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THE FOIBLES OF FORMALISM: APPLYING A POLITICAL "TRANSACTION COST" ANALYSIS TO SEPARATION OF POWERS

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In recent years, legal academics and political actors increasingly have focused on structural reform as *the* most promising solution to a host of political and policy problems. The list of the contemplated changes is endless, but surely must include the legislative veto,[1] the balanced budget amendment,[2] Gramm-Rudman,[3] executive order number 12,291 and its progeny,[4] term limits,[5] reinvigorated standards of federalism,[6] and greater unitary presidential powers.[7] While a variety of intersecting concerns lie behind these proposals, to varying degrees they all presume that something

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1. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983)

2. See 1997 U.S.J.J.R. 69, 1992 U.S.J.R. 12.

3. Pub. L. No 99-177, 99 Stat. 1638 (1985)

4. Exec. Order No. 12,291, 3 C.F.R. 127 (1981); Exec. Order No. 12,498, 3 C.F.R. XX (1985); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (Clinton order superseding Exec. Order No. 12,291 but maintaining centralized review of significant agency rules).

5. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)

6. *See* United States v. Lopez, 514 U.S. 549 (1995); Prinz v. United States, 66 U.S.L.W. 1005 (June 27, 1997).

7. *See generally* Stephen Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV 23 (1995); Larry Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). *See also* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997).

has gone awry with our current state of politics and that effective policy reform can best be achieved through a restructuring of the formal rules of the game.

Neal Devins's quite thoughtful article[8] focuses on the latest example of this approach—the passage of a line item veto. His central claim, however, is that the veto is unlikely to have a major effect on policy, that is, on the overall size of the federal budget. Moreover, he maintains, this outcome should not be unexpected, given the political motives of its drafters, who in many cases wish to create the appearance of confronting the problem of budget deficits without actually doing anything serious about them. In other words, barring a high political moment,[9] truly effective structural reform is unlikely to result from the current system and its state of normal politics.

I agree with much of the Devins thesis, as will become clearer below.[10] In this commentary, however, I wish to focus on the more fundamental questions it raises about the numerous proposals for, and (in some cases) academic preoccupation with, structural reform in government. My central claim: Lawyers and public choice experts who spend their professional lives thinking about the legal and formal rules of government structure may systematically overestimate the effect of such rules, or at least underestimate the role informal politics plays in redirecting formal government decisions along significantly different paths than the formal, rule-based analysis initially suggests. Moreover, this overestimation is not coincidental, I speculate, but may stem from some rather basic qualities of (and changes in) our current political system. The (somewhat tentative) analysis leads me to introduce, in very encapsulated form, an argument I am currently developing in a separate paper, which seeks to rethink separation of powers in terms of these informal politics.

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8. *See* Neil E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV 1605 (1997).

9. The reference is to BRUCE ACKERMAN, WE THE PEOPLE (1991). For a discussion of the political science literature upon which this analysis rests, see, e.g., WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970).

10. Devins also concludes that the line item veto is unlikely to be struck down on constitutional grounds. I do not address that constitutional question in my comments.

I. THE IMPORTANCE OF GOVERNMENT STRUCTURE

Why have separation of powers issues—and the perceived impact of government structure—become so prominent in recent years? There are a variety of reasons, most of them quite legitimate.

For one, we understand the significance of government and legal structure much better than we used to. One need not be an expert in rational choice or game theory to appreciate that the way an issue is structured can determine the outcome.[11] Lawyers and political scientists have always recognized this general point, but the new learning has certainly provided a lot of substance—and numbers—to the observations.

In addition, there is a sense in conservative as well as even some liberal circles that our public policies may be ill, and that the structure of our political institutions may be partly to blame. This is one explanation for the scores of serious proposals to change the way in which we structure our government and its decisions. As noted above, the list is long, but surely must include Gramm-Rudman, the balanced budget amendment, term limits, executive order number 12,291 and its progeny, reinvigoration of the legislative veto, and, last but not least, the line item veto.

Finally, the large number of separation of powers cases in recent years, including *INS v. Chadha*,[12] *Misretta v. United States*,[13] *Morrison v. Olson*,[14] and *U.S. Term Limits, Inc. v. Thornton*,[15] has underscored the significance of separation of powers principles. Such decisions are grist for the academic tenure mill, as well as the source of predictions of impending Armageddon or Nirvana, depending on which side you happen to sit.

Given this background, is it possible that some legal academics nevertheless overestimate the significance of these decisions and related structural changes? Neal Devins alludes to several examples of this phenomenon in his excellent article on the Line Item Veto. He is somewhat more circumspect about the effect of the veto than in some of his earlier work, which was written when the veto was

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11. *See, e.g.*, DENNIS MUELLER, PUBLIC CHOICE II (1989); DENNIS MUELLER, THE PUBLIC CHOICE APPROACH TO POLITICS (1993).
12. 462 U.S. 919 (1983).
13. 488 U.S. 361 (1989).
14. 487 U.S. 654 (1988).
15. 514 U.S. 779 (1995).

being considered, as he himself observes. But I suspect there are more fundamental reasons why judgments about the formal institutional allocation of government decisions might be overstated.

II. THE COASE THEOREM AS A POLITICAL HEURISTIC

As with many problems in law these days, I begin my analysis with what some academics still view as the academic Holy Grail—the Coase theorem.[16] As has been pointed out more times than I need mention, the Coase theorem teaches us that the initial allocation of property rights should not determine the ultimate outcome in situations where there are low transaction costs—in other words, when informal renegotiation can undo the formal assignment. Indeed, when transaction costs decline, the Coase theorem instructs, the initial property rights allocation is likely to matter even less, as renegotiation becomes even easier. Those who value the property right the most ultimately secure the right.[17]

While far from a perfect analogy, our separation of powers jurisprudence establishes a quite elaborate formal allocation of decision making authority—that is, a type of political property rights system—among the branches. When the courts decide that Congress cannot veto an executive act or the President line item veto a part of a legislative bill, they assign a political property right. Indeed, one can conceptualize many of the great structural debates occurring today as disagreements about the allocation of these political property rights—between the President and the agencies, between Congress and the agencies, between the agencies and the courts, and so on.

Viewed in this particular light, the significance of any particular constitutional or statutory allocation can be seen to turn in part on the ease with which informal or other formal political mechanisms may be employed to overcome or effect the decision made by the institution given the formal placement.[18] Of course, this

16. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960).

17. Of course, the allocation of property rules can effect distributional considerations significantly. *See generally* PERSPECTIVES ON PROPERTY LAW, 200-35 (Robert Ellickson et al. eds., 1995) (outlining distributional and other implications of the Coase theorem). This distributional effect has been widely discussed in the property rights literature, and may also be useful, by analogy, in understanding the impact of legal assignments of rights to the *overall* powers of the branches.

18. Others have usefully employed the Coase theorem to explore particular interactions between the branches in the foreign affairs context, though not in the systemic way proposed in this article. *See generally* John McGinnis, *Constitutional Review by Executives in*

impact does not usually occur in a classic Coasian trade of money for a change in the substantive decision or in the legal right to make the decision; in the absence of any constitutionally protected enforcement mechanism and the presence of various constitutional and legal prohibitions against *explicit* trades minimizes the number of such cases.[19] Rather, such accommodations ordinarily take place informally among repeat players, when political actors from other branches or institutions pressure the decision maker through the "political market" to make the decision they would have made. This influence can be exercised through various devices: by making threats of (or actually engaging in) political exposure, retaliation, or public mobilization; by passing new legislation; by promulgating new and different orders; or by making or refusing to accept certain other decisions or appointments. While these responses may or may not themselves involve the exercise of formal legal powers, I characterize this process as informal because the substantive authority to make the decision has not been formally transferred. Rather, it has been indirectly (and thus informally) constrained by actors in other institutions through the exercise of powers vested in that institution.

Of course, in order for the process to be effective, the exercise of power across political decisions must be linked.[20] But where such connection exists, while we may say that authority to make a decision has been formally transferred by statutory or constitutional intervention from the President to Congress, or from an agency to the President, the shift of formal responsibility may be undercut, as the ultimate decision is constrained by outside forces.[21] To draw the admittedly imperfect analogy to the Coase theorem, the decision would really be made by the actor with the greatest political interest.

Foreign Affairs and War Powers, LAW & CONTEMP. PROBS. (Autumn 1993); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991); *see also* J. Gregory Sidak, *Comment: The Inverse Coase Theorem and Declarations of War*, 1991 DUKE L.J. 32 (1991).

19. Though recent events in Washington may change assessments in this regard.

20. "Transaction costs" presumably rise for a variety of reasons, including the passage of time and intervening elections, limitations on information, as well as legal doctrine, such as prohibitions against "unconstitutional conditions," bribery laws, or even procedural due process.

21. Note the important proviso: there first must be the existence of the ability to retaliate and the expectation of retaliation.

III. POLITICAL TRANSACTION COSTS

This leads me to my basic empirical point. In many situations today, political forces seem to be able to undo informally, or at least strongly influence, such formal allocations in ways that we may not fully appreciate or incorporate into our separation of powers analysis. Before giving some specific examples, let me offer two reasons why this may be happening.

The first and most important reason relates to the creation of and evolution in new forms of informational and organizational oversight. A number of commentators have delineated these processes, which include the growth of the media and alternative forms of telecommunication; government fire alarm rules such as the Freedom of Information Act ("FOIA") and the Government in the Sunshine Act ("GSA"); executive order number 12,291 and its progeny; legislative committee oversight; PACs and interest group oversight; special prosecutors; and even daily public opinion polling.[22] While the impact of all of these phenomena varies, especially given the decline of political parties, through these devices members of government and the public generally have improved their ability to be apprised of government decisions vested elsewhere and to mobilize a response through the exercise of political or non-political means.

Some of these responses can also be conceptualized in classic principal-agent terms. If the delegation of power in government is viewed as a principal-agent issue between branches, such as when legislative discretion is transferred from Congress to the executive branch, then the significance of that delegation by the principal

22. *See generally* Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996). On the media, see generally SUZANNE GARMENT, SCANDAL (1991); KATHLEEN JAMIESON, THE MEDIA AND POLITICS (1996); THOMAS PATTERSON, OUT OF ORDER (1994). On consultants, see generally LARRY SABATO, THE RISE OF POLITICAL CONSULTANTS (1981); DAVID CHAGALL, THE NEW KINGMAKERS (1981). On committees and so-called fire alarm rules, see generally JOEL ABERBACH, KEEPING A WATCHFUL EYE (1990); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and Political Control of Agencies*, 75 VA. L. REV. 431 (1989). On PACs, see, e.g., LARRY SABATO, PAC POWER (1990). On special prosecutors, see, e.g., TERRY EASTLAND, ETHICS, POLITICS AND THE INDEPENDENT COUNSEL (1987).

declines to the extent that the principal retains better information and tighter control.[23]

Indeed, it is important to recognize the greatest principal-agent connection of them all—between the public and government in general. To the extent that the *public* retains greater oversight of decisions made by the different branches, then the significance of *this* most fundamental and foundational allocation—to the government generally and to specific branches in particular—may decline in some cases as well.[24] We have names for different aspects of this public oversight of government today: "the constant campaign," "going public," "feeding frenzy," "the rise of consultants," "the plebiscitary presidency," "the personal presidency," "the rhetorical presidency," and the like.[25]

Needless to say, as the labels underscore, this phenomenon is especially applicable to the presidency, which has become in recent years the most visible institution in all of government, if not the world, even when the officeholder decides who should sleep in the Lincoln bedroom. Much of the work in this area, by such diverse scholars as Theodore Lowi, George Edwards, Samuel Kernell and Gary Miller, has served to update Neusdadt's classic work by showing how the modern president can take advantage of—as well as be a tragic prisoner of—this public environment.[26]

A second and related way formal allocations between branches can be undone is simply through debate and dialogue between representatives of the various branches. While such changes are not explainable strictly in terms of Coasian bargaining, they can systematically diminish the effect of legal allocations. Rather than threaten a political response, opponents of a particular action else-

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23. *See generally* Richard Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1231 (1989) (analyzing separation of powers issues in systematic principal-agent terms).

24. As a normative matter, greater public oversight may be positive in some cases and negative in others. *See generally* Michael A. Fitts, *Can Ignorance Be Bliss, Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990). To say that oversight is more immediate is not to say that is "optimal" in any common sense of that word; rather, it simply suggests that the processes of informal oversight will have a greater effect on outcomes.

25. *See generally* THEODORE LOWI, THE PERSONAL PRESIDENCY (1986); JEFFREY TULIS, THE RHETORICAL PRESIDENCY (1987); LARRY SABATO, FEEDING FRENZY (1991); SAMUEL KERNELL, GOING PUBLIC (1993).

26. *See generally* GEORGE EDWARDS, PRESIDENTIAL LEADERSHIP: POLITICS AND POLICYMAKING (1994); KERNELL, *supra* note 25; Gary Miller, *Formal Theory and the Presidency*, *in* RESEARCHING THE PRESIDENCY 289 (George Edwards III et al. eds., 1993); RICHARD NEUSTADT, PRESIDENTIAL POWER (1960).

where in government may simply persuade the formal decision maker, often via public debate, to make the decision differently than she otherwise would.[27]

Of course, it helps if the parties are both part of the same political coalition, or (in current vernacular) "interpretative community." In particular, when branches and institutions are controlled by the same political party, less persuasion may be necessary. But political homogeneity is not required, nor is it the focus of my analysis; the exogenous impact of political responses from other institutions is. In this sense, engaging in a rational dialogue and bringing to bear public opinion can be directly related. For example, in many situations, public opinion and the polls serve as a dispositive form of moral argument, as decision makers feel incapable of withstanding the moral pressure of polls or media elites. Thus, even when Congress or the courts relocate a decision formally from one institution to another—that is, from an entity that is thought to be bureaucratic or political, national or local—other political actors may still be able informally to prod the formal decision maker to move in their direction through political or moral pressure.[28]

IV. ILLUSTRATIVE EXAMPLES

Political scientists discuss these issues frequently, but it is not clear that legal academia appreciates their full implications in separation of powers debates. My hypothesis: These processes may weaken or at least systematically change the significance of some legal allocations of power. Let me offer five somewhat speculative examples, which are snapshots to be developed at much greater length elsewhere. Given the current space, they should be treated here in the spirit in which they are offered—as subjects for further exploration.

The first is historically the most important—the legislative delegation of power to administrative agencies. For many years, some administrative law scholars have considered the transfer of "legislative" authority to administrative agencies as the *bete noire*

27. The classic example is the deregulation movement in the 1970s and 1980s. *See* MARTHA DERTHICK & PAUL QUIRK, THE POLITICS OF DEREGULATION (1985).

28. *See generally* DAVID MAYHEW, DIVIDED WE GOVERN (1991). The significance of dialogue in separation of powers is also an important theme of the civic republicans. *See generally* Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

of the New Deal State.[29] A number of academics writing in the so-called congressional dominance literature, however, have shown that legislative delegation may be less momentous than we had thought. A variety of devices, especially the so-called fire alarm rules and legislative oversight, provide notice to concerned actors in Congress, interest groups, and the White House and the basis for a political response.[30] In other words, the agencies have power, but they may not be headless.

A second example may be the legal independence of independent agencies, which are thought to be significantly further outside executive control than the executive branch agencies.[31] Yet, as the empirical and anecdotal evidence suggests, the difference sometimes may be more apparent than real.[32] Presidents have ways of ensuring that independent agencies are more under their thumb than even some executive agencies, such as the Department of Justice.

The third example relates generally to the presidency itself. In recent years a number of scholars have written at length about the rise of the so-called imperial presidency. According to this literature, new formal legal powers have been vested in the person of the President over time, resulting, in theory, in the rise of the strong or imperial presidency. The factual evidence on presidential powers, however, seems quite mixed, as I argued in a recent article.[33] Why? Other institutions, such as Congress, have been vested with their own powers, which can serve as a check on the President in alternative venues. In addition, modern presidents, who must navigate in today's highly public environment, are often so subject to close *public* scrutiny that they have little latitude. In this sense, public oversight may replace legislative oversight.

Fourth, to move to a separate branch, many scholars have come to believe that the committees of Congress are perversely all-

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29. *See* A.L.A. Schechter Poultry Corp v. United States, 295 U.S. 495 (1934); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). *See generally* THEODORE LOWI, THE END OF LIBERALISM (1969); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

30. *See generally* McCubbins et al., *supra* note 22.

31. *See generally* Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1987); Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359 (1997).

32. *See generally* Neal Devins, *Political Will and the Unitary Executive*, 15 CARDOZO L. REV. 273 (1993); Peter Strauss, *The Place of Agencies*, 84 COLUM. L. REV. 573 (1984); Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595 (1997).

33. *See generally* Fitts, *supra* note 22.

powerful.[34] Relying in part on this evidence, judges and legal academics have suggested courts should ignore their work product, especially committee reports, in construing statutes.[35] Recent scholarship documenting the informal and formal oversight of committee activities by the chamber and party caucus, however, may suggest that committees are more under the control of the center than we had believed.[36] Where true, committees are more likely to represent the considered view of the majority in Congress on legislation than to serve as a perverse outlier.

Finally, the most interesting case may be the most debated structural issue—the constitutionality of the legislative veto. Some years ago, at the time of the *Chadha* decision, everybody seemed to predict resolution of the question would lead to the aggrandizement of one of the branches—they just disagreed about which one it should be.[37] (In the interest of truth in advertising, I have to include myself in one of the groups). As it turns out, the invalidation of the veto seems to have had little effect. Congress has moved to respond through appropriations and oversight hearings and executive agreements to oversee executive discretion through other alternative mechanisms.[38]

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34. *See, e.g.*, KENNETH SHEPSLE, THE JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE (1978); MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1989).

35. *See* Frank Easterbrook, *Statutes Domains*, 50 U. CHI. L. REV. 533, 534 (1983); Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & PUB. POL'Y 59, 65-66 (1988); Thomas Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994); Conroy v. Aniskoff, 507 U.S. 511, 518 (1993) (Scalia, J., concurring); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 619-22 (1991) (Scalia, J., concurring). *See generally* WILLIAM ESKRIDGE, DYNAMIC STATUTORY CONSTRUCTION (1992) (offering an overview of these issues).

36. *See* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 24-25 (1994); JOHN ALDRICH, POLITICAL PARTIES 203 (1995); JAMES COX & MATTHEW MCCUBBINS, LEGISLATIVE LEVIATHAN (1993); KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991).

37. *See, e.g.*, Thomas Franck & Clifford Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After The Chadha Case*, 79 AM. J. INT'L L. 912, 959 (1985); Elliot Levitas & Stanley Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 HOFSTRA L. REV. 593, 615 (1984).

38. *See generally* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (1993); Neal Devins, *Electoral Branch Influences in Constitutional Decisionmaking: Forward*, 56 LAW & CONTEMP. PROBS. 1, 6 (1993); Stephen Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4, 10 (1984); Misty Ventura, *The Legislative Veto: A Move Away From Separation of Powers or a Tool to Ensure Non-Delegation?*, 49 SMU L. REV. 401 (1996).

V. UNDERSTANDING SEPARATION OF POWERS DEBATES IN POLITICAL TRANSACTION COST TERMS

Obviously, these outcomes, while perhaps unexpected, do not suggest that changes in the structure of government are unimportant. Such an extreme view of the "political market" has perhaps been reflected in some law and economics writing,[39] but surely is overstated. Changes in legal rules matter and matter profoundly.[40] Indeed, that has been the underlying research agenda and insight of virtually everyone working in the area of public choice and separation of powers—to show how important the rules of the game are. My purpose, however, is to add an important qualification to, and sketch a potential redirection for, this analysis. Like the drunk who looks for the keys only under the light, even though they were dropped far away, legal academics in this area, I would argue, may be focusing too intensely on the formal legal rules of the game, over which legal institutions seemingly have greater control, and may be ignoring the less obvious but sometimes equally important impact of informal politics on the outcomes.

If I am correct, there should be considerable value in systematically rethinking our separation of powers jurisprudence in terms of both the formal rules as well as the informal political processes. In other words, to draw the analogy to the Coase theorem, we need to examine how the presence and quality of these political transaction costs changes the political property rights, thereby giving greater rigor and clarity to the analysis of "checks and balances." Guido Calabresi and Douglas Malamud undertook an analogous project in their classic article *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral.*[41] There, applying a transaction cost analysis to common law rules, they reconceptualized the significance of a variety of property, tort, and contract law doctrines. Here, if one applies an analogous political transaction cost perspective to separation of powers issues, we should be able to better understand how the success of a shift in formal powers from one branch or institution to another depends

39. *See, e.g.*, Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); DONALD WHITMAN, THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT (1995).

40. Put another way, regulation impacts "political markets," as well as economic markets.

41. Guido Calabresi & Douglas Malamud, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 88 HARV. L. REV. 1089 (1972).

ultimately on how easily the other branches, as well as the public at large, may be able to respond through formal and informal venues to the change.[42] That is what appears to be going on in the classic separation of powers cases described above, where the ultimate resolutions turn out to be more modest than the original analysis predicted.[43]

In addition to exploring specific doctrinal issues in separation of powers, we also need to understand, at the same time, the generic importance of laws that directly regulate informal modes of oversight. Legal changes such as the passage of the FOIA and the GSA, establishment of inspector generals and whistleblower protections, expanded committee oversight, and appointment of special prosecutors, all provide means for facilitating informal and formal political responses. Similarly, laws regulating political parties and campaign finance can be significant, because parties (and other extra-governmental political institutions) are an informal mechanism by which arrangements can be secured and enforced between actors formally separated by the branches. On the other hand, the absence of repeat players in government, as might occur if term limits were adopted, could limit the impact of such informal politics, since the opportunity for linking decisions over time would diminish.[44]

Finally, this analysis helps illuminate the attempts by political actors to *avoid* oversight and political responsibility (that is, increase "political transaction costs"), even when it means they are handing over *formal* power to another institution in government. The classic separation of powers analysis usually assumes that political actors crave greater formal power, with "ambition counteracting ambition." But the formal authority to take action, if subject to clear popular or institutional oversight, may not translate into actual discretionary influence. Indeed, this may be what is going on with the congressional decision to pass the line item veto in the first place; it allows Congress to avoid some of the responsibility for the deficit, as Devins suggests.[45] To the extent that budget

42. In other words, we need to be sensitive to how informal politics can and cannot undo or redirect allocations of power, and analyze formal decisions in terms of both processes.

43. Exploring these changes in a more dynamic way focuses attention on when and where shifts in authority can and cannot be constrained.

44. I thank Larry Lessig for this point on the significance of term limits to my analysis.

45. *See* Devins, *supra* note 8.

deficits are an intergenerational problem that the public is unwilling to confront, political actors gain little from attempting to resolve the conflict, and may risk a great deal. This motivation is reminiscent of the classic explanation for the political success of individual members of Congress in achieving reelection—legislators voting in a collective body are able to avoid responsibility for collective goods and tradeoffs, since there is little public oversight of their individual actions, while they can take credit for locally popular activities.[46]

VI. DEVINS AND THE LINE ITEM VETO

This leads back to Devins's prophecies regarding the limited impact of the line item veto. In light of my general thesis, his seemingly counterintuitive predictions are not all that unpredictable. Of course, on a formal level, almost as a tautology, granting the President the right to veto line items should give him more influence. Quite simply, he has the ability to do things—veto a line in a particular appropriation—that he did not previously possess. As the old proverb goes, more must be better than less.

As Devins correctly points out, however, there are a variety of ways Congress, when it does not agree with the exercise of that power, can prevent or undo it. Congress may simply add extra items into the budget, in effect forcing the President to veto them. The end (or equilibrium) result may be more, not less, of political pork, and a weakened, not stronger, President. Or, as I have argued elsewhere, Congress may introduce items into the budget that may not be politically palatable, but on which the President, by virtue of a line item, will be forced to take a politically unpopular stand. This is just a particular case of the more general budget balancing dilemma Congress has forced on the President with the passage of the veto in the first place. Or, Congress may threaten retaliation for a veto through other devices, such as investigations, oversight hearings, or advise and consent review. Because of these possibilities, one suspects, Congress would often reach agreements ahead of time about what provisions the President would or would not veto. The point is that budgetary reform is a classic case for commensu-

46. *See, e.g.*, MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1989) (providing the classic analysis on legislative avoidance of collective responsibility).

rable tradeoffs, as legislators can trade dollars in one bill for dollars or decisions in another.

To be sure, a line item veto would not *weaken* the presidency. The formal power to veto a line item does mean a lot. And the informal effects I have talked about can cut in different directions, especially when the new legal right improves the decision maker's capacity to rally or influence the public. For example, one real benefit of a line item veto is the ability it affords the *President* to identify and publicize politically embarrassing cases of waste by vetoing them. The formal budgetary impact may be modest, but the ultimate political effect can be quite significant for the President. I am reminded of Ronald Reagan's "Make My Day" veto speeches and Clinton's budgetary veto in December 1995—a decision which ultimately resurrected his presidency. In this sense the line item veto needs to be evaluated according to the ability it affords the President to marshall such informal political forces *on his own behalf.* In other words, under the analysis outlined above, it allows the President to focus oversight onto Congress by the public at large. Using a similar type of analysis, Bob Inman and I were able to explain the relative political successes and failures of Ronald Reagan and Jimmy Carter, respectively, in seeking similar types of tax reform. Reagan's willingness to use the traditional veto in this manner and go public via the presidential bully pulpit was the significant difference.[47]

Finally, this general analysis underscores why more systematic structural reform would probably be needed to fundamentally change political incentives over the budget. Rather than rely simply on the President, we may need a process that sets a substantive standard that cannot be bargained around—namely a balanced budget amendment—and then vests responsibility in a politically and legally accountable figure, such as the President through a line item veto or impoundment authority. While I am not advocating any particular intervention here,[48] only such coercive formal interventions are likely to overcome in a significant way any pervasive informal short term political forces opposed to balancing the budget.[49]

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47. *See generally* Michael A. Fitts & Robert Inman, *Controlling Congress*, 80 GEO. L.J. 1737 (1992).

48. The long term economic effects of budget deficits are the subject of intense debates, which are not explored here. *See, e.g.*, DAVID SHAVIRO, DO BUDGET DEFECITS MATTER? (1997).

49. Needless to say, it is possible that judicial intervention may also reduce transaction

VII. CONCLUSION

At this point, my brief analysis can only hope to be illuminating, not exhaustive. I have not attempted here to articulate any general principles about where this process is most likely to occur and where it is not. It would be interesting, for example, to speculate about cases, such as the War Powers Act, where the law has left the legal right ambiguous, presumably for some of the reasons outlined above, to facilitate political competition over the decision, as (in effect) Peter Shane argues in this symposium.[50] Nor do I have the space to explore the possible *normative* concerns raised by a system which permits decisions to be made through political, not legal processes, and by institutions or groups not formally granted the power. That is Theodore Lowi's classic criticism of legislative delegation,[51] except here the problem may be generalized across many institutions. Rather, my intent is simply to underscore the need for greater recognition and more systematic analysis of the ability of political institutions and actors to undo or influence what we think has been done through legal intervention in the separation of powers context.

For those who are quick to generalize in this area, however, I must end with a warning about the highly stochastic nature of such informal politics. Neal Devin's paper gives a perfect example, the 1974 Budget Act. Under the classic collective action analysis, the centralization of power in Congress under the Act was supposed to lead to greater budget accountability in Congress and perhaps a reduction in budget deficits. Yet, as Neal Devins points out in describing the subsequent history of the Act, legislative centralization may have had the opposite effect. Why?

While Devins does not develop the point at length, his analysis suggests the changes must be viewed through the public lens. To the public, political centralization in Congress had conflicting consequences. On the one hand, individual members of Congress may have felt that they had been held to a higher standard of institutional responsibility. On the other hand, the President, who was not longer viewed as *the* dominant figure in the public's mind, Devins implies, may have felt *less* responsible.[52] We thus may

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costs. *See generally* ESKRIDGE, *supra* note 35.

50. *See* Peter M. Shane, *Learning McNamara's* Lessons: *How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281 (1997).

51. *See* LOWI, *supra* note 29.

52. *See* Devins, *supra* note 8.

have been facing a problem of a political second best, to borrow another economic analogy. Curiously, I suspect a similar phenomenon may have occurred when the election of a Republican Congress helped bring Bill Clinton back politically; he was no longer viewed as responsible for decisions in government, even though Congress itself was probably far more responsible, at least in the traditional party sense.

Can all or even most issues in separation of powers be analyzed in this way? Obviously not; formal rules and legal structure matter quite a bit. Moreover, several scholars have distinguished between the administrative and political functions of agencies.[53] Clearly I am focusing much more on the latter category, and only certain special cases within that political class. Surely it is not the whole world. But it is a part of it, and if I am correct, more than we have traditionally thought.

53. *See, e.g.*, Lessig & Sunstein, *supra* note 7.