcham ed., 2006).

strong groups, or coalitions of strong groups in defending the structure of the Constitution—specifically, in arguing that the broad federal government is inherently resistant to the dangers of faction.³⁴⁷

Liebman and Garrett argue that Madison’s notion of justice as protection against group-based subordination supports an antisubordination understanding of the Equal Protection Clause, but its implications for the values considered in separation-of-powers analysis are even more direct. Madison’s view of the need to structure government to “guard one part of the society against the injustice of the other part”³⁴⁸ provides historical precedent for the consideration of that goal in resolving separation-of-powers questions today.

Moreover, ratification is not the only period relevant for assessing constitutional structure and meaning. As Charles R. Lawrence III explains, “The Reconstruction Amendments and the Equal Protection Clause embody a constitutional norm or value of antisubordination.”³⁴⁹ William M. Carter, Jr., argues that Re-

347. In Federalist 51, Madison advocated structuring the Constitution “to guard one part of the society against the injustice of the other part.” THE FEDERALIST NO. 51, *supra* note 32, at 323 (James Madison). Moreover, Madison’s vision of “injustice” was explicitly focused on groups, not individuals. Liebman & Garrett, *supra* note 344, at 840 n.3; THE FEDERALIST NO. 51, *supra* note 32, at 323 (James Madison) (“Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.”); THE FEDERALIST NO. 51, *supra* note 32, at 324 (James Madison) (“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature.”). The “interests, parties, and sects,” THE FEDERALIST NO. 51, *supra* note 32, at 325 (James Madison), that Madison had in mind included economic groups based on occupation and industry, classes based on wealth and ownership of land, and even race. THE FEDERALIST NO. 10, *supra* note 245, at 79 (James Madison); James Madison, Debates in the Federal Convention (June 6, 1787), https://avalon.law.yale.edu/18th_century/debates_606.asp [<https://perma.cc/DGJ4-3MQM>] (“[W]e have seen the mere distinction of colour made . . . a ground of the most oppressive dominion ever exercised by man over man.”); *see also* Liebman & Garrett, *supra* note 344, at 868 n.144 (collecting other sources indicating that Madison understood race as a source of abuses of faction).

348. THE FEDERALIST NO. 51, *supra* note 32, at 323 (James Madison).

349. Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1382 (2004); *see also* Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 682 (“[A]nti-subordination theories of equality find strong support in precedent and in the surrounding historical context of the Fourteenth Amendment.”); Siegel, *supra* note 314, at 1491-95 (surveying historical perspectives on the meaning of equal protection); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 784-88 (1985) (tracing the introduction and passage of the Fourteenth Amendment); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960) (asserting that the Fourteenth Amendment reflects a “broad principle of practical equality”); Sunstein,

construction should be considered a “second founding” that informs interpretation of the First Amendment.³⁵⁰ Again, the point is even more direct with regard to the separation of powers. The Reconstruction Amendments were not merely substantive. They were also structural, changing fundamentally the relationship between the federal government and the states and increasing both congressional and judicial power.³⁵¹

Reconstruction saw major structural developments in the federal government: the first presidential impeachment,³⁵² the creation of the Department of Justice (DOJ)³⁵³ and the Department of Agriculture,³⁵⁴ and, of course, the resolution of the longstanding controversy over states’ ability to secede.³⁵⁵ It would be odd indeed to reject as a value relevant to separation-of-powers questions the motivating purpose of these constitutional and subconstitutional changes to the distribution of power within the federal system.³⁵⁶

Lastly, it is worth noting that a form of antisubordination—in the guise of antifascism—played a significant role in another formative period for the federal government: the development of the Administrative Procedure Act. In *The Antifascist Roots of Presidential Administration*, Noah A. Rosenblum notes that in designing internal separation-of-powers tools in the 1930s, American reformers

supra note 309, at 2429 (“[T]he Civil War Amendments can be understood as an effort to counteract this form of disadvantage [based on group membership].”).

350. See generally Carter, *supra* note 316 (arguing that courts should understand the First Amendment in light of Reconstruction Era understandings).
351. See U.S. CONST. amend. XIV, § 5; *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (“[T]his Court has held that the Fourteenth Amendment’s Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States.”); see also Amar, *supra* note 344, at 1284 (“[T]he Fourteenth Amendment has reconstructed the meaning of the Bill of Rights in both the popular and the legal mind.”).
352. See ERIC C. SANDS, *AMERICAN PUBLIC PHILOSOPHY AND THE MYSTERY OF LINCOLNISM* 99 (2009).
353. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).
354. Act of May 15, 1862, ch. 72, 12 Stat. 387 (1862); see also Angela P. Harris, *[Re]Integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157, 167 (2015) (describing the creation of the Department of Agriculture).
355. HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 284 (1973) (“[T]he primary immediate impact of the Civil War was to be the abandonment of secession as a state’s right . . .”).
356. On antisubordination as a motivating value, see sources collected *supra* note 349. Cf. 14 CHARLES SUMNER, *THE WORKS OF CHARLES SUMNER* 424 (Boston, Lee & Shepard 1883) (“I say a new rule of interpretation for the National Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly and thoroughly for human rights. Before the Rebellion the rule was precisely opposite. The Constitution was interpreted always, in every clause and line and word, for Human Slavery. Thank God, it is all changed now.”).

sought a way to invigorate the Executive without running afoul of the dangers of fascism.³⁵⁷ From this insight, Professor Rosenblum's analysis focuses on the operational features of fascism, developing an argument that presidential administration's antifascist roots support efforts to invigorate civil servants vis-à-vis political appointees as an end in itself.³⁵⁸ But Professor Rosenblum's historical analysis also supports an argument on which such features of internal and external administrative law are not an end in themselves. Instead, they are a means to the end of preventing the racial subordination with which fascism was closely associated.³⁵⁹

3. *Pluralism*

Finally, Professor Huq and Jon Michaels point out that separation-of-powers theory is normatively pluralistic, including values that often compete with one another. Accommodating these competing values, they contend, can be a good thing.³⁶⁰ Value pluralism is itself an argument for including antisubordination. Not only is antisubordination an important end in itself, it can also work in synergy with other longstanding (or at least already-established) separation-of-powers values including liberty, accountability, deliberation, efficiency, and partisan balance.

Start with liberty. In *Obergefell*, Justice Kennedy saw a “profound . . . synergy” between liberty and equality:

Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence

357. See Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, COLUM. L. REV. (forthcoming) (manuscript at 1), <https://ssrn.com/abstract=3635821> [<https://perma.cc/6RP7-PDNF>] (“[T]he architects of presidential control of the administrative state reconciled a strong executive with democratic norms by embracing separation of powers in order to make the government responsible and antifascist.”).

358. *Id.* (manuscript at 67) (“It shifts the discussion from the ideas that might constitute fascism towards the practices through which fascism operates.”).

359. *Id.* (“Among fascism’s main commitments, scholars have identified claims that the nation or race is the true subject of history.”); see also *id.* (manuscript at 43-44) (describing the opposition to fascism in the United States as driven by fear and notorious public examples, not by knowledge of or response to particular fascist processes).

360. See Huq & Michaels, *supra* note 8, at 382; Michaels, *supra* note 6, at 558-59 (offering a view of the internal interactions of political appointees, the public, and civil servants in which each champions certain values, thereby ensuring government action reflects and accommodates a plurality of sometimes competing goals).

of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.³⁶¹

Chief Justice Roberts found this synergy “difficult to follow” because it did not reflect the “usual framework for deciding equal protection cases” – that is, the anticlassification approach which strictly limits the use of explicitly racial categories.³⁶² Kenji Yoshino explains the missing link: the synergy that Justice Kennedy describes is between liberty and antisubordination, not liberty and anti-classification.³⁶³

The synergy between liberty and antisubordination is a strong one,³⁶⁴ even on narrow, negative conceptions of liberty as “an individual’s freedom to do as she wishes without legal command or coercion.”³⁶⁵ Arguably the most infamous, widespread, and severe deprivations of liberty in the nation’s history have been motivated by and effectuated through group-based subordination – through laws, norms, structures, and institutions which interacted to enslave and restrain Black people, displace and starve Native people, and entrap and assault women.³⁶⁶ It does no violence to an individualized conception of liberty to recognize this danger posed by subordination. Rather, an antisubordination outlook promotes individual liberty by identifying and uprooting threats to individual freedom that operate through or on particular groups, especially when

361. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (internal citations omitted).

362. *Id.* at 706-07 (Roberts, C.J., dissenting); see also *supra* Section III.A.1 (describing the anticlassification approach).

363. Kenji Yoshino, *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 147, 173-74 (2015).

364. Cf. Sunstein, *supra* note 309, at 2411 (“Perhaps the best conceptions of equality are entirely compatible with the best understandings of liberty.”).

365. Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. (forthcoming 2021) (manuscript at 23), <https://ssrn.com/abstract=3779457> [<https://perma.cc/KMU8-7Z5V>] (offering a typology of the notions of liberty that the Supreme Court employs).

366. See, e.g., Rafael I. Pardo, *Bankrupted Slaves*, 71 VAND. L. REV. 1071, 1165 (2018) (discussing “the role that the federal bankruptcy system played in the domestic slave trade of antebellum America”); Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924, 1009 (2020) (describing “[f]ederal officials’ explicit, enduring support for Jim Crow”); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 766 (1992) (describing the “Trail of Tears” forced march of the Cherokee Tribe from Georgia to Oklahoma, during which one-fifth of the Tribe died, and the subsequent divestiture of land); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1379 (2000) (“[L]eading nineteenth-century feminists . . . explained a woman’s lack of control over her person as the key foundation of her subordination.”).

such threats might otherwise be missed. Rebecca L. Brown framed due process as an important means to the end of liberty in defending its consideration in the separation of powers.³⁶⁷ So, too, antisubordination should be considered in separation-of-powers analysis, if only as a means to that same end.

Furthermore, separation-of-powers tools with lopsided impacts themselves undermine democratic accountability. As David A. Super points out in discussing temporal equal protection, a law or practice that disproportionately forces a marginalized group to expend its political energy just to protect its interests effectively takes that group's voice out of the political process as to other issues.³⁶⁸ Thus, SNAP beneficiaries must prioritize support for SNAP in choosing candidates each election cycle, essentially taking their views on other points off the table. Means of empowering institutional actors over broader subject matters avoid this distortion.

Subordination also complicates deliberation. Skewed impacts associated with a structural rule collapse boundaries between “structure” and “substance.” A benefit of transsubstantivity in resolving questions about the design of decision-making processes is that it permits their resolution to be based on long-term societal values such as those discussed above (e.g., the rule of law) rather than on competing interests fighting for particular substantive outcomes (e.g., health-care investments or lower taxes).³⁶⁹ To secure this benefit, however, a “veil” must be created to protect the resolution of structural questions from substantive interests, whether it be a veil of actual ignorance (an inability of substantive interests to predict whether particular rules would help or hurt them) or a veil of fictional ignorance (a refusal by decisionmakers to consider substantive interests, even if impacts on such interests are predictable).³⁷⁰ In reality, fictional ignorance is fantastical, making the restoration of actual ignorance a key means to ensure that institutional values win out in shaping the structures of

367. Just as due-process values are prized in separation-of-powers analysis because arbitrary government action is a threat to liberty, see Brown, *supra* note 12, at 1550 (arguing that due-process concerns should inform separation-of-powers analysis in order to safeguard liberty); *id.* at 1516 (contending that separation-of-powers cases should be resolved to further ordered liberty, “understood as a concern for protecting individual rights against encroachment by a tyrannical majority”), analysts should recognize that subordination is also a key threat to liberty, and so antisubordination should be valued as a means of safeguarding it.

368. David A. Super, *Temporal Equal Protection*, 98 N.C. L. REV. 59, 68 (2019) (“Having some protection against devastating withdrawals of subsistence benefits would free these voters to select candidates on other criteria as well.”).

369. See Vermeule, *supra* note 335, at 404-05 (discussing the use of “veil rules” to limit self-interested decision-making, forcing consideration of public values); Wechsler, *supra* note 336, at 6 (“[F]or anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation.”).

370. See Vermeule, *supra* note 335, at 399-400, 404-05.

government. The skewed distribution of the costs of separation-of-powers tools discussed in Part II destroys this veil, loading with substantive implications support for, or opposition to, institutional reforms.³⁷¹

Furthermore, a subordination perspective is also essential to understanding the efficiency implications of design choices. For example, the skewed distribution of particularized harms associated with the separation-of-powers tools described in Part II distorts the operation of federal programs. Program advocates today, aware of the threat of disappropriation or conditions for spending programs, sometimes engage in what might be called power avoidance, designing their programs to be operationalized through alternative channels shielded from separation-of-powers battles.³⁷² From the standpoint of program efficiency and effectiveness evaluated in the abstract, it often makes sense to implement programs through “spending” rather than through tax expenditures, cross subsidies, or other means of social ordering.³⁷³ But funding a program through spending subjects it to the forced instability associated with appropriations as a separation-of-powers tool. This makes spending a less desirable means of implementing programs because other allocative devices, such as taxes and cross subsidies, are not burdened for the sake of congressional power. This interaction offers an explanation for the tax-expenditure and cross-subsidy phenomena noted by other scholars.³⁷⁴ But such power avoidance creates operational problems because direct spending is a more effective way to implement some programs.³⁷⁵ Without considering these distortions, assessment of the efficiency

371. See Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487, 498 (2009) (“If we add the claims of interests outside the legislative four walls, the institutional claims on each member’s behavior have ample competition.”).

372. See David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 957-58 (2004) (offering “institutional design” as a criterion for evaluating whether distribution should be effectuated through spending or through the tax code based on the comparative efficiency of the spending system and the tax system for administering a program).

373. See Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 189 (2004).

374. See Susannah Camic Tahk, *Converging Welfare States: Symposium Keynote*, 25 WASH. & LEE J. C.R. & SOC. JUST. 465, 466 (2019) (discussing the advantages of implementing social programs through the tax code); Susannah Camic Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875, 891-96 (2018) (describing the growth in tax expenditures); Brooks et al., *supra* note 148, at 1268 (“Financing policies through cross-subsidies rather than through taxes may also affect the likelihood that the policy will be enacted and sustained over time.”).

375. See Weisbach & Nussim, *supra* note 372, at 957 (describing the literature arguing that a broad tax base maximizes economic productivity because it produces fewer distortions in economic decision-making and thus contending that social programs should not be administered through the tax code); *id.* at 957 n.4 (collecting sources).

implications of this choice between spending and taxation as a means of resource allocation would be incomplete.

Antisubordination also furthers the “separation of parties” goal of partisan balance.³⁷⁶ The ability to threaten a program empowers those who support the program less than those who oppose it. In the current political environment, this means that appropriations, executive conditions, and nonentrenchment not only propagate subordination but also tend to empower Republicans more than Democrats.³⁷⁷ On the other hand, if Congress’s and the Executive’s leverage over resources impacted allocations that affected a broad swath of the population equally—like taxation or military spending—then the relative strength of the “power of the purse” would no longer have a discernable partisan bent.

Finally, considering subordination offers an analytic device to combat a problematic tendency in separation-of-powers scholarship to be insufficiently mindful of how government works in practice.³⁷⁸ There can be a dramatic mismatch between the biased sample of heavily manipulated and tidy snapshots of government presented by the parties in the few cases to make it to the appellate courts and the actual, messy operation of government.³⁷⁹ Separation-of-powers scholarship’s current focus on generalized values invites it to look up, not down. In this way, it feeds a tendency to see abstraction and theoretical breadth as an unalloyed virtue.³⁸⁰ The subordination question pushes in the opposite direction, forcing careful attention to the hard work of tracing how laws and norms actually influence behavior, and thus outcomes, in the real world.

376. See Levinson & Pildes, *supra* note 6, at 2347 (“Reorienting separation of powers around parties might lead constitutional law and theory in a number of different directions.”).

377. Political scientists have repeatedly found that the President’s influence over spending is asymmetric; the President has power to reduce spending but not to increase it. *E.g.*, Kiewiet & McCubbins, *supra* note 98, at 713-14. This produces a party asymmetry in the power associated with appropriations and executive conditions because Republicans today tend to favor reduced spending and smaller government and Democrats today tend to favor more spending and a substantial role for government. See Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 962 (2018) (“The value of . . . the federal government [] has become a point of deep division between the parties.”). For an extensive catalogue of structural rules that may impact the parties differently, see Gould & Pozen, *supra* note 8 (manuscript at 4-8).

378. See Milligan & Tani, *supra* note 8.

379. *Id.* (noting administrative-law scholarship’s intense focus on procedure and arguing that scholars should “look beyond the records that agencies compile for judicial review”).

380. *Id.* (problematizing abstraction in the analysis of government institutions).

IV. INTERVENTIONS

Incorporating antisubordination into separation-of-powers theory requires three overlapping interventions. Section IV.A describes implications for institutional analysis of separation-of-powers questions by scholars and political-branch actors. Section IV.B describes implications for doctrinal analysis of separation-of-powers questions by courts (or scholars and advocates developing arguments for courts). And Section IV.C explains how antisubordination alters not only the way separation-of-powers questions should be analyzed but also the questions that separation-of-powers scholarship should ask.

A. *Institutional Analysis*

None of the narratives of subordination in Part II resulted in a lawsuit. Yet they did result in congressional letters and hearings and in newspaper headlines – and they produced massive real-world impacts on millions of lives. This is because they were largely a product of the “constitution outside the Constitution.”³⁸¹ For the most part, the legal disputes did not revolve around specific constitutional doctrines created by courts, but rather around statutes, rules, and practices established by policymakers. They were conflicts waged in what Professors Huq and Michaels describe as the “thick political surround”³⁸²: actors in the legislative and executive branches whose decisions – including but not limited to interpretations of the Constitution³⁸³ – largely construct the separation of powers and determine its implications. The thick political surround is made up of a wide array of actors, from OMB attorneys to the Parliamentarians in the House and Senate to legal scholars whose views might inspire such actors, frame understandings, or influence public opinion.³⁸⁴ This diverse set of institutional

381. Young, *supra* note 42, at 411.

382. Huq & Michaels, *supra* note 8, at 391; *see also id.* (“There is . . . a complex ecosystem of intrabranched and entirely external actors not traditionally accounted for in the separation-of-powers literature that do a lot of the work pushing and pulling, advancing prized values, and jockeying with one another.”).

383. *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2013) (“[A]dministrative constitutionalism . . . encompasses the elaboration of new constitutional understandings by administrative actors, as well as the construction (or ‘constitution’) of the administrative state through structural and substantive measures.”); *id.* at 1909-15 (describing the common features of administrative constitutionalism).

384. In the executive branch, the thick political surround includes dozens of officials. In the Executive Office of the President, there is the President herself, the White House Counsel, the National Economic Council, the Domestic Policy Council, the General Counsel and Resource Management Offices of OMB, and the Office of Information and Regulatory Affairs. And in

actors is part of the reason why the separation of powers is a promising field in which to pursue antisubordination. Instead of turning to courts to reinterpret established doctrine, new content is brought into the separation of powers through the daily exercise of government.³⁸⁵

In making choices that construct the separation of powers, actors in the thick political surround are often guided not only by their own or their superiors' immediate political objectives but also by overarching structural values.³⁸⁶ Concern about immediate harm to marginalized groups may seem inappropriate in these conversations, as it is cast off as the stuff of politics, not institutional decision-making. But this would be a mistake. As explained in Part III, actors within the thick political surround who develop and implement the laws and norms that allocate power should understand questions of subordination to be a necessary and appropriate component of their design.

1. Ask “Who Pays?”

Incorporating antisubordination alters institutional analysis in three ways. First, and most importantly, separation-of-powers scholars have employed a straightforward balancing of costs and benefits to analyze separation-of-powers tools,³⁸⁷ and legal policymakers have referenced such a balancing in constructing such tools as well.³⁸⁸ This approach is incomplete. When separation-of-powers tools entail costs, scholars wishing to consider antisubordination must explore the distribution of those costs. They must ask whether costs are generalized or

the agencies, there is the Office of Legal Counsel in DOJ, political appointees, civil servants, and inspectors general. Huq & Michaels, *supra* note 8, at 393; Pasachoff, *supra* note 6, at 2194-2207. In the legislative branch, the thick political surround includes the Speaker's and Leaders' offices, committee leadership and staff (especially for the Appropriations, Budget, and Rules Committees), the Parliamentarians, the General Counsels' Offices, GAO, and the Congressional Research Service. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1555-1600 (2021) (describing the actors within the legislative branch); Gould, *supra* note 50, at 1959-79 (discussing the system of parliamentary precedent).

385. See *supra* Section III.A.

386. E.g., Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1494-96 (2010). Political-branch entities might be influenced by structural values for their own sake, or because doing so is politically advantageous, or, as with the civil service, because they are themselves institutionally structured to empower actors who see themselves as advancing long-term interests drawn from statute, the Constitution, or a notion of the public interest. See generally Michaels, *supra* note 6 (describing the rise of an administrative separation of powers).

387. See CHAFETZ, *supra* note 4, at 306-07, 314; Serkin, *supra* note 16, at 882.

388. See 43 Op. Att'y Gen. 293, 307 (1981) (“Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.”).

particularized. Wherever they are particularized, the next question must be “who pays?”

Second, institutional analysis of separation-of-powers questions should explore the possibility of alternatives to arrangements with skewed costs. The judgment that an existing or potential arrangement brings greater net benefits than costs does not suffice to conclude that the arrangement is desirable if the costs are skewed in a way that burdens marginalized groups. If they are skewed in this way, the possibility of alternative arrangements that bring the same benefits with a more equitable distribution of costs should be explored.

Third, and relatedly, generalized harm should be seen as potentially preferable, all else being equal, to targeted harm. In scholarly debates, the fact that harms are “widespread” or “existential” is often cited as a problem. For example, building on the work of Carl Schmitt, proponents of unbridled executive power in foreign affairs argue that a unitary actor is best positioned to navigate and overcome national-security threats in the modern era.³⁸⁹ Abstract structural questions like empowering Congress or preventing tyranny should stand aside, they argue, because the “existential” stakes of foreign affairs impact the nation as a whole.³⁹⁰ Incorporating antisubordination flips this approach on its head. Widespread stakes for the nation can be a feature, not a bug. If dividing power must entail costs, it is better that those costs be paid by the entire country than imposed only on its most vulnerable. Exercises of power that threaten harm to the country as a whole pose less risk of subordination and avoid the institutional and operational concerns discussed in Section III.B. Moreover, as Part II suggests, once costs are particularized, it is often logistically and politically difficult

389. See Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CALIF. L. REV. 235, 238 (2007) (“Carl Schmitt . . . [was a] German constitutional thinker[] who developed an argument about the need for extra-constitutional Executive power in times of existential crisis for the Republic.”); see also POSNER & VERMUELE, *supra* note 35, at 4 (developing a theory of executive power that builds on Schmitt’s approach); Memorandum from Jay S. Bybee, Assistant U.S. Att’y Gen., to Alberto R. Gonzales, Counsel to the President 36–37 (Aug. 1, 2002), [https://www.therenditionproject.org.uk/pdf/PDF%2019%20\[Bybee%20Memo%20to%20Gonzales%20Standards%20Interrogation%201%20Aug.pdf](https://www.therenditionproject.org.uk/pdf/PDF%2019%20[Bybee%20Memo%20to%20Gonzales%20Standards%20Interrogation%201%20Aug.pdf) [https://perma.cc/PA53-KEZV] (citing the grave nature of threats as justification for vigorous executive authority); Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 304 (2009) (criticizing claims that the “existential” nature of threats to national security is a reason to support unitary executive power in this area).

390. *But see* Kutz, *supra* note 389, at 238 (“Necessity cannot serve as justification for overriding rights against torture or congressional authority to dictate constraints on warfare.”). Kutz’s challenge to the meaning of the term “existential” in this context, *see id.* at 266, reveals that the term is often used as a shorthand for widespread, national harms.

to prevent them from being targeted at marginalized groups. To analogize to tax law, the separation of powers must “broaden the base.”³⁹¹

2. *The Least Unconstitutional Option Reconsidered*

The ongoing scholarly debate about the role of executive discretion in one particularly destructive congressional power source, the debt ceiling, illustrates the usefulness of asking “who pays?”

The debt ceiling is a statute that prohibits the federal government from borrowing above a set numerical threshold.³⁹² If the government ever hit the debt ceiling, it would be forced to default on federal obligations of all stripes, harming the country’s credit rating, freezing markets, and throwing the economy into recession.³⁹³ Because of these catastrophic effects, Congress has avoided ever reaching the ceiling by simply raising the roof each time it has approached.³⁹⁴ As a result, the debt ceiling’s primary function is to serve as an important source of power. By threatening not to raise the debt ceiling, members of Congress can extract policy concessions and influence the legislative agenda.³⁹⁵ In this way, the debt ceiling dominated President Obama’s policy agenda.³⁹⁶ At this writing, it is playing a disruptive role in President Biden’s as well.³⁹⁷

391. In tax law, “broadening the base” — eliminating loopholes and exceptions and expanding who pays and on what — is a recurring goal. See, e.g., JANE G. GRAVELLE, *THE ECONOMIC EFFECTS OF TAXING CAPITAL INCOME* 95 (1994) (explaining that supporters of corporate tax-rate cuts believed that “broadening the base would result in a more neutral tax system, and a more efficient allocation of capital”).

392. D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RSCH. SERV., RL31967, *THE DEBT LIMIT: HISTORY AND RECENT INCREASES* 6-9 (2011) (discussing iterations of the debt-ceiling statute).

393. See Steven L. Schwarcz, *Rollover Risk: Ideating a U.S. Debt Default*, 55 B.C. L. REV. 1, 2 (2014) (“Any . . . default, even one that is temporary, would have severe economic and systemic consequences, significantly raising the cost of borrowing and causing securities markets to plummet.” (emphasis omitted)).

394. See, e.g., Buchanan & Dorf, *supra* note 29, at 1177-78 (discussing the resolution of the debt-ceiling crisis in 2011).

395. See, e.g., 157 CONG. REC. 12,801 (2011) (statement of Sen. Mitch McConnell) (“[N]ever again will any President, from either party, be allowed to raise the debt ceiling . . . without having to engage in the kind of debate we have just come through.”).

396. See *supra* Section II.A.3.

397. See Carney, *supra* note 29; Burgess Everett, Caitlin Emma & Nicholas Wu, *Senate Advances Short-Term Debt Limit Hike After GOP Scramble*, POLITICO (Oct. 8, 2021, 7:24 AM EDT), <https://www.politico.com/news/2021/10/07/senate-advances-short-term-debt-limit-hike-after-gop-scramble-515578> [<https://perma.cc/7FTT-X7DF>].

Legal scholars have engaged in a robust discussion of the debt ceiling during and after the Obama Administration. They focus on its legal ramifications,³⁹⁸ whether the debt ceiling's benefits justify its costs,³⁹⁹ and what the Executive should do if the debt ceiling were ever reached. Professors Buchanan and Dorf put this last question in stark terms by asking how the President should choose "between three unconstitutional options."⁴⁰⁰ They forcefully contest the assumption that the law would require the President to halt all spending. Instead, they argue, the President would have a choice to make. She could either (1) halt all spending and violate statutory obligations such as the payment of government interest or entitlements; (2) unilaterally raise taxes to generate revenue to honor those obligations; or (3) ignore the debt ceiling and unilaterally borrow sufficient funds to honor obligations.⁴⁰¹ All of these options, they insist, violate the Constitution. Given this constraint, they argue that the President should select the "least unconstitutional" approach: unilaterally borrow to fund obligations.⁴⁰²

Asking "who pays?", however, sheds new light on the "least unconstitutional option" debate. The debt ceiling's assumed requirement that all federal spending must halt is more balanced than is a selective stoppage. It is a source of national fragility, a distressingly easy way that the House, or Senate, or President can periodically gain leverage by threatening to disrupt the nation's economic and social wellbeing. Unlike the tools described in Part II, the power the debt ceiling generates comes largely at the nation's expense, not at the expense of particular groups.⁴⁰³ So it is that today the work of lobbying Congress, making concessions, and advocating for a debt ceiling reprieve is a full-court press, enlisting

398. Howell E. Jackson, *The 2011 Debt Ceiling Impasse Revisited*, in *IS U.S. GOVERNMENT DEBT DIFFERENT?* 55, 59-66 (Franklin Allen, Annal Gelpert, Charles Mooney & David Skeel eds., 2012).

399. See Kamin, *supra* note 29, at 50-53.

400. Compare Buchanan & Dorf, *supra* note 29, at 1175 (arguing that the President should issue bonds to fund obligations in event of an impasse), with Laurence H. Tribe, *Prioritizing Debt Obligations Is the Most Constitutional Plan*, *N.Y. TIMES* (Aug. 18, 2014, 12:04 PM), <https://www.nytimes.com/roomfordebate/2013/01/13/proposing-the-unprecedented-to-avoid-default/prioritizing-debt-obligations-is-the-most-constitutional-plan> [<https://perma.cc/S3DX-GM7V>] (stating that the President would have to halt funding), and Jay Carney, Press Sec'y, The White House, Press Briefing (Dec. 6, 2012, 11:58 AM EST), <https://obamawhitehouse.archives.gov/the-press-office/2012/12/06/press-briefing-press-secretary-jay-carney-12062012> [<https://perma.cc/K2R5-ZZWM>] ("[T]his [A]dministration does not believe that the [Fourteenth] Amendment gives the President the power to ignore the debt ceiling—period.").

401. Buchanan & Dorf, *supra* note 29, at 1205-11.

402. *Id.* at 1243.

403. The debt ceiling's impacts on the stock market would be felt most acutely by the wealthiest Americans. See Schwarcz, *supra* note 393, at 27-30 (stating that it "would likely result in stocks, bonds, and the dollar plummeting" (internal quotation marks omitted)).

everyone from the National Association of Real Estate Investment Trusts to the Corn Refiners Association.⁴⁰⁴

By contrast, Buchanan and Dorf's alternative approach would deepen the imbalance in the modern costs of power. They presumably would have the President issue bonds to pay for mandatory, permanently appropriated obligations. By contrast, all discretionary spending would have to halt.⁴⁰⁵ This would place the costs of the debt ceiling on the shoulders of those who rely on programs that are susceptible to annual appropriations and executive discretion. This would mirror and deepen the disparities in the costs of these tools described in Part II and convert the threat posed by the debt ceiling from a general one to a targeted one. The debt ceiling would become a threat felt most profoundly by marginalized groups, putting the responsibility to advocate for reprieve and make political concessions each time the debt ceiling approaches on already-squeezed groups who depend on annually funded spending programs.

That Buchanan and Dorf's approach would skew the debt ceiling's effects is not necessarily a fatal objection to that approach. Perhaps other considerations can justify this subordinating impact (and perhaps not). Fully evaluating the merits of their proposal, however, requires answering the subordination question.

B. Doctrinal Analysis

What about courts? Limitations on the judicial role circumscribe both courts' influence on the separation of powers and the extent to which courts consider separation-of-powers values at all in adjudicating the cases that come before them. Courts should nonetheless consider antisubordination as such a value when they do. Antisubordination's most influential role in the development of

404. See *Multi-Industry Coalition Letter Regarding the Continuing Resolution and Debt Limit*, U.S. CHAMBER COM. (Sept. 29, 2013, 8:00 PM), <https://www.uschamber.com/letter/multi-industry-coalition-letter-regarding-continuing-resolution-and-debt-limit> [https://perma.cc/6RE6-TXRM] (statement by 251 industrial organizations imploring Congress to raise the debt ceiling); see also *id.* ("The undersigned . . . urge [Congress] . . . to act expeditiously to raise the nation's debt limit.").

405. Professors Buchanan and Dorf address situations where "Congress has required" the President to spend. Neil H. Buchanan & Michael C. Dorf, *Nullifying the Debt Ceiling Threat Once and for All: Why the President Should Embrace the Least Unconstitutional Option*, 112 COLUM. L. REV. SIDEBAR 237, 245-48 (2012). Given the President's authority to defer and to seek rescission under the Impoundment Control Act (ICA), 88 Stat. 297 (1974) (codified as amended in scattered sections of 2 U.S.C.), it is not apparent how this "required" rationale could apply to spending that is not expressly made mandatory by statute. Expenditures for most programs could be delayed for weeks or months, depending on the timing of the debt-ceiling impasse, before the ICA's prohibition on rescissions forced obligation or expenditure.

doctrine may come as a counterbalance to historical gloss, which tends to entrench existing subordinating practices.

1. *Legal Basis for Consideration of Antisubordination*

Courts have an important role to play in steering the separation of powers. Courts' decisions shape the often-fuzzy guardrails within which political-branch actors and other participants in the thick political surround construct the separation of powers. Moreover, the values courts identify as constitutionally relevant inform the values that actors in the thick political surround choose to consider.

That said, however desirable it might be for courts to take on a vigorous role in bringing antisubordination into separation-of-powers doctrine, their willingness to do so will be constrained by institutional limitations in the judicial role.⁴⁰⁶ For example, under recent precedent, the Equal Protection Clause is not a promising route for bringing antisubordination into the separation of powers by attacking laws and norms with skewed impacts directly. Courts have moved away from such a version of equal protection, favoring an anticlassification conception.⁴⁰⁷

There nonetheless is a plausible and available legal argument that courts may consider antisubordination in resolving separation-of-powers disputes. Specifically, they may do so in three impactful spaces in which courts may already consider structural values: in the face of ambiguity,⁴⁰⁸ in choosing and weighing interpretive tools (such as historical gloss),⁴⁰⁹ and in cycling between formalist,

406. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1974) (“We do not sit as a committee of review, nor are we vested with the power of veto.”).

407. Siegel, *supra* note 314, at 1532-46. David A. Super’s proposed temporal equal protection would apply antisubordination concepts to some separation-of-powers questions while requiring a less fundamental doctrinal shift, but courts have also not yet adopted that approach. See Super, *supra* note 368, at 63-64 (“[W]e are unlikely to achieve meaningful equality without taking temporal equal protection seriously and . . . doing so would not seriously burden representative democracy.”).

408. Even courts approaching separation-of-powers questions as questions of “ordinary interpretation” as endorsed by John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1949-50 (2011), will often encounter ambiguity—that is, interpretive questions that lack clear textual answers. As Edward H. Stiglitz points out, regardless of whether they should, “[a]bstract constitutional values often motivate separation-of-powers doctrine.” Edward H. Stiglitz, *Constitutional Folk Theories as a Guide to Constitutional Values? The Case of the Legislative Veto*, 48 J. LEGAL STUD. 45, 45 (2019).

409. Courts have no choice but to refer to underlying values in deciding which nontextual interpretive tools to employ and what weight to give those tools.

functionalist, and other doctrinal approaches from case to case and issue to issue.⁴¹⁰ Courts may consider antisubordination in these doctrinal spaces for the same two reasons described in Section III.B. First, like other structural values that courts already consider, antisubordination has its own constitutional and historical bona fides. Second, courts may also consider antisubordination in these doctrinal spaces because antisubordination can be a means to the ends of already-established values, such as liberty and accountability.

2. *Competence Objection Is Unpersuasive*

A skeptic might object that courts lack institutional competence to identify or weigh the subordinating tendencies of separation-of-powers tools. To be sure, courts do have a limited ability to predict and trace patterns of real-world harms associated with particular tools or choices. But this is a contingent objection, not a universal one. It is a reason not to consider antisubordination in particular cases where the implications of doing so are impossible to assess—not a reason to reject inquiries about “who pays?” or, where the question has a clear answer, to consider it.

Moreover, this objection proves too much. Assessing the impact of structural choices on underlying values is often difficult, whether the underlying value in question is liberty, accountability, or antisubordination. Thus, Edward H. Stiglitz observes limitations in courts’ competence to predict and trace impacts of separation-of-powers tools on accountability, liberty, and antityranny,⁴¹¹ Blake Emerson problematizes courts’ attempts to predict how separation-of-powers tools impact liberty,⁴¹² and Professor Huq complicates any effort to predict how separation-of-powers choices impact libertarian values.⁴¹³ The objec-

410. Aziz Z. Huq and Jon D. Michaels note that the choice between “formalist” (rule-like) and “functionalist” (standard-like) conceptions of separation-of-powers doctrine as to a particular question does not carry precedential effect in subsequent cases implicating different questions. Huq & Michaels, *supra* note 8, at 388 (“Horizontal coherence across the jurisprudence is not generally considered a prerequisite of the rule of law.”). Courts can and do “cycle” between these overarching doctrinal approaches from case to case. *Id.* Again, structural values are a natural source of guidance to courts in deciding which approach (formalism or functionalism, rule or standard) to employ in a given case. *Id.*

411. Stiglitz, *supra* note 408, at 48 (“[T]inkering with institutions to promote functionalist values is often a fraught business . . .”); *see also id.* at 46 (“Often, courts work off incomplete folk theories of institutions that provide poor or even misdirected guidance.”); POSNER & VERMUELE, *supra* note 35, at 176-204 (questioning the empirical support for concerns about the risk of tyranny).

412. Emerson, *supra* note 365 (manuscript at 6-7).

413. Aziz Z. Huq, *Libertarian Separation of Powers*, 8 N.Y.U. J.L. & LIBERTY 1006, 1010-13 (2014).

tion based on competence, then, is an objection to courts considering any structural values in separation-of-powers cases at all, not to the inclusion of antisubordination when courts do consider structural values.

Finally, the competence objection wrongly assumes that judicial consideration of antisubordination in resolving separation-of-powers cases is useful only insofar as it helps courts correctly decide which arrangements to invalidate or uphold. That is not the case, however. A major benefit of judicial consideration of antisubordination would come through the upstream, ex-ante impacts of such consideration on the choices of the executive- and legislative-branch actors whose behavior shapes the day-to-day functioning of government. Administrative constitutionalism and judicial constitutionalism are not separate spheres.⁴¹⁴ They interact in a constant dialogue through which political-branch actors incorporate and build on the guidance given by judges in their opinions who, in turn, look to political practice when developing doctrine.⁴¹⁵ Judicial consideration of antisubordination could prove influential in precisely this way. If just a few judges explicitly invoked this consideration in a few separation-of-powers cases, even if in dissents or concurrences and even when its valence was not certain, then political-branch actors would have added reason to take this value into account. In short, if some judges ask “who pays?” then that may well prompt many agency lawyers and congressional staffers to do so as well.

3. *Antisubordination in Clinton, King, and Chadha*

An antisubordinating separation-of-powers doctrine may conceptualize and resolve cases differently, but determining where and how will take work. The development in Part II of subordination concerns surrounding appropriations, executive conditions, and nonentrenchment sets the stage for understanding disputes related to these tools through an antisubordination lens. In light of those concerns, two past Supreme Court cases that might be reunderstood as consistent with and indeed furthering antisubordination goals are *Clinton v. New York*⁴¹⁶ and *King v. Burwell*.⁴¹⁷ A third that might be reunderstood as undermining antisubordination goals – at least as it was written – is *INS v. Chadha*.⁴¹⁸ To

⁴¹⁴. Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 B.Y.U. L. REV. 147, 177-80 (2021).

⁴¹⁵. *Id.* Professors Huq and Michaels make a similar observation in defending cycling between rules and standards in separation-of-powers jurisprudence. They note that judges push “regulated entities to engage in normatively oriented deliberation” by articulating values they will consider in their opinions. Huq & Michaels, *supra* note 8, at 420.

⁴¹⁶. 524 U.S. 417 (1998).

⁴¹⁷. 576 U.S. 473 (2015).

⁴¹⁸. 462 U.S. 919 (1983).

be clear, none of these cases was explicitly resolved on antisubordination grounds. Considering how antisubordination either justifies or problematizes these past cases can illustrate its potential relevance in future cases, however, and offer new ways to understand and expound them going forward.

Antisubordination offers a new, limited justification for *Clinton v. New York*, which invalidated the line-item veto of spending legislation.⁴¹⁹ The line-item veto is a separation-of-powers tool through which the Executive may block individual provisions of a legislative enactment from becoming law, rather than having to sign or veto the entire bill.⁴²⁰ Many states give their governors some form of line-item veto authority.⁴²¹ At the federal level, the Supreme Court invalidated a law creating a legislative veto as unconstitutional. Specifically, after decades of pressure from the executive branch, Congress enacted the Line Item Veto Act of 1996.⁴²² Yet two years later, in 1998, the Supreme Court held that the mechanism violated the constitutional requirements of bicameralism and presentment in *Clinton v. New York*.⁴²³

Justice Scalia pushed on the majority in *Clinton v. New York* for singling out the Line Item Veto Act because, in the modern administrative state, the legislature has delegated broad authorities over the operation and implementation of federal legislation to the executive branch.⁴²⁴ The executive branch often has discretion to refuse to promulgate regulations necessary to make a legal requirement mandatory and routinely treats provisions of law as ineffective because it judges them to be unconstitutional (and declares as much in presidential signing statements).⁴²⁵ It even makes binding changes to federal law through agency actions that receive *Chevron* deference.⁴²⁶ How is the authority that the Line Item Veto Act gave the President to block particular provisions of a legislative enactment functionally different from these other routes?

One way to understand *Clinton* is as a case of pure formalism. But that presents the unsatisfying question of why the Court went with a formalist approach in *Clinton* but has declined to do so in other cases touching on executive influence

419. *Clinton*, 524 U.S. at 436-47.

420. *Id.* at 436-39.

421. See *Separation of Powers: Executive Veto Powers*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-executive-veto-powers.aspx> [<https://perma.cc/Z25B-3PHY>].

422. Line Item Veto Act of 1996, Pub. L. No. 104-130, § 1021, 110 Stat. 1200, 1200-01, *invalidated by Clinton v. New York*, 524 U.S. 417 (1998).

423. *Clinton*, 524 U.S. at 436-47.

424. *Id.* at 464-66 (Scalia, J., concurring in part and dissenting in part).

425. Price, *supra* note 14 *passim*.

426. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

over federal law. An antisubordination perspective provides a fuller justification. As created in the Line Item Veto Act, the mechanism was a deeply skewed separation-of-powers tool because it empowered the President only as to the temporarily funded spending programs provided for in annual appropriations statutes.

The Line Item Veto Act did not give the President authority to nullify provisions of already-enacted legislation or newly enacted legislation across the board. Instead, it was an explicitly and intentionally skewed provision. It empowered the President to nullify (1) new spending provisions, including annual appropriations provisions, and (2) new tax expenditures.⁴²⁷ Indeed, the law made the President's nullification authority contingent on her conclusion that, among other things, the cancellation would "reduce the federal budget deficit."⁴²⁸ The tool was thus designed to empower the President—and, arguably, benefit the nation's taxpayers—at the expense of those dependent on spending programs. That is why the plaintiffs in *Clinton* were a city, health-care providers, a union, and a farmers' cooperative.⁴²⁹ Moreover, the tool gave the Executive a new, targeted source of leverage over such beneficiaries. Under the line-item veto, the Executive would have even greater influence over Native peoples, for example, through the threat of nullifying legislative victories won in Congress. The veto would thus function as a stronger, more durable, and more discretionary version of the apportionment power which the President uses as a source of leverage today.⁴³⁰

Another confusing case for which antisubordination offers a new justification is *King v. Burwell*,⁴³¹ which applied the "major questions" exception to *Chevron* to refuse deference to the Department of Health and Human Services' interpretation of the ACA's premium tax-credit-subsidy amounts.⁴³² The key statutory question in the case pertained to the availability of billions of dollars in federal subsidies to help eligible enrollees pay their insurance premiums in dozens of states. Although the government sought *Chevron* deference, the Supreme Court refused it in an opinion by Chief Justice Roberts citing the "deep 'economic and political significance'" of the interpretive question.⁴³³

427. Line Item Veto Act of 1996 § 1021.

428. *Id.*

429. *Clinton*, 524 U.S. at 422-28.

430. See *supra* Section II.B; see also *Clinton*, 524 U.S. at 444 ("In contrast, whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment.").

431. 576 U.S. 473 (2015).

432. For a more detailed discussion of this case, see Lawrence, *supra* note 14, at 1104-06.

433. 576 U.S. at 485 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Scholars have puzzled over *King*'s basis for applying this "major questions" exception to the ACA-subsidy question⁴³⁴ – and thus its applicability to other cases. Antisubordination provides a coherent basis. Deferring to the executive branch's interpretation of the ACA in *King* would have given the Executive discretion to turn "on" or "off" the flow of billions in subsidies from a permanent, indefinite appropriation to millions of low-income and middle-class enrollees. It would thereby have given the Executive tremendous financial power over them, their states, and their insurers – power that could be leveraged in the problematic ways described in Section II.B.

Chief Justice Roberts's reluctance in *King* to give the executive branch leverage over ACA enrollees proved prophetic a few years later when President Trump publicly threatened to use what power he did have over ACA subsidies in his push to enact health-reform legislation.⁴³⁵ That threat ultimately did not prove consequential, but things may have been very different if the Supreme Court had left the availability of the ACA's premium subsidies themselves to the executive branch by deferring in *King*. Understanding *King* in this way, as an antisubordination case, suggests that its "major questions" exception to *Chevron* deference should reach only other interpretive questions as to which deference would grant the Executive significant leverage over vulnerable groups.⁴³⁶

Finally, antisubordination offers a reason for concern about the breadth of *INS v. Chadha*, which invalidated the legislative veto.⁴³⁷ The modern-day reliance on appropriations as a tool of congressional influence over the administrative state is in part a result of the Supreme Court's invalidation of an alternative means of influence that was Congress's first choice in the twentieth century to control the new supercharged administrative state: the legislative veto. In *INS v. Chadha*, the Supreme Court invalidated a statutory provision empowering one branch of Congress effectively to "veto" the Attorney General's decision not to

434. See, e.g., Christopher J. Walker, *What King v. Burwell Means for Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (2015), <https://www.yalejreg.com/nc/what-king-v-burwell-means-for-administrative-law-by-chris-walker> [<https://perma.cc/GZA7-B6H8>] ("To be sure, the major questions doctrine . . . has been around for a while. But its application here seems strained and less obvious.").

435. Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2017, 9:27 AM PT), <https://twitter.com/realDonaldTrump/status/891334415347060736> [<https://perma.cc/Q9BM-VL37>] ("If a new HealthCare Bill is not approved quickly, BAILOUTS for Insurance Companies . . . will end very soon!").

436. This may mean it should reach only questions on which the very availability of a permanently funded statutory entitlement depends. See Lawrence, *supra* note 14, at 1105-06. For an argument that the availability of the Judgment Fund for Medicare's \$5.3 trillion dollar shortfall is such a determination, see Matthew B. Lawrence, *Medicare "Bankruptcy,"* 63 B.C. L. REV. (forthcoming 2022) (manuscript at 22-27) (on file with author).

437. 462 U.S. 919 (1983).

deport a particular undocumented resident.⁴³⁸ Unfortunately, from an antisubordination standpoint, this ruling has been read broadly to prohibit the “legislative veto” in any form.⁴³⁹ This has forced Congress to rely to a greater extent on the appropriations process as a tool of influence, with the problematic consequences described previously in Section II.A.⁴⁴⁰ In litigating *INS v. Chadha*, the House of Representatives attempted unsuccessfully to persuade the Court to adopt a sort of balancing test that would invalidate only some legislative vetoes.⁴⁴¹ From an antisubordination perspective, and given the benefit of hindsight, it would be better if the Court had done so.

4. *Antisubordination Versus Historical Gloss*

Because antisubordination operates in synergy with many other separation-of-powers values, it may prove most doctrinally influential as a counterweight to an interpretive tool with which it is in tension: historical gloss.⁴⁴² By problematizing current arrangements, the subordination question motivates a creative search for novel replacements, which puts it in conflict with historical gloss’s effort to entrench current arrangements. This significantly qualifies Curtis A. Bradley and Trevor W. Morrison’s conclusion that “oppression of minorities or other disadvantaged groups” is not a significant argument against reliance on historical gloss in resolving separation-of-powers cases.⁴⁴³ The examples of legislative standing and the Two-Year Clause illustrate this point.

438. *Id.* at 959.

439. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 150 & n.43 (3d ed. 2000) (“[T]he Court has indicated its willingness to read *Chadha* broadly . . .”); *id.* at 146-50 (discussing the uncertainty in the bases and the breadth of the *Chadha* ruling).

440. See Louis Fisher, *The Claim of Judicial Finality: Theory Undercut by Experience*, 16 U.N.H. L. REV. 305, 349-50 (2018) (describing a shift to threatening appropriations as a tool of influence after the Supreme Court invalidated the legislative veto); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789, 813 n.95 (“[I]t seems likely that Congress will learn to substitute appropriations controls for the legislative veto . . .”).

441. U.S. House of Representatives Reply Brief at 5-10, *Chadha*, 462 U.S. 919 (No. 80-1832) (arguing that “Chadha’s case obviously entails no ‘legislative involvement in rulemaking’” and that the Court should review it as executive power over an individual deportation decision analogous to the Supreme Court’s certiorari authority (quoting *Buckley v. Valeo*, 424 U.S. 1, 140 n.176 (1976))).

442. Bradley & Morrison, *supra* note 9, at 417-24.

443. *Id.* at 416.

a. *Categories of Legislative Standing*

In the summer of 2020, a panel of the D.C. Circuit joined two district court judges in holding that the House of Representatives had standing to challenge certain expenditures alleged to have been made by the Executive without an appropriation, thereby protecting the power of the purse.⁴⁴⁴ This budding line of caselaw has inspired a growing body of legal scholarship that recognizes its potential to transform the role of courts and Congress in the administrative state.⁴⁴⁵

Courts recognizing Congress's interest in the power it currently creates through temporary appropriations could define the doctrinal category of legislative standing in two ways: (1) as permitting Congress to enforce *appropriations* in court (which would lock in the current, problematic focus on threats to spending programs to empower Congress); or (2) as permitting Congress to enforce *temporary legislation* in court (which would leave open to future Congresses the development of threats to nonspending programs as a means of empowerment).⁴⁴⁶

Some commentary on this issue has assumed that such legislative standing would be available only for spending in violation of the Appropriations Clause.⁴⁴⁷ Judicial opinions, for their part, thus far have utilized language suggesting judges were also thinking of "appropriations" as the relevant category, declining to articulate more flexible doctrinal categories.⁴⁴⁸ Historical gloss was

444. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 8-15 (D.C. Cir. 2020).

445. See, e.g., Matthew I. Hall, *Making Sense of Legislative Standing*, 90 S. CAL. L. REV. 1, 23-36 (2016); Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 663 (2019) ("Institutions have no greater interest in their constitutional powers and duties than any other member of society."); Bradford C. Mank, *Does a House of Congress Have Standing over Appropriations?: The House of Representatives Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141, 144 (2016) (endorsing standing to challenge spending without appropriations); McKaye Neumeister, Note, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L.J. 2512, 2571 (2018) (same); Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339, 343-45 (2015) (suggesting that congressional standing depends on the magnitude of the threatened permanent reduction in legislative bargaining power associated with the particular alleged executive activity).

446. Alternatively, courts could adopt a functional definition, such as the focus on diminution in institutional bargaining power developed by Nash, *supra* note 445, at 378-86.

447. E.g., Neumeister, *supra* note 445, at 2515-17.

448. See *Mnuchin*, 976 F.3d at 14 (basing injury in "[t]he Constitution's structure and the Appropriations Clause," not in the congressional practice of enacting temporary legislation); U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 76 (D.D.C. 2015) (finding legislative standing under a "Non-Appropriation Theory").

crucial in the D.C. Circuit’s opinion framing standing in this way.⁴⁴⁹ The Court examined historical materials in depth in developing and defining the unicameral congressional interest in “appropriations.”⁴⁵⁰

Defining the relevant category for legislative standing as “appropriations,” consistent with their historical use, would encourage Congress to maintain its modern, problematic emphasis on temporary spending legislation as a tool for empowering itself.⁴⁵¹ It would give Congress the ability to enforce temporary legislation as to spending programs, but not other forms of time-triggered legislation. Historical gloss, and the category defined based on it, would stand in the way of future enforcement of a congressional effort to replace the power it derives from time-limited appropriations with alternative time-triggered legislation, such as a springing tax or time-limited tax expenditure.

The category-definition question for legislative standing is a crucial one which may determine the viability of redistributing the costs of power within the United States federal system in the years to come. With legislative standing limited to “appropriations” rather than extending to all “temporary legislation,” it is not clear how tools for empowering Congress built into the tax code, for example, could be enforced against a reluctant Executive because no civilian would have standing to challenge the Executive’s failure to collect third parties’ taxes.⁴⁵² Considering the implications of constitutional doctrine for separation-of-powers tools’ tendency to propagate or combat subordination thus counsels toward either refusing legislative standing for appropriations, so as not to favor the tool, or recognizing legislative standing for a more flexible category of cases, which could include time-triggered legislation of all stripes.

b. The Two-Year Clause

An underdeveloped constitutional clause that could provide a relatively egalitarian means to increase Congress’s role in foreign affairs offers another example of the conflict between historical gloss and antsubordination. Article I, section 8, clause 12 of the Constitution provides that “The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that

449. See *Mnuchin*, 976 F.3d at 9 (“While custom cannot create an interest sufficient to establish standing, it can illustrate the interest of the House in its ability, as discussed above, to limit spending beyond the shared ability of the Congress as a whole.”).

450. *Id.*

451. Here we see another example of the importance of categories described by Lee Anne Fennell. See LEE ANNE FENNELL, *SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE* 2 (2019) (“[I]ndivisibility and fragmentation generate . . . a wide range of legal and social problems.”).

452. See *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (limiting taxpayer standing).

Use shall be for a longer Term than two years.”⁴⁵³ This Two-Year Clause is all but forgotten in constitutional law.⁴⁵⁴ Unlike other constitutional provisions, which are the focus of scores of articles, the Two-Year Clause is discussed in only a handful.⁴⁵⁵

Two extratextual legal opinions from the Office of Legal Counsel (OLC) rendered the Two-Year Clause effectively a dead letter in the first half of the twentieth century.⁴⁵⁶ The strained legal arguments in these opinions have never been questioned in published legal scholarship,⁴⁵⁷ even though no court has ever addressed the Clause’s meaning. As a result, the armed forces regularly enter commitments and receive appropriations that exceed two years, limiting Congress’s influence.⁴⁵⁸

From an antisubordination perspective, a reinvigorated Two-Year Clause would be a promising alternative to today’s skewed means of empowering Congress. If read as written – as a binding constitutional prohibition – it forces both the House and the Senate to retain power over the Executive through periodic threats to funding for the armed services, even if Congress attempts to give away this power. The widespread harms from a partial loss of funding for the military would be visited on the nation as a whole, especially as contractors upped bids

453. U.S. CONST. art. I, § 8, cl. 12.

454. Lucas Issacharoff & Samuel Issacharoff, *Constitutional Implications of the Cost of War*, 83 U. CHI. L. REV. 169, 185 (2016) (“Most legal scholarship about the war powers has paid insufficient attention to the role of Article I, § 8 in imposing a two-year limitation on the military budget cycle.”).

455. The only sustained discussion is by Lucas Issacharoff and Samuel Issacharoff. See *id.* For brief discussions, see JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 154 (2005); Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1390 (1994) (book review); Edward F. Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L.J. 539, 555 (1974); and Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1821-25 (2006).

456. Based on an *expressio unius* inference and without citation to Founding Era sources, these opinions interpret “support” strictly, so as to exclude “equipping” the army by purchasing guns or supplies, among other functions. See 25 Op. Att’y Gen. 105, 106-07 (1904) (adopting a limiting interpretation of the Two-Year Clause as inapplicable to so-called “no-year” funding); 40 Op. Att’y Gen. 555, 555-56 (1948).

457. The interpretations are questioned in an unpublished manuscript. See Xiping Zhu, *The Armies and Navy Clauses: An Analysis of Two ‘Forgotten’ Clauses and Their Implications for Defense Appropriations* (May 29, 2011) (unpublished manuscript), <https://ssrn.com/abstract=1853775> [https://perma.cc/5HM6-XCAP].

458. *E.g.*, Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3418 (2009) (providing three-year appropriations for ammunition procurement).

to guard against cutoffs, and the threat of such a lapse would primarily give Congress leverage over the Executive.⁴⁵⁹

The possibility of reviving the Two-Year Clause as a means of bolstering congressional influence therefore deserves further consideration, as it has the potential to advance the larger project of replacing problematic tools of congressional influence with balanced ones. Such an effort to revive the Clause would be an uphill battle, however, if courts were to rely on historical gloss in interpreting the provision. The decades of acquiescence by the legislative branch in OLC's limiting interpretations of the Clause would support a historical-gloss argument in favor of that interpretation, potentially foreclosing a more literal interpretation of the Clause.

C. *Agenda*

Stepping back, the discussion so far has focused on the specifics of institutional and doctrinal analysis of particular separation-of-powers questions. Updating such analysis to consider antisubordination will tend to limit future changes that exacerbate subordination and facilitate future changes that counter it. But the exploration of the “who pays?” question in Part II did not show merely that separation-of-powers tools might, hypothetically, entail subordination. It concluded that important, modern tools actually do so.

Although essential, more inclusive analysis alone will do little to address that problematic preexisting status quo. The fact that key modern separation-of-powers tools entail subordination—along with the possibility that other tools may, as well—is a serious problem. Recognition of this problem necessitates attention not just to the ultimate question of the mechanics of any particular institutional or doctrinal analysis but also to the determinative, upstream question of agenda setting. To what topics should separation-of-powers theory focus its attention?

1. *Creativity and Compromise*

Antisubordination requires an agenda that values creativity. Much legal scholarship on the separation of powers is passive in the sense that it discovers

459. Service members would be insulated insofar as they are statutorily treated as excepted employees who may continue to work during a shutdown. See Alex Ward, *Trump Is Wrong. A Government Shutdown Won't Devastate the U.S. Military.*, VOX (Jan. 18, 2018, 3:10 PM EST), <https://www.vox.com/world/2018/1/18/16905640/government-shutdown-military-trump> [<https://perma.cc/SEZ2-Q89G>] (explaining how contractors would be most severely impacted).

or evaluates arrangements developed by the political branches rather than seeking to develop or refine innovative arrangements itself. It is also regressive in the sense that it seeks a return to arrangements understood to have existed in the past. This is a marked difference in agenda from other fields, like health law, whose bread and butter is the development of new ideas for reform.⁴⁶⁰ That said, there are important exceptions to this passivity. A growing line of separation-of-powers scholarship focused on empowering Congress has devoted its attention to crafting new potential arrangements that do so.⁴⁶¹ Such creativity will be needed to address subordination, but it must be directed toward promoting equity rather than toward enhancing congressional or executive power.

This raises a second key focus of an antisubordination agenda for the separation of powers: compromise. Competition between, or within, Congress and the Executive is the key battle within the separation of powers. Some scholars take sides in the competition, endorsing and strategizing executive power⁴⁶² or legislative power.⁴⁶³ Others observe and support the competition for its own sake, endorsing limited interventions to ensure that the sides remain competitive or encouraging internal power struggles within agencies to mirror and replicate the broader fight between Congress and the Executive.⁴⁶⁴

As a separation-of-powers value, antisubordination is neither “pro-Congress” nor “pro-Executive” but, instead, “pro-equity.” It is a third way. The search for arrangements to modify or replace problematic current tools to make them less unfair is likely to be most successful if those involved pay careful attention to the impacts of proposed reforms on the relative power of the branches. The best hope for achieving a less subordinating separation of powers may lie in the possibility of compromise between the executive and legislative branches on fairer (or less unfair) alternatives to current tools such as appropriations, executive conditions, and legislative nonentrenchment. Executive-branch actors will tend to favor executive-branch interests, even if persuaded to consider antisubordination, too. The same is true of legislative-branch actors. If it is to succeed, antisubordination requires an agenda that directs creativity toward the development of compromise approaches – alternative tools, ways of regulating tools, or

460. E.g., Allison K. Hoffman, Howell E. Jackson & Amy Monahan, *A Public Option for Employer Health Plans* 21-41 (U. Pa. Pub. L. & Legal Theory Rsch. Paper No. 21-12, 2021), <https://ssrn.com/abstract=3787675> [<https://perma.cc/JE8V-L6R2>]; Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 201-19 (2010).

461. See CHAFETZ, *supra* note 4 *passim*; Adler & Walker, *supra* note 154, at 1974-93; Kysar, *supra* note 153, at 818-31; Kevin M. Stack & Michael P. Vandenberg, *Oversight Riders*, 97 NOTRE DAME L. REV. (forthcoming 2021) (on file with author).

462. E.g., POSNER & VERMEULE, *supra* note 35, at 3-17.

463. E.g., CHAFETZ, *supra* note 4, at 1-6.

464. E.g., Michaels, *supra* note 6, at 555.

exchanges that preserve each branch's relative power while avoiding problematic subordinating side effects. At this level of granularity, and with an overarching goal that diverse actors across the branches might agree upon, new arrangements and compromises might become possible.⁴⁶⁵

2. *The STOP SUBORDINATION Act*

One place where this Article has shown that creativity and compromise are needed is in the use of appropriations and the threat of shutdown to empower Congress. There is disagreement in legal scholarship about whether Congress should enact legislation to prevent shutdowns, such as the STOP STUPIDITY Act, which automatically funds annually appropriated programs, like IHS, in the event of an impasse.⁴⁶⁶ On one side, David Scott Louk and David Gamage favor such reforms to avoid the real-world harms shutdowns cause.⁴⁶⁷ On the other side, other scholars, including myself, have argued that such reforms would deprive Congress of an important source of power.⁴⁶⁸

In light of appropriations' role in propagating and facilitating subordination, existing defenses of shutdowns based on their role in the separation of powers are incomplete. It is true that automatically funding annually appropriated programs in the event of a lapse would diminish congressional power. But even defenders who believe the goal of furthering other institutional values can justify subordination must show more to justify subordinating Native peoples, SNAP beneficiaries, and other groups who are predictably harmed by refusing automatic funding. They must explore other means of empowering Congress without imposing such harms and eliminate the possibility that there could be more

465. An antistubordinating separation of powers does not necessarily seek either a stronger Congress, a stronger President, or a stronger judiciary. The subordination question is focused at the microlevel of individual tools and practices, not at the macrolevel of the overall balance of power.

466. Stop the Shutdowns Transferring Unnecessary Pain and Inflicting Damage in the Coming Years Act, S. 198, 116th Cong. (2019). This law would automatically fund programs at prior-year levels in the event that Congress failed to enact annual appropriations.

467. David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 255-57 (2015).

468. At a hearing on Congress's power of the purse before the House Budget Committee, Philip G. Joyce, Josh Chafetz, and Eloise Pasachoff replied to a question from Representative Brendan Boyle by explaining that his bill automatically funding the government in the event of a shutdown was problematic because it would diminish congressional power. *Protecting Congress's Power of the Purse and the Rule of Law*, *supra* note 4, at 11-22, 75-84, 97-109 (statement of Philip G. Joyce, Josh Chafetz & Eloise Pasachoff); *see also* Lawrence, *supra* note 4, at 65 (explaining that addressing disappropriation could inadvertently decrease legislative power).

equitable alternatives that would protect marginalized populations from subordination while generating comparable influence for Congress.

Doing so reveals novel possibilities. Rather than fund the entire government automatically in the event of a shutdown, Congress could specifically insulate programs targeted at marginalized communities, like IHS, SNAP, and other “appropriated entitlements.”⁴⁶⁹ Such a STOP SUBORDINATION Act could be politically viable despite fiscal-austerity concerns because a law providing permanent appropriations for existing entitlements should not “score” in the budget process.⁴⁷⁰

At the same time, Congress could counteract the diminution in its power from funding these programs by making shutdowns trigger not only a halt in the remaining annually appropriated federal spending but also an increase in federal taxes. If the disruption of shutdowns was experienced not only by those who the market leaves behind but also by those who are served by the market and rely on market entitlements, this source of power would be more egalitarian. Moreover, a broader distribution of harms could reduce the likelihood that shutdowns actually materialize by expanding the base of voters invested in preventing them.

Specifically, a STOP SUBORDINATION Act could create a “shutdown tax” that the Secretary of the Treasury would impose and require employers to add to Americans’ paychecks, alongside the payroll tax, in the event of a shutdown. Making this tax separate would increase its salience, predictably increasing Americans’ attention and reaction to a shutdown.⁴⁷¹ Such an Act should also require a moratorium on corporate tax expenditures in the event of a shutdown.⁴⁷² This would lessen the extent to which the immediate, visible financial hit of a funding lapse is targeted at marginalized groups.

Regarding the amount and nature of the shutdown tax, it is worth further considering the possibility of setting the rate high enough to truly level the “cost” of a shutdown across sectors and populations. For immediate purposes, a simplified approach could require the Treasury to estimate the likely cost of unfunded obligations to be incurred per month during a shutdown and set the

469. See *supra* notes 150–157 and accompanying text.

470. See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 167–70 (3d ed. 2008).

471. Schenck, *supra* note 168, at 264–70 (describing evidence that saliency influences behavioral responses to policy).

472. On the significance and nature of corporate tax expenditures, see U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-339, *CORPORATE TAX EXPENDITURES: INFORMATION ON ESTIMATED REVENUE LOSSES AND RELATED FEDERAL SPENDING PROGRAMS* 10 (2013), which estimates annual corporate tax expenditures over \$180 billion.

amount of the shutdown tax at a rate expected to cover those obligations.⁴⁷³ Imposing a shutdown tax set at the rate necessary to cover expected obligations would not increase the net harms of shutdowns. It would only change who bears them, and when.⁴⁷⁴

3. Unanswered Questions

This Article has evaluated or proposed specific arrangements in order to illustrate the interaction between subordination and the separation of powers, not conclusively to map that interaction. Further study of this interaction might begin with three categories of questions raised but not answered in this Article. First, further study could research impacts of the tools discussed here to either confirm, clarify, supplement, or contradict the problematic patterns mapped in Part II.⁴⁷⁵

Second, further study could explore whether harms associated with separation-of-powers tools, concepts, or approaches not discussed here are also problematically, or even desirably, skewed and assess the extent to which the separation of powers impacts subordination and inequity on a macro level. This Article's examples indicate that, while often neglected in legal scholarship,⁴⁷⁶ laws connected to spending or resource allocation are a particularly potent source of institutional authority and skewed harms. Given the close connection between

473. See Lawrence, *supra* note 4, at 43-44 (describing the Anti-Deficiency Act exceptions permitting the Executive to incur debt (obligations) despite a lack of funding).

474. Often it takes years for courts to determine whether an obligation was actually incurred and, if it was, order payment from the "Judgment Fund" appropriation, which can create a surprising (and, from a budgeting perspective, problematic) impact on federal expenditures. See *id.* at 72-74.

475. It is notoriously difficult to tell whether and to what extent particular federal programs improve outcomes in the real world. See Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. 1933, 1952-66 (2017) (describing this challenge). Assessing the impact of laws and norms that allocate influence over such programs on downstream outcomes is still more difficult. In a perfect world, we would have randomized-controlled trials comparing results among programs subject to different separation-of-powers tools. Only one such study has been conducted, modeling contract bids in an annually funded program compared with analogous contract bids with a more stable funding stream. That study found that the risk of lapse came with significant cost. Yang, *supra* note 151, at 173-74. Additional research along these lines would be valuable. In an imperfect world with imperfect knowledge, Part II analyzed existing evidence, supplemented by theory, to form impressions about the effects of the separation-of-powers tools it analyzed. See also *supra* notes 85-86 and accompanying text (discussing methodology).

476. See Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CALIF. L. REV. 1531, 1536 (2020) ("We have concentrated too much attention on constitutional doctrine and not enough on money.").

economic power and subordination, this should not be surprising.⁴⁷⁷ Other tools in this domain that are ripe for future study include reconciliation procedures for bypassing the filibuster (as well as the filibuster itself),⁴⁷⁸ the President's broad discretion to threaten or impose tariffs under the International Emergency Economic Powers Act (not to mention presidential emergency authorities more generally),⁴⁷⁹ and the occasional prohibition on congressional earmarks.⁴⁸⁰

Beyond resource allocation, specific tools that would be particularly fruitful subjects for future study are those that entail tradeoffs which include potentially targeted effects, such as limitations on statutory removal protections for administrative law judges.⁴⁸¹ The list developed by Jonathan S. Gould and David E. Pozen of structural constitutional features with biased impacts on the contemporary political parties is an excellent resource in this project.⁴⁸² Similarly, the structural mechanisms that empower Native nations described by Maggie Blackhawk—federalism, Federal Indian law, unions, and petitioning—are a useful starting point in searching for structural tools that tend to benefit, rather than burden, marginalized groups.⁴⁸³

Even more broadly, the subordination question might be used to problematize or justify broader themes connected to the separation of powers, such as the

477. See sources collected *supra* note 27.

478. See Lauren Fox, Ryan Nobles, Manu Raju & Phil Mattingly, *Senate Parliamentarian Rules Against Including Minimum Wage in Covid Relief Bill*, CNN (Feb. 25, 2021, 9:50 PM EST), <https://www.cnn.com/2021/02/25/politics/minimum-wage-covid-relief-senate-parliamentarian/index.html> [<https://perma.cc/QR8V-HHTR>] (describing how the Byrd rule blocked reform to the minimum wage through reconciliation, but permitted the 2017 Tax Cuts and Jobs Act); Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROBS. 99, 106-07 (2018) (describing the influence of the Senate Parliamentarian's interpretation of reconciliation rules on legislation in recent years); David Super, *Keep the Filibuster. It Could Save Progressive Legislation in the Future.*, WASH. POST (June 22, 2021, 6:00 AM EST), <https://www.washingtonpost.com/outlook/2021/06/22/filibuster-reform-republican-extremism-hr1> [<https://perma.cc/9CHL-DSCCK>] (“[T]he filibuster is more important than ever to protect hard-won legislative gains of the civil rights, environmental and consumer revolutions.”).

479. See Swanson, *supra* note 254.

480. See Melanie Zanona, *House GOP Opens Fraught Internal Debate over Earmarks*, POLITICO (Feb. 24, 2021, 6:13 PM EST), <https://www.politico.com/news/2021/02/24/house-freedom-caucus-opposes-earmarks-471344> [<https://perma.cc/SEJ4-3R3D>] (citing legislators noting the tradeoff entailed in permitting earmarks, which reduces executive power but increases the role of politics in resource-allocation decisions).

481. Removing such protections can entail sacrificing independent decision-making and efficiency, on the one hand, for accountability, on the other. See Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1697-99 (2020) (discussing the developing doctrine on removal protections).

482. See Gould & Pozen, *supra* note 8 (manuscript at 24-46).

483. Blackhawk, *supra* note 101, at 1864-65.

statutory separation of powers⁴⁸⁴ and administrative constitutionalism.⁴⁸⁵ It is both an impediment to and an inherent benefit of this work that, while often theoretical, it requires close attention to details about the actual workings of government. Finally, more broadly still, as such study progresses it may become possible to move beyond individual tools and themes to assess, at the macro level, the extent to which laws and norms allocating power between and within the branches contribute to inequity and subordination across society in light of their net negative and positive impacts.⁴⁸⁶

Third, in pursuing the agenda of creativity and compromise mapped above, further study is needed to explore changes to combat subordination, including how tools that serve salutary purposes can be modified or substituted to maintain those purposes without disproportionately burdening marginalized groups. In doing so, the patterns developed here – of harms dependent on income, wealth, courts, derivative dependence, and political power, as well as harms targeted at communities⁴⁸⁷ – would be promising starting points for inquiry.

All of these avenues for study prompt a final question. Who should do this work? Everyone involved in constructing the separation of powers has a role to play. Although courts and litigation offer a secondary vehicle for incorporating antisubordination in the separation of powers, responsibility lies first and foremost with the thick political surround. Congressional committees might hold hearings exploring impacts, and members should ask the Congressional Research Service and GAO to study the problem.⁴⁸⁸ Meanwhile, executive-branch

484. Jacobs, *supra* note 46, at 380 (noting that separating authority over a given subject can promote accountability but may impact the efficiency of policymaking).

485. Gillian E. Metzger observes multiple ways in which administrative constitutionalism has facilitated experimental and creative approaches advancing the interests of marginalized groups through constitutional interpretation that courts would likely have rejected. See Metzger, *supra* note 383, at 1904–08 (first citing Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 810–36 (2010); and then citing Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 320–23 (2012)). If these examples illustrate an overarching tendency toward greater openness to subordinated interests in agencies than in courts, that fact itself would offer an additional argument in favor of administrative constitutionalism to supplement the defenses based on expertise, structure, pluralism, and participation that Professor Metzger advances. *Id.* at 1922–28.

486. Cf. LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 275 (1st ed. 2008) (describing findings of income-related disparities in outcomes of political processes).

487. See *supra* Part II.

488. While these offices have studied and catalogued the effects of shutdowns, for example, their reports make no effort to assess the distribution of harms. See, e.g., CONG. RSCH. SERV., RL34680, *SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS* 25–35 (Dec. 10, 2018) (analyzing only the costs and effects on spending programs as a whole).

officials in DOJ, OMB, and the agencies should ask the subordination question of themselves, and direct their subordinates to address distributive impacts of even institutional choices. Such a command would be consistent with President Biden's executive order on equity.⁴⁸⁹

Academics, civil-society groups, and journalists also have an important part as independent voices. Members of Congress and their staff may be reluctant to question arrangements that empower their own institution and its leaders,⁴⁹⁰ and executive-branch actors are no less susceptible to institutional bias. As an early branch chief at the Bureau of the Budget (which later became OMB) put it in an aphorism that has become known as Miles's Law, "where you stand depends on where you sit."⁴⁹¹ Those who sit outside of government can bring necessary motivation and objectivity – or at least a different set of biases – to the difficult work of mapping patterns of harms associated with separation-of-powers tools.

CONCLUSION

Scholars, courts, and policymakers consider many values in evaluating separation-of-powers questions. Antisubordination should be one of them. When protecting liberty, accountability, the rule of law, or other structural values that have real-world costs, asking "who pays?" can reveal inequities in the distribution of such costs and point the way toward more balanced sources of institutional power that better serve other goals. Moreover, by pursuing such reforms, antisubordination advocates could protect Native peoples, the asset poor, family caretakers, and others targeted by existing separation-of-powers tools from being taken advantage of by political actors willing, consciously or unconsciously, to leverage their wellbeing. Incorporating antisubordination could thereby produce a more equitable and more effective separation of powers.

489. See, e.g., Exec. Order No. 13,985, § 6, 86 Fed. Reg. 7009, 7010 (Jan. 20, 2021) ("The Director of OMB shall identify opportunities to promote equity in the budget that the President submits to the Congress.").

490. For example, to a significant extent the power generated through the annual appropriations process today inures to the Appropriations Committees, see FENNO, *supra* note 138, at 47-51, 160-61, 193, making their members perhaps the most direct beneficiaries of the skewed impacts described in Section II.A. Members of Congress or congressional agencies may be unwilling to question power sources that benefit congressional leadership.

491. Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399, 399 (1978).