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Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity

MICHAEL C. DORF*

INTRODUCTION

As a constitutional stylist, Charles Black belongs in the pantheon with Justices Marshall, Holmes, Brandeis, and Jackson. His writing was invariably crisp, clear, and elegant. *Structure and Relationship in Constitutional Law* is certainly no exception to this rule.¹ And yet, the book is easily misread. The signal contribution of *Structure and Relationship* is its identification of a method of constitutional interpretation in which the reader draws inferences from the relationship among the structures of government—such as Congress, the Presidency, and the states. Nonetheless, as I explain in Part I of this essay, Black is sometimes read simply as a holist, as one who urges attention to the entirety of the Constitution rather than to isolated clauses.

Why, given the lucidity of Black's prose, would he be so grossly misread? In Part II, I explain that the structural method that Black advocated places a great deal of power in the hands of those who would employ it. Scholars and judges justifiably worry that the structural method may become nothing more than a mask for judicial usurpation of functions best left to the political process. Interpretive holism hews closer to constitutional text than Black's structural method. Thus, by attributing interpretive holism to Black, judges and scholars who worry about the courts' legitimacy pay Black homage without stirring their anxieties about usurpation.

Such anxieties have their place, but Black's work need not necessarily stir them up. Although Black illustrated his structural method with Supreme Court cases, the method was not designed exclusively for judges. Black wrote and cared a great deal about constitutional interpretation outside of the courts, especially in confrontations between Congress and the President.² In this *political* context, the structural method operates without

* Michael I. Sovern Professor of Law, Columbia University School of Law. This essay originated in oral comments delivered in response to a paper presented by Stephen Carter at Yale Law School on March 28, 2003, as part of the Charles Black Memorial Colloquia. I thank Professor Carter for calling my attention to Charles Black's work on congressional acquiescence in presidential power, discussed at some length here. Thanks also to Akhil Amar, Richard Briffault, Samuel Issacharoff, Amelia Simpson, and Adrienne Stone for helpful conversations, to William Eskridge and Vicki Jackson for co-organizing the colloquia, to Akiva Goldfarb and Zachary Tripp for excellent research assistance, and to Charles Black for inspiration.

1. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

2. *See, e.g.*, CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* (1974).

raising the specter of judicial usurpation. I argue in Part III that Black's structural method can also be extended and applied to illuminate a puzzle that Black himself remarked upon: Given that Congress has more formal power than the President, why does Congress so rarely stand up to the President?³ Whereas Black reasoned from the relationships among the institutions the Constitution creates and recognizes, I suggest in Part III that the Constitution sometimes plays a related but distinct role: It *calls into existence* some institutions. In particular, the Constitution calls into existence political parties and with them the practice of party loyalty that makes members of Congress unlikely to challenge Presidents of their own party.

Black's structural method is not merely an explanatory device, and so, in Part IV, I ask whether any normative conclusions follow from the observation that political parties are at least a quasi-constitutional feature of our system of government. I argue that the two-party system as we know it is a double-edged sword. As I have just noted, political parties divert loyalty away from institutions like Congress, thereby undermining the constitutional system of separation of powers. On the other hand, by aggregating interests on a national scale, the two major political parties serve the same constitutional function that James Madison claimed for the "extended Republic" in *The Federalist No. 10*: they domesticate and thus control the vice of faction.

I conclude Part IV by asking how these competing constitutional values might be traded off against one another in the concrete context of campaign finance regulation. Posing the question as one for the courts, I tentatively argue that campaign finance regulation has appropriately been upheld in part *because* (rather than in spite) of the fact that it may weaken the two-party system. The argument is not entirely persuasive, however, because here, as elsewhere, the structural method is open-ended. Its great virtue, as Black himself argued, is that it focuses attention on the questions that really matter, but only we—by which I mean judges, politicians, and interested citizens—can decide how to resolve those questions.

I. MISREADING THE STRUCTURAL METHOD AS INTERPRETIVE HOLISM

This Part distinguishes Black's structural method from interpretive holism. I must begin, however, by acknowledging that passages of *Structure and Relationship* appear to sound in interpretive holism. Black states his thesis thus:

[I]n dealing with questions of constitutional law, we [by which Black means the Supreme Court and Court-focused commentators] have preferred the method of purported explication or exegesis of the particular textual passage considered as a directive of action, as opposed to the method of inference

3. See Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13 (1974).

from the structures and relationships created by the constitution in all its parts or in some principal part.⁴

This passage, and the book more generally, could thus be (mis)taken to espouse a method of holistic interpretation of the Constitution. The message would go something like this: *Don't just read each clause in isolation; see the document as a whole; understand how its various provisions fit together.*

I have no quarrel with interpretive holism.⁵ Indeed, I doubt that even self-described textualists such as Justice Scalia have any quarrel with holism. It is, after all, a conventional principle of textual construction that words are to be interpreted in accordance with their context.⁶ To use an example provided by Professor Amar—himself an interpretive holist who greatly admires Charles Black⁷—the placement of the constitutional provision governing suspension of the privilege of the writ of habeas corpus in the Article dealing with Congress creates a rebuttable presumption that Congress, rather than the President, has the power to suspend the privilege of the writ.⁸ This sort of holism-as-sophisticated-textualism makes a great deal of common sense, and Charles Black certainly believed in common sense.⁹

Nonetheless, it would be a mistake to read Black's *Structure and Relationship* as principally addressed to the structure of the Constitution and the relationship among its various provisions.¹⁰ The Structure in which Black was most inter-

4. BLACK, *supra* note 1, at 7.

5. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 21–23 (1991) (warning against “dis-integration” in constitutional interpretation); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 953 (2002) (employing “holistic methods . . . [that] share the premise that the meaning of the constitutional text is not exhausted by whatever concepts an isolated phrase connotes to the reader [because] further guidance can often be gleaned from the balance of the constitutional text”).

6. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (“In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail . . .”).

7. For Professor Amar's version of holism, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). For an example of his admiration for Black, see Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 699 n.104 (2002) (acknowledging a debt to Black, who “preached holism, although Black explicitly defined his brand of ‘structural’ interpretation in contradistinction to textualism”).

8. See Amar, *Architexture*, *supra* note 7, at 697–98. Amar concludes that in this instance the presumption is rebutted by other factors. See *id.* at 698.

9. “Use your common sense” is an apt summary of Black's account of *Brown v. Board of Education*, 347 U.S. 483 (1954). See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1959).

10. For examples of (otherwise excellent) works that cite Black's *Structure and Relationship* as presenting an argument for holistic interpretation, see Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. I, 141 n.465 (1998) (describing *Structure and Relationship* as “arguing that the Constitution should be read holistically, not as sequence of discrete provisions”); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution,”* 72 IOWA L. REV. 1177, 1181 n.4 (1987) (attributing to Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 217 (1980), the view that *Structure and Relationship* counsels a methodology of “comparing structural relationships between clauses of the original constitutional document to discover commonalities of approach and usage, as

ested is the structure of the government of the United States of America. The Relationship is the relationship of its component parts: the federal government; the state governments; citizens; aliens; local officials; Congress; the President; the Supreme Court; and so forth.

Even the title of this colloquium reflects the misreading—or misemphasis—I have just noted. Our panel is called *Structure and Relationship in Constitutional Interpretation*, whereas Black's book was titled *Structure and Relationship in Constitutional Law*. That is a subtle but important difference. *Constitutional interpretation* suggests a focus on the Constitution as an interpretive object. *Constitutional law*, by contrast, suggests a wider angle of view: Parts of constitutional law are drawn from the Constitution's text—whether interpreted clause-by-clause or holistically—but other parts, Black insists, emerge out of the institutions the Constitution creates or recognizes, rather than directly from the text.¹¹

A few examples suffice to show that interpretive holism is not the main theme in *Structure and Relationship*. The book begins with a discussion of *Carrington v. Rash*, which held that El Paso County, Texas, could not deny the franchise to a resident on the ground that he was a member of the armed services who resided outside of El Paso when he enlisted in the army.¹² The case was decided on equal protection grounds,¹³ but, Black argues, it would have been better justified using the structural method, namely by recognizing—as a matter of the relation among citizens, the federal government, and states—“that no state may annex any disadvantage simply and solely to the performance of a federal

well as structures and relationships within the document,” although Brest appears not to view Black's work that way at the cited page); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1240 n.40 (1987) (citing *Structure and Relationship* in support of the legitimacy of deriving meaning “from the structure and relationship of terms, limits, and rights in the text”); Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1189 n.16 (2003) (describing *Structure and Relationship* as “recommending that courts should generally infer principles from the Constitution's structure, not from particular textual provisions”); Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the “Living Constitution,”* 76 N.Y.U. L. REV. 1456, 1462 n.20 (2001) (labeling *Structure and Relationship* “the best work on structuralist interpretative practice,” which “emphasizes construing the various provisions of the Constitution so that they ‘fit,’ or remain consistent with the organic whole of the text”). Professor Amar does not mistake Black's structuralism for his own holism. See Amar, *Architecture*, *supra* note 7, at 699 n.104; Amar, *Intratextualism*, *supra* note 7, at 790, 797 n.197. However, as a holist who counts Black as one of his heroes, Amar may invite all but the most careful readers of his work to conflate Black's methodology with his own. See Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2281 (1999) (reviewing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)) (“Professor Amar's analysis brilliantly illustrates the technique that he has called ‘intratextualism’ . . . and that Charles Black has called reasoning by structure and relationship.”).

11. As one of the principal organizers of the Charles Black Memorial Colloquia, I bear substantial responsibility for the title of the conference, but I vociferously deny having (consciously) chosen the title for the purpose of facilitating my own critique thereof.

12. 380 U.S. 89 (1965).

13. See *id.* at 96 (invalidating “invidious discrimination in violation of the Fourteenth Amendment”).

duty.”¹⁴ In his discussion of *Carrington*, the only constitutional provision Black even mentions is the Fourteenth Amendment, and then only to argue that it is superfluous to the proper grounds for the decision.¹⁵ Black does not juxtapose constitutional provisions or in any way attend to the structure of the Constitution; he infers his constitutional rule of law from what he takes to be the most productive way of organizing relations among constitutionally created and recognized actors, not constitutional clauses.

The proof of the pudding is in Black’s discussion of *McCulloch v. Maryland*.¹⁶ A structuralism that paid principal attention to the structure of the Constitution would invoke John Marshall’s argument concerning the placement of the Necessary and Proper Clause “among the powers of Congress, not among the limitations on those powers.”¹⁷ This argument shows that Marshall himself paid close attention to what a holist like Professor Amar would call the “architexture” of the Constitution—the structure of the document and the relationship of its clauses to one another. Yet that sort of structure and that kind of relationship do not especially interest Professor Black. His exegesis of *McCulloch* pays far greater attention to the “relational proprieties between the national government and the government of the states.”¹⁸ Black concedes that the decision could be rooted in the Supremacy Clause of Article VI if one needed a textual hook, but he ascribes the real, proper ground of decision to “reasoning from the total structure which the text has created.”¹⁹ Again, note that the structure that interests Black is not the structure of the Constitution as a document; it is the structure of institutions the document creates.

Let me give one more example of the difference between Black’s institutionalism and interpretive holism. Much of the second of the three lectures that comprise *Structure and Relationship*²⁰ argues that protection of freedom of expression against state interference would be better accomplished as an inference from the relationship of citizens to their government than—as per standard doctrine—via the Fourteenth Amendment’s “incorporation” of the First Amendment.²¹ Black invites a thought experiment in which there were no Fourteenth Amendment.²² Nonetheless, and even assuming that *Barron v. Baltimore*²³ were good law, he says that surely a principle of free expression would bind the states. He asks: “[I]s it not an inference from structure and relation, just as sure as any constitutional inference could be, that no state could constitutionally

14. BLACK, *supra* note 1, at 11.

15. *See id.* at 12.

16. 17 U.S. (4 Wheat.) 316 (1819).

17. *Id.* at 419.

18. BLACK, *supra* note 1, at 15.

19. *Id.*

20. Charles L. Black, Jr., *Some Particular Structural Considerations in Constitutional Law*, in BLACK, *supra* note 1, at 33–66.

21. *See id.* at 33–51.

22. *Id.* at 33–34.

23. 32 U.S. (7 Pet.) 243 (1833) (holding the original Bill of Rights inapplicable to the states).

make criminal the signing and transmittal of any petition to Congress?"²⁴ He continues that "such a state law would" be invalid because it would "interfere[] with a transaction which is a part of the working of the federal government."²⁵ Black does not need the Fourteenth or the First Amendment for this conclusion; it flows, in his view, from the relations of citizens to the state and federal governments. The federal government has broad powers; citizens elect members of Congress; therefore, citizens need to be free to discuss all the issues that may be relevant to matters of potential federal legislation. Accordingly, state officials, who also have some constitutionally-assigned federal functions, cannot constitutionally interfere with communication between citizens and the federal government, or for that matter, communications among citizens. Then, from the core of petitions to Congress, Black expands outward to a general right of communication that "eventuate[s] in the conclusion that most serious public discussion of political issues is really a part, at least in one aspect, of the process of national government, and hence ought to be invulnerable to state attack."²⁶

II. THE OPEN-ENDEDNESS OF THE STRUCTURAL METHOD

Structure and Relationship in Constitutional Law has been and continues to be an extremely influential book. In the sense that constitutional lawyers know better than to read the Constitution one provision at a time, we are all structuralists now. Nonetheless, the particular structural method that Black championed—drawing inferences from the structures of government rather than from the structure of the constitutional text—remains under-utilized. Why?

The answer, I think, is that for a constitutional regime still haunted by the ghost of *Lochner*²⁷ and fearful, by turns, of both politically conservative and politically liberal overreaching by the judiciary, inference from institutional structures appears to be too open-ended a methodology. Arguments grounded in the text and structure of the Constitution seem more determinate.

Black had a partial response to the charge of judicial usurpation. As he emphasized in the third lecture of *Structure and Relationship*,²⁸ most of the theoretical fuss about judicial review concerns the paradigm of *Marbury v. Madison*,²⁹ in which the Court substitutes its constitutional views for those of Congress.³⁰ In practice, however, the constitutional decisions of the Supreme Court that trigger the most vociferous opposition do not typically pit the federal

24. BLACK, *supra* note 1, at 40.

25. *Id.*

26. *Id.* at 44–45.

27. *Lochner v. New York*, 198 U.S. 45 (1905) (holding that state maximum-hours law violated right to freedom of contract entailed by the Fourteenth Amendment).

28. Charles L. Black, Jr., *Constitutional Structure and Judicial Review*, in BLACK, *supra* note 1, at 67–98.

29. 5 U.S. (1 Cranch) 137 (1803).

30. See BLACK, *supra* note 1, at 70–73.

judiciary against the national legislature.³¹ To be sure, even state and local elected officials are more politically accountable than the Court; therefore, a version of the countermajoritarian difficulty³² still arises when the Court nullifies their decisions. But one important function of a national constitution is to settle certain issues as a matter of national policy, and therefore any national legal system in which the constitution is more than hortatory would provide for the occasional displacement of some decisions as inconsistent with the constitution. If the Supreme Court lacked the power of constitutional review, such power might well be vested in Congress. What distinguishes the *Marbury* paradigm from judicial review of actors other than Congress is that review of congressional acts cannot be justified on the ground that the Constitution demands some measure of national uniformity. The point was put with characteristic pith by Justice Holmes, who wrote: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."³³

Black's distinction between judicial review of acts of Congress and judicial review of the actions of other institutions was a fair response when he delivered the lectures comprising *Structure and Relationship*. As Professor Amar has noted, at that time the Warren Court was striking down roughly one federal statute per year.³⁴ By contrast, the current Rehnquist Court strikes down about four federal statutes per year,³⁵ including, just since 1997, provisions of four federal civil rights laws.³⁶ Some of those decisions, as well as other rulings

31. Many of the most controversial exercises of the power of judicial review involve the constitutionality of state statutes. For example, *Roe v. Wade*, 410 U.S. 113 (1973), invalidated a Texas statute, although even then, the case was nominally an action filed against a county district attorney. *See id.* at 120. Likewise, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the plaintiffs challenged, *inter alia*, a policy of intentional racial segregation in public schools that had been adopted by the Topeka Board of Education pursuant to a state statute that did not require such segregation. *See id.* at 486 n.1. Whatever else might be said in favor of judicial restraint, one cannot plausibly argue that the Topeka Board of Education is a co-equal constitutional actor with the Supreme Court of the United States.

32. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

33. OLIVER WENDELL HOLMES, *LAW AND THE COURT*, reprinted in *COLLECTED LEGAL PAPERS* 291, 295–96 (1920).

34. *See* Amar, *Architexture*, *supra* note 7, at 678.

35. *See id.*

36. *See* Bd. of Trustees v. Garrett, 531 U.S. 356 (2001) (invalidating provision entitling plaintiffs to sue states for damages under the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (invalidating provision entitling plaintiffs to sue states for damages under the Age Discrimination in Employment Act); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating civil remedy provision of the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as applied to suits against state though perhaps not federal actors). The tide may be turning, however. For two rare instances of the Court sustaining congressional power to enact civil rights remedies against the states that provide greater protection than the Court's own jurisprudence, see *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (permitting suits against states to enforce the public access provisions of the Americans with Disabilities Act insofar as they implicate the fundamental right of court access); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721

invalidating congressional action, rest on a principle of state sovereign immunity that is nowhere expressly stated in the Constitution—indeed, that is ruled out by conventional clause-by-clause interpretive analysis—but which the Court justifies by what I must admit is a form of Blackian structuralism. Here is how Justice Kennedy, writing for the Court in *Seminole Tribe of Florida v. Florida*,³⁷ summarizes the grounds for the inference of state sovereign immunity:

Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms. That presupposition . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.³⁸

In other words, don't interpret the Eleventh Amendment as a stand-alone provision. Look at the larger relationships between citizens, states, and the federal government. And when you do, the Court says, you will find that the relationship of sovereign states to citizens requires that the former be immune to suit by the latter, absent the state's consent or congressional authorization under a constitutional provision—such as one of the Reconstruction Amendments³⁹—that operates as an exception to the background structure of the relevant institutions. That is a structuralist move of the sort Black championed.⁴⁰

I do not say, of course, that the Court's Eleventh Amendment jurisprudence is especially wise. I think it is not. And, of course, any interpretive methodology can be misused, so we should not tax Black's structuralism with the worst uses to which it is put. There remains, however, the question of whether structuralism is especially susceptible of abuse. This question boils down to whether structuralism is any less determinate than its rivals because the more open-ended an interpretive methodology, the easier it is to justify bad (as well as good) decisions using that methodology.

Black himself pretty clearly thought that structuralism was no more indeterminate than any of the alternatives. He believed that the structural method was at least as determinate as nominally textual interpretation of such open-ended

(2003) (sustaining provision entitling plaintiffs to sue states for damages under the Family and Medical Leave Act).

37. 517 U.S. 44 (1996).

38. *Id.* at 54 (citations and internal quotations omitted).

39. *See* U.S. CONST. amends. XIII–XV.

40. It could be argued that the current Court would not endorse the structuralist method on display in its Eleventh Amendment cases if the question were to arise as one of first impression, but is simply applying the principle established in *Hans v. Louisiana*, 134 U.S. 1 (1890). I find this view implausible given the current Court's willingness to extend the immunity principle of *Hans* beyond the federal courts to state courts, *see Alden v. Maine*, 527 U.S. 706 (1999), and federal agencies, *see Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

provisions as “due process of law.”⁴¹ Moreover, Black thought that structural interpretation had the further virtue of focusing discussion on the real stakes in constitutional adjudication:

We will have to deal with policy and not with grammar. I am not suggesting that grammar can be sidestepped, or that policy can legitimately be the whole of law. I am only saying that where a fairly available method of legal reasoning, by its very nature, leads directly to the discussion of practical rightness, that method should be used whenever possible.⁴²

Let us pause a moment over what might be regarded as the perfunctory caveat in Professor Black’s credo: Black says that structural reasoning should be used “whenever possible,” thereby acknowledging that it is meant to supplement rather than supplant attention to individual snippets of text. He was, to use the vocabulary of Philip Bobbitt, proposing that we recognize another “modality” of constitutional argument,⁴³ not that we do away with the existing ones. Moreover, he thought that decisions reached via the structural method should be examined for consistency with text, doctrine, and so forth.⁴⁴

Despite Black’s defense of structuralism, it remains vulnerable to the charge of indeterminacy, which may explain the greater emphasis on text and other sources of meaning that one sees in some of Black’s followers than one finds in Black’s work itself.⁴⁵ Indeed, those of us who are broadly sympathetic to the values that Charles Black promoted—that you might say he embodied—should be careful not to pass over the written constitutional text too quickly in our enthusiasm for structure and relationship. The reasons have as much to do with protection of those values as they do with the authority of written text.

At least with respect to cases involving individual rights, the current alignment of political and jurisprudential viewpoints still associates strong judicial protection of rights with open-ended methods of interpretation such as structuralism, and weak rights with closer textual analysis. Social conservatives denounce liberal judicial activism on the ground that it is usurpation to a much greater extent than civil libertarians denounce conservative judicial activism on that ground. But the association of text-focused interpretation and political conserva-

41. BLACK, *supra* note 1, at 49.

42. *Id.* at 23.

43. See PHILIP BOBBITT, CONSTITUTIONAL FATE 6–8 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

44. See BLACK, *supra* note 1, at 31 (“There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.”); see also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (explaining how text, doctrine, and other sources of constitutional meaning should be integrated).

45. See *supra* note 10.

tism is largely an accident of the last three decades. The most celebrated textualist Supreme Court Justice is not Antonin Scalia or Clarence Thomas, but Hugo Black—who sought to use the Bill of Rights as a constraint on the meaning of the open-ended Due Process Clause not simply because he believed in constraining judges, but also because he believed that the provisions of the actual Bill of Rights that we are lucky enough to have, do a pretty good job of protecting the liberties essential to protecting human flourishing against government overreaching.⁴⁶

Let me give an example from a foreign legal system. It happens that the thought experiment proposed by Professor Black was later actually carried out in Australia. The Australian Constitution lacks a bill of rights, but in 1992 the High Court of Australia nonetheless inferred a principle of freedom of speech from the system of representative government set forth in the constitution.⁴⁷ A subsequent decision indicated that the free speech principle would be interpreted robustly, locating a somewhat modified version of the test set forth in *New York Times v. Sullivan*⁴⁸ in the Australian constitutional structure.⁴⁹ However, after an intervening change of personnel, the High Court cut back on its free speech jurisprudence, declaring the following:

[T]he Constitution gives effect to the institution of “representative government” only to the extent that the text and structure of the Constitution establish it. . . . Under the Constitution, the relevant question is not, “What is required by representative and responsible government?” It is, “What do the terms and structure of the Constitution prohibit, authorise or require?”

. . . .

To the extent that the requirement of freedom of communication is an implication drawn from [particular sections] of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections.⁵⁰

Now, one can fairly criticize the High Court of Australia for its retrenchment on the ground that it misapplied, or failed to apply, Professor Black’s structural method. The whole point of structural inference, after all, is to look beyond what is strictly necessary to give effect to particular bits of constitutional

46. See Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 56 (1994) (“Justice Black favored constitutional literalism and formalism as a way of eliminating judicial activism in economic due process cases. But, he also advocated bold judicial enforcement of the Constitution’s explicit guarantees” because he thought absolute limits were necessary “to protect the American people from certain ‘ancient evils.’”) (quoting Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960)).

47. See *Australian Capital Television Pty. Ltd. v Commonwealth of Australia* (1992) 177 C.L.R. 106; *Nationwide News Pty. Ltd. v Wills* (1992) 177 C.L.R. 1.

48. 376 U.S. 254 (1964).

49. See *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104.

50. *Lange v. Australian Broad. Corp.* (1997) 189 C.L.R. 520, 566–67.

language.⁵¹ But such criticism misses the point, I think. In our legal culture—by which I mean at least the legal culture of the common-law countries and probably something substantially broader—interpretive arguments unmoored from text are always vulnerable to being attacked as illegitimate.⁵² It is possible, of course, that a newly conservative High Court of Australia would have found a way to retrench on free-speech-protective decisions even if the Australian Constitution contained an express provision guaranteeing a right of free speech; however, it would have had a more difficult time justifying such a maneuver and, for that reason, we might think that free speech and other values will, on average, do better if the courts are asked to protect them by express invitation rather than as a matter of structural inference.

To return from the antipodes to our immediate situation, if structuralism in the absence of clear textual warrant is always vulnerable to retrenchment, structuralism that is overly freewheeling poses dangers for textual entrenchment. In the current political climate, the gravest governmental threat to civil liberties comes from policies such as detention, without trial or even any serious judicial scrutiny, of persons—including citizens—that the executive branch determines to be enemy combatants, and like measures justified in the name of public safety. Such measures can only be squared with the Constitution by the sort of creative construction that textualists purport to abjure.⁵³

But a version of structuralism that is unconcerned with constitutional text makes such creativity seem more plausible. For if inferences from structure and relationship can be used to recognize rights that are not clearly spelled out in the constitutional text, then it is hard to see why such inferences cannot also be used to narrow the scope of, or even eviscerate, what would otherwise be at least *prima facie* protections for civil and political rights.⁵⁴ “The Constitution is not a suicide pact”⁵⁵ is both a truism thought to justify nearly anything our government plans to do in the name of combating terrorism and a structural principle.

51. For a criticism generally along these lines, see Adrienne Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, 23 MELB. U. L. REV. 668 (1999).

52. Black would have likely replied that good structural arguments are never completely unmoored from the text, because the structures and relationships derive from the text. See BLACK, *supra* note 1, at 31. To the extent that structuralism is a distinct methodology from textual interpretation, however, arguments rooted in structure and relationship as such must count as, at best, only very loosely tethered to text.

53. Accordingly, self-described textualist Justice Scalia (joined by Justice Stevens) went furthest in rejecting the executive claim that a U.S. citizen could be held indefinitely as an “enemy combatant” in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). Although the Court’s other textualist, Justice Thomas, was the only Justice willing to sustain the claim of executive power, his dissent repeatedly invokes “principles of constitutional structure” and the “structural advantages” of Presidential authority rather than the Constitution’s text. See *id.* at 2674, 2675 (Thomas, J., dissenting).

54. See SCALIA, *supra* note 6, at 42–44.

55. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”).

Almost any draconian measure can be defended by the following structuralist syllogism: (1) The Constitution creates a federal government and recognizes state governments that are meant to endure for the benefit of, in the words of the Preamble, “our Posterity;” (2) Draconian measure *X* is necessary to prevent a catastrophe that would undermine the nation; (3) Therefore, draconian measure *X* must be permissible notwithstanding constitutional language that seemingly blocks it. If one thinks that over the course of history, judges are far more likely to perceive a danger of type *X* where there is none than to discount a real *X*-type danger, and if one thinks that constitutions are designed to protect against just this tendency,⁵⁶ then one will be skeptical of doctrines and interpretive methods that leave judges with a great deal of room to rationalize their fears. And there is reason to think that the structural method as Professor Black conceived it does just that.

In the end, therefore, it is not especially surprising that Black’s method of inference from the structures and relationships created and recognized by the Constitution should have been conflated with a method that infers rules of law from the structures and relationships found in the constitutional text. For without something like this conflation, the structural method may be dangerously open-ended—at least when it is seen as a method to be used by judges performing the task of judicial review.

III. THE CAUSE OF CONGRESSIONAL ACQUIESCENCE IN THE IMPERIAL PRESIDENCY

Given its open-endedness, Professor Black’s structural method may be most relevant to nonjudicial actors who must interpret the Constitution, which was a subject about which Black himself cared deeply. In particular, in a 1974 paper, *The Working Balance of the American Political Departments*,⁵⁷ Black explains how the Constitution allocates to Congress ample tools to resist presidential policymaking. Given that fact, why does Congress never seem to utilize these tools? A political scientist might attempt to answer such a question by explaining the growth in the administrative state, and the political scientist would be right of course. But there may be a further, constitutional, dimension to the phenomenon. This Part proposes that we follow Charles Black’s lead in taking constitutional structure seriously, even while looking beyond the four corners of the Constitution. In doing so, we may find an answer to the puzzle of the acquiescent Congress in a set of institutions—political parties—that the Constitution implicitly calls into existence.

Let us begin with the political scientist’s—or more precisely, the public choice theorist’s—explanation for congressional acquiescence in the expansion of presidential power. Public choice theory teaches that individual members of Congress care about getting re-elected, rather than advancing the public good or

56. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

57. Black, *supra* note 3.

even maximizing the power of Congress as an institution.⁵⁸ Further, members of Congress can take credit for solving social problems—and thus look good to their constituents—without putting themselves on the hook for tough policy tradeoffs, by delegating broad power to the Executive; thus, the incentive structure strongly disfavors close congressional supervision of the President's policymaking.

I do not so much want to disagree with this account as I want to supplement it with a constitutional story, for we can gain some further traction on the phenomenon of congressional acquiescence to presidential power by extending Professor Black's structural method. Where others saw only the constitutional text, Black saw the institutions created or recognized by the Constitution. Suppose that we go one step further still and ask about institutions that are in some sense *necessitated* by the Constitution, though nowhere mentioned in it? I have in mind political parties, and, although I shall not discuss them here, other civil society institutions.

Consider the relatively uncontroversial proposition that political parties play a central role in the actual operation of American government as we know it,⁵⁹ despite the fact that the Constitution is blind to their existence. That blindness, of course, is no accident. *The Federalist No. 10* is only the most famous statement of the Framers' antipathy to political factions, which they associated with political parties.⁶⁰ Madison was hardly alone in his fear of factionalism.⁶¹ And, as I now briefly explain, we find evidence of the Framers' fears in *The Federalist* and the Constitution itself, which manifests concern with factionalism along at least four dimensions: among religious sects; between debtors and creditors; between slave states and free states; and between small states and large states.

58. See, e.g., Edward L. Rubin and Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 621–22 (2003) (explaining that “public choice, which is the rational actor theory's approach to politics . . . [posits] that legislators and the chief executive will try to maximize their chances of being re-elected”). For a useful critical account of public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). The seminal public choice works include ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989); and MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOOD AND THE THEORY OF GROUPS* (1965).

59. See generally Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (arguing that political parties form an unintended part of the constitutionally structured political safeguards of federalism); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) (arguing that political parties serve as natural brokers between state and federal government).

60. *The Federalist No. 10* itself sometimes uses the term “party” in the sense of political party as a synonym for “faction.” See, e.g., THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961) (discussing “the spirit of party and faction in the necessary and ordinary operations of Government”); *id.* at 60 (noting the ability of “a predominant party, to trample on the rules of justice” in apportioning taxes).

61. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 57–59 (1969) (arguing that most of the Framers' generation conceived of factionalism as “dangerous and destructive, arising from false ambition, avarice, or revenge”) (internal quotations omitted).

The Federalist No. 10 describes the vice of factional fighting along religious lines.⁶² Although Madison's views (along with those of his fellow Virginian Thomas Jefferson) were probably at the extreme end of secularist sentiment of the day,⁶³ the Federal Constitution, with its prohibition on religious tests and a national established religion, was in its time and remains today one of the most secular in the world. And that is so despite—or perhaps because of—the fact that Americans tend to be more religious than citizens of other Western democracies.⁶⁴

Next, consider economic factionalism. If Madison went further than his fellow Framers in wishing to keep religion out of government, the fear of economic populism was widely shared among his class.⁶⁵ The elite worried that absent sufficient safeguards, popular rule would generate “a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project.”⁶⁶

For Madison, if not for others,⁶⁷ the sheer size of the new Republic was an important factor in combating economic populism, but even he did not rely on size alone. Fearing that state legislatures would fall into the hands of the debtor class, the Framers assigned the power to coin money exclusively to the federal government.⁶⁸ They hoped thereby to hock easy-money, inflationary policies that would benefit debtors at the expense of creditors; monetary policy would be in the hands of the relatively aristocratic federal government and not the relatively populist states.⁶⁹ Moreover, although Madison failed in his objective of affording the national legislature a power

62. See THE FEDERALIST NO. 10, *supra* note 60, at 64 (“[A] religious sect, may degenerate into a [local or regional] political faction . . .”).

63. See Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 791 (2002).

64. See The Pew Research Center for the People & the Press, *Global Attitudes: 44-Nation Major Survey (2002)* (showing, inter alia, that only forty percent of American respondents agreed that it is “not necessary to believe in God to be moral and have good values,” whereas the lowest response of any other industrialized democracy was sixty-six percent for Japan and Germany), available at <http://people-press.org/reports/pdf/185topline.pdf> (last visited May 8, 2004).

65. See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (The Free Press 1965) (1913) (describing the Constitutional Convention as essentially an aristocratic counterrevolution against the populism of the previous decade and a half); WOOD, *supra* note 61 at 403–09.

66. THE FEDERALIST NO. 10, *supra* note 60, at 65.

67. Professor Kramer has argued that James Madison's argument for the extended Republic, set forth in his *Vices Memo* and *The Federalist No. 10*, was not widely appreciated in its day. Larry Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 637–71 (1999). That may be, but Kramer does not deny that the founding generation broadly shared Madison's antipathy to political factions. What they may have misunderstood was Madison's prescribed remedy, not the nature of the illness.

68. See U.S. CONST. art. I, § 8 (“The Congress shall have Power To . . . coin money . . .”); *id.* § 10 (“No State shall . . . coin Money . . .”).

69. Charles Beard attributes such motives to the Convention generally. See BEARD, *supra* note 65. Less controversially, Wood attributes these motives at least to the Federalists. See WOOD, *supra* note 61, at 403–09, 483–99.

to veto all state legislation,⁷⁰ the supremacy of federal law, along with the Marshall Court's broad interpretation of federal power (ironically contested by Madison himself in his later, Jeffersonian Republican phase⁷¹), assured the near-equivalent: The federal government would have and has had the power to regulate the national economy and to displace most state regulatory efforts deemed unduly intrusive.

The original Constitution included parallel mechanisms to combat factionalism along the other dimensions mentioned above. On the slave question, this meant preventing an anti-slavery majority from "tyrannizing" slaveholders by turning the federal government against the peculiar institution. The Fugitive Slave Clause, the preservation of the slave trade through 1808, the three-fifths compromise, and in one way or another, virtually every other feature of the federal government, all would serve to frustrate an abolitionist faction should it manage to come to power.⁷²

Finally, the compromise between large and small states ensured the preservation of the status quo even against "factions" that comprise a substantial majority of the population. The Constitution permanently preserves small states' suffrage in the Senate, disproportionately values their electoral votes in Presidential elections, and places them on an equal footing with large states in the ratification of constitutional amendments.⁷³

70. Madison sought a "national negative." See Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 THE PAPERS OF JAMES MADISON, 9 APR. 1786–24 MAY 1787, at 317–18 (Robert A. Rutland et al. eds., 1975) [hereinafter MADISON PAPERS]; Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in MADISON PAPERS, *supra*, at 368, 370; Letter from James Madison to George Washington (Apr. 16, 1787), in MADISON PAPERS, *supra*, at 382, 383–84.

71. See CLINTON ROSSITER, 1787: THE GRAND CONVENTION 308–09 (1968) (relating that Hamilton's proposal to create what became the First Bank of the United States "tormented Madison," who believed that "incorporation could be justified only on an interpretation of the authority of Congress that . . . leveled all the barriers which limit the power of the general government, and protect those of the state governments") (internal quotations omitted). After Madison became president, he "expressly disclaimed the view, so tenaciously advocated by himself twenty-three years earlier, that the Bank was unconstitutional." Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 286–87 (1997).

72. See Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 219–23 (Richard Beeman et al. eds., 1987) (Fugitive Slave Clause); *id.* at 210–18 (1808 Preservation Clause); *id.* at 196–97 (three-fifths compromise).

73. The Framers' efforts to protect the interests of small states have continuing ramifications. As is well-known, in the 2000 Presidential election, Al Gore won the popular vote while losing the electoral vote. Less well-known is the fact that the total population of the states Gore won also exceeded the total population of the states George W. Bush won—even counting Florida in the Bush column. Bush won thirty states and 271 electoral college votes from 50,456,002 voters in states with a combined population of 140,626,203. Gore won twenty states and the District of Columbia, and thus 266 electoral college votes from 50,999,897 voters in states with a combined population of 140,795,703. For electoral data, see Federal Election Commission, 2000 Official Presidential General Election Results, available at <http://www.fec.gov/pubrec/2000presgeresults.htm> (last visited May 8, 2004). For population data, see U.S. Census Bureau, United States Census 2000, Table GCT-PHI-R, Population, Housing Units, Area, and Density, available at <http://www.census.gov/census2000/states/us.html> (last visited July 16, 2004).

When the Framers expressed hostility to political parties, they were voicing opposition to factionalism along the lines of quasi-permanent interest groups such as religions, classes, and states.⁷⁴ They did not anticipate the ideological umbrella parties that would eventually come into being, and that failure rendered the Constitution incompatible with the political system to which it gave birth. In only the second contested Presidential election, the system nearly collapsed.⁷⁵ The Twelfth Amendment patched things up, but awkwardly, so that we have succession crises roughly once a century.⁷⁶ Had the Supreme Court not resolved *Bush v. Gore*⁷⁷ as it did, and had Florida sent two competing slates of electors to Washington, we might well have had a Republican President (because Republican state delegations outnumbered Democratic state delegations in the House of Representatives, which chooses the President if there is no electoral majority⁷⁸) and a Democratic Vice President (because Democrats at the time outnumbered Republicans in the Senate, which chooses the Vice President in these circumstances⁷⁹). The Electoral Count Act of 1887⁸⁰ purports to avoid some of these difficulties, but its constitutionality is hardly clear-cut.⁸¹

Despite the Constitution's failure to provide for clear rules—or indeed *any* rules—about the interaction of political parties with the apparatus of government, the Black-inspired point I wish to emphasize here is that the Constitution nonetheless calls parties into existence. In any but the most trivially small polity, politics is impossible without organizations. The Constitution created a complex governmental system in which the enactment of legislation requires

74. See, e.g., THE FEDERALIST NO. 10, *supra* note 60, at 57 (defining “faction” as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community”).

75. George Washington faced no real opposition in 1788 and 1792. See TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787–1804, at 38, 57 (1994) (noting that the 1788 election was unanimous in the electoral college and that the 1792 election was also essentially uncontested). The second contested Presidential election took place in 1800, and the rise of parties exposed a defect in the original Constitution, which permitted each elector to cast two votes. Contrary to the Framers' original expectations, each of the major parties ran a Presidential and a Vice Presidential candidate, and each elector of the victorious Democratic-Republican Party cast one vote for Thomas Jefferson and one for Aaron Burr. The tie was only broken after thirty-six ballots cast in the House of Representatives. See *generally id.* at 96–101; David P. Currie, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 39 (2001).

76. In addition to the Presidential election of 1800, the elections of 1876 and 2000 yielded deadlocks that had to be resolved by extraordinary intervention—a special commission in the former instance and a decision of the Supreme Court in the latter. See *generally* *Bush v. Gore*, 531 U.S. 98 (2000); KEITH IAN POLAKOFF, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION 203 (1973).

77. 531 U.S. 98 (2000).

78. U.S. CONST. art. II, § 1, cl. 3.

79. *Id.*

80. 24 Stat. 373 (codified at 3 U.S.C. §§ 5–7, 15–18 (2000)).

81. The Act sets forth various procedures, including a safe harbor that purports to insulate from review in Congress the electoral count of a state complying with a deadline set forth in the Act. See 3 U.S.C. § 5 (2000). Insofar as that procedure imposes constraints on Congress not found in Article II or the Twelfth Amendment, its constitutionality is open to question.

joint action by the President, the House, and the Senate, and where national politics also gives a substantial role to the states in the operation of the federal government.⁸² As a practical matter, in order for the government to function, institutions for coordinating political action needed to arise.⁸³ To be sure, we can imagine politics organized by institutions other than political parties such as churches, labor unions, and other civil society institutions. But political parties that were custom-built to address a full range of political issues obviously had an advantage over these other institutions designed primarily to serve other purposes.

What sort of party politics did the Constitution call into existence? Although our constitutional history might have unfolded differently, at least since 1842, when the pattern of single-member geographical districts became more or less fixed,⁸⁴ the two-party system has been all but guaranteed. Duverger's Law entails two and essentially only two parties in each district,⁸⁵ and while in principle those two parties could be different in different states, in practice the

82. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–52 (1954) (describing the structural mechanisms that tie Congress to the states).

83. See Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, *supra* note 59, at 279–80 (“For much of our history (from at least Thomas Jefferson’s time until the late 1960s), getting elected to federal office was simply impossible without the enthusiastic backing of state and local party officials.”); *id.* at 281–85 (explaining how political parties have continued to be essential to national politics since the 1960s).

84. Prior to 1842, states commonly selected their congressional delegations on a statewide basis, and some states intermittently did so for many years thereafter. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1156–59 (2d ed. 2001); see also ANDREW HACKER, *CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION* 8–10 (1963); ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850* (1987); Tory Mast, *History of Single Member Districts for Congress* (1999), available at <http://www.fairvote.org/reports/monopoly/mast.html> (last visited May 8, 2004). A 1967 federal statute mandates single-member geographical districts, 2 U.S.C. § 2(c) (2000), and there is some evidence that Americans regard winner-take-all elections for single-member districts as part of their constitutional heritage—and may erroneously believe them to be constitutionally required as a literal matter as well. Cf. Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL. F. 241, 270 (“The cumulative voting system apparently was met with contempt and disbelief by the general public.”). Under the influence of the 1982 amendments to the Voting Rights Act, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (2000)), alternatives to winner-take-all elections for single-member districts have been implemented at the state and local level. See Pildes & Donoghue, *supra*, at 259 (“Unbeknownst to many, in recent years there has been a quiet proliferation of alternative voting systems in the United States.”). However, the Supreme Court has indicated that it will not require or uphold aggressive enforcement of the Voting Rights Act. See *Georgia v. Ashcroft*, 539 U.S. 461, 490-91 (2003) (holding that an electoral districting plan that does not maximize the number of districts in which minority voters are in the majority is not, for that reason alone, retrogressive in violation of Section 5 of the Voting Rights Act). Accordingly, there appears to be little legal incentive for Americans to give up their attachment to winner-take-all elections in single-member districts.

85. See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 217 (Barbara North & Robert North trans., Wiley 2d English rev. ed. 1959) (1951) (observing that the tendency of first-past-the-post electoral systems to produce two major political parties “approaches the most nearly perhaps to a true sociological law”). Canada, for cultural and other reasons, is an exception, as Duverger himself recognized. See *id.* at 223.

advantages of affiliating with more-or-less like-minded voters in other states has meant that throughout American history there have been two and only two major national parties, each with a sufficiently broad ideological definition to encompass substantial regional diversity. When third parties arose around issues that the two major parties were not addressing, their agendas were quickly appropriated by one or both of the major parties or, less commonly, the third party eventually replaced one of the other two.⁸⁶ Though neither expressly created nor recognized by the Constitution, the two-party system is nonetheless a quasi-constitutional feature of our system of government—called into existence by the structures the Constitution does expressly create and recognize.

And what is the nature of our two-party system? Ralph Nader was wrong when he said that there is no substantial difference between the Republican and Democratic parties.⁸⁷ Median voters do not typically become party activists, and because candidates must appeal to activists to receive their party's nomination, the major parties do exhibit real differences.⁸⁸ However, the need to appeal to, or at least not to alienate, median voters in the general election means that neither major party can afford to capitulate too clearly to activists whose agenda would be regarded by mainstream voters as extreme.

The major American parties do, of course, provide a home for social groups based on religion, race, and class. Most notably, Christian conservatives are a vital Republican constituency while African-Americans and organized labor are among the most loyal constituencies of the Democratic Party, even if union leaders do not consistently deliver the rank and file.⁸⁹ But, despite providing homes to interest groups, modern American umbrella parties facilitate rather than impede the coalition-building game of *The Federalist No. 10*. Within the

86. The birth of the Republican Party and the death of the Whig Party on the eve of the Civil War is the best-known example of the latter phenomenon. As to the former, there are numerous instances of third parties coalescing around issues, moving them to the national agenda, and then fading. Most recently, Ross Perot's Reform Party promoted deficit reduction and campaign finance reform, only to fade after these issues were appropriated by the major parties.

87. In 2000, Nader referred to the two major parties collectively as "Republicrats," deliberately mixing and matching the major party candidates' names as "Gush and Bore." Sam Howe Verhovek, *What Makes Ralph (and Pat) Run?*, N.Y. TIMES, Oct. 29, 2000, § 4, at 5.

88. See Mark Tushnet, *The Supreme Court 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 44 (1999) (citing MARTIN P. WATTENBERG, *THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980s*, at 22–23 (1991)).

89. See Elisabeth Bumiller, *Talk of Religion Provokes Amens as Well as Anxiety*, N.Y. TIMES, Apr. 22, 2002, at A19 ("Mr. Bush's evangelical cadences appeal mightily to a core constituency, Christian conservatives, particularly in a midterm election year."); Lynette Clemetson, *Younger Blacks Tell Democrats To Take Notice*, N.Y. TIMES, Aug. 8, 2003, at A1 ("Democrats have traditionally counted on more than 90 percent of the black vote."); Adam Clymer, *Democrats Seek a Stronger Focus, and Money*, N.Y. TIMES, May 26, 2003, at A1 ("Democrats are . . . a coalition of interests, notably African-Americans, labor, feminists and all-purpose liberals."); John Heilemann, *The GOP Big Tent Is Full of Holes*, WIRED, Apr. 1996 ("In 1994, one in every three Republican votes was cast by a white evangelical, with fully two in five coming from the broader category of self-described religious conservatives, including Roman Catholics."), available at <http://www.wired.com/wired/archive/4.04/netizen.html> (last visited May 8, 2004).

Republican Party, Christian conservatives make peace with the anti-tax agenda of economic libertarians, just as the latter accept more conservative social policies than they might otherwise favor. Meanwhile, the Democratic Party is home to mainstream labor and environmental activists whose interests often diverge—and even when their interests converge, as they sometimes do on trade issues, they are often unable to steer the party.⁹⁰

To be sure, Christian conservatives have recently had somewhat greater success in controlling the Republican Party's social agenda,⁹¹ but that is a quite recent and perhaps ephemeral phenomenon. In the 1990s, Republican governors in the northeastern states of Massachusetts, New Jersey, and New York won elections and governed as social liberals, suggesting that religious conservatism has been a regional force more than a party force. Rapid sunbelt population growth increased the national political power of social conservatives over the last two decades by increasing congressional representation for Bible belt politicians, but continued southward migration over the coming decades could reverse the trend—if migrants to sprawling southern suburbs bring moderate politics with them. That qualification is itself a large “if,” however, because there is evidence that people tend to migrate to places where they feel politically comfortable.⁹² Accordingly, absent severe economic dislocations of the sort that would induce large-scale migration across the political spectrum, in the medium term, the politics of the American South are unlikely to become more liberal due to migration.

The larger point, however, is that American political parties are, over the long haul, hollow shells, vehicles for aggregating interests and trading off factions. Their *raison d'être* is obtaining and holding power rather than advancing an agenda. Though unanticipated by the Constitution's Framers, the party system that their handiwork called into existence thus very much serves the constitutional vision of *The Federalist No. 10*.

But, alas, it does so at the expense of the constitutional vision of *The Federalist No. 51*⁹³—the classic statement of separation of powers as the mechanism by which the Constitution prevents excessive concentration of power. Professor Black was right that, in principle, Congress has a great many

90. For example, as a candidate for President, Bill Clinton strongly supported the North American Free Trade Agreement, even as he also pledged to negotiate labor and environmental side agreements. Once in office, his administration acceded to Mexican and Canadian demands that no additional labor requirements be imposed by side agreement. See Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 U.S.F. L. REV. 521, 538–40 (2003).

91. See, e.g., White House Press Release, President Speaks at 30th Annual March for Life on the Mall (Jan. 22, 2003) (trumpeting President Bush's opposition to abortion, embryonic stem cell research, and physician-assisted suicide), available at <http://www.whitehouse.gov/news/releases/2003/01/20030122-3.html>. As an example of the interconnectedness of the Christian right and the Republican Party, note that Ralph Reed, the former director of the Christian Coalition, currently serves as chairman of the Georgia Republican Party. See Bumiller, *supra* note 89.

92. See Jonathan Tilove, *The New Map of American Politics*, AM. PROSPECT, May–June 1999, at 34–35.

93. THE FEDERALIST NO. 51 (James Madison).

powers to check the President, but it can only use these successfully if members of Congress believe that their first institutional loyalty is to the chamber in which they serve, rather than to the party that funds and otherwise facilitates their election. Except for the rare member of Congress who can raise money independently of his party, such institutional loyalty at the expense of party loyalty seems extremely unlikely.

IV. THE STRUCTURAL METHOD IN ACTION: CAMPAIGN FINANCE

My analysis to this point has been inspired by Charles Black in the sense of looking beyond the Constitution's text to concrete institutions, but I have not yet applied the structural method as such. To do so would require drawing a normative inference from the relationship of the institutions the Constitution recognizes and calls into existence. In the current context, the inference seems straightforward enough: If possible, we should find a way to reconcile the Constitution's commitment to separation of powers—the possibility of an independent-minded Congress—with its commitment to moderating the influence of factions. Yet the political party system we have impedes the former commitment while furthering the latter. How are we to choose between two competing constitutional values? The analysis of the previous Part suggests that we should look for the beginning of an answer in the constitutional and subconstitutional law governing the electoral process.

Consider campaign finance regulations of the sort embodied by Section 323 of the Federal Election Campaign Act—enacted as the Bipartisan Campaign Reform Act of 2002 (“BCRA”),⁹⁴ and recently upheld by the United States Supreme Court.⁹⁵ The law has the purpose and effect, *inter alia*, of making it more difficult for state and national political parties to raise money. Conventional wisdom, as expressed most insistently by campaign finance regulation opponents like Senator Mitch McConnell, holds that limiting the ability of parties to raise money will weaken political parties, and thereby increase the power of special interests, or to use the Madisonian lexicon, factions.⁹⁶

Critics of campaign finance reform worry that the application of contribution limits to party spending for individual candidates will free politicians from their parties' fundraising machinery, and thereby weaken party discipline. Explaining without formally endorsing the critics' concern, Professor Persily describes a world of weakened parties in which campaigns funded by “wealthy interest groups (unmediated by parties) . . . lead to [the] narrowing of the policy agenda to satisfy those interests.”⁹⁷

94. 2 U.S.C. § 441a (Supp. 2003).

95. *McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 686 (2003).

96. *See, e.g.*, Alison Mitchell, *Senate Debates McCain's Bill on Campaigns*, N.Y. TIMES, Mar. 20, 2001, at A1.

97. *See* Nathaniel Persily, *Parties, Money and Corruption*, The Funding of Political Parties Workshop, Institute of Advanced Legal Studies, University of London, July 5–6, 2002 (unpublished draft, on file with author, at 22).

Where campaign finance regulation's critics see restrictions on party fundraising and spending as playing into the hands of well-heeled special interests, however, optimists like Professor Briffault see BCRA as simultaneously serving the public and the long-term interests of the parties by weaning the latter from their dependence on large donors and connecting them to the grass roots.⁹⁸ In this view, BCRA's continued reliance on private money to fund campaigns avoids the problem most closely associated with public finance—that of severing the link between the party and its members⁹⁹—while at the same time allowing parties to thrive. BCRA's "combination of a higher hard money ceiling and continuing provision for the use of some soft money for voter mobilization," Briffault writes, "should allow the parties to cover if not expand" their electoral activities.¹⁰⁰

In some sense, Briffault's response is a non sequitur. The main problem with cutting the tie between large donors and the parties, according to the critics, is not that parties will be starved for cash. The problem is that the large donors will seek to spend their money outside the moderating, compromise-inducing influence of the parties. As Professors Issacharoff and Karlan have argued, legal restrictions on political contributions or expenditures do not eliminate the demand for money in politics; they merely shift the locus of activity.¹⁰¹

But what if they are wrong? What if the individuals and corporations that donate to candidates and parties do so less for the purpose of buying favors, than because they want to avoid being punished for failing to make sufficiently large contributions? What if, in other words, we assimilate the corrupting influence of money in national politics, not to the model of bribery, but to the model of extortion? Representative Christopher Shays, one of the leading advocates of campaign finance reform in the United States over the last decade, has described the activities of politicians as a form of "shakedown," defined (in response to a query from campaign finance reform opponent Representative Tom DeLay) as a phenomenon in which "leaders from both parties will call up a corporation president and say, 'We would like \$100,000 or \$200,000 or \$300,000 or half a million,' and make it very clear to those leaders that they can expect no action on their legislation unless they get it."¹⁰² Assuming such shakedowns do occur, tightening restrictions on large donations will result in corporate donors pocketing the money that they otherwise would have spent in response to

98. See Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 174–75 (2004) (noting how BCRA promotes public participation).

99. See Keith D. Ewing, *The Funding of Political Parties in Britain: What Is To Be Done?*, The Funding of Political Parties Workshop, Institute of Advanced Legal Studies, University of London, July 5–6, 2002 (unpublished draft, on file with author).

100. *Id.* at 20.

101. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 *passim* (1999). Although it upheld most of BCRA, in doing so the Court acknowledged (without attribution) the hydraulic effect Issacharoff and Karlan identified. See *McConnell*, 124 S. Ct. at 706 ("Money, like water, will always find an outlet.").

102. Alison Mitchell, *After Hours, Debate on Fund-Raising Rages*, N.Y. TIMES, July 20, 1998, at A1.

pressure from politicians. Some portion of the money in the political system will not simply flow hydraulically to purchase influence upstream because those funds were not in the system voluntarily. Thus, not every dollar diverted from party coffers goes to independent expenditures that increase factionalism.

Neither, however, is it plausible to assume that all or even most corporate and other large contributions are simply responses to politicians' demands. Undoubtedly, some substantial portion of such contributions are an attempt to purchase influence, and banning the direct purchase of influence will lead those interested in buying to seek substitute goods; in other words, such a ban will have the hydraulic effect that Issacharoff and Karlan identify. We do not know the precise proportions of money in the system that are attributable to pressure from politicians and efforts to buy influence, respectively, nor is it even clear that these are cleanly severable categories—sometimes it is impossible to distinguish between submitting to extortion and offering a bribe. My own suspicion, albeit merely a hypothesis, is that shakedowns account for a relatively modest fraction of money contributed, so that the hydraulic phenomenon is real and substantial. More empirical information is needed to assess the hydraulics claim fully, which is one reason why I might have advised the Court to uphold BCRA—but only provisionally, to see whether its predicted effects materialized.¹⁰³

Another reason the Court was right to uphold BCRA is that the law's critics may be right: it may have the effect of weakening the political parties. But if so, it is hardly clear that this fact should count against BCRA in the constitutional analysis. If I am right that the political party system—and, in particular, the dependence of members of Congress on their parties' fundraising apparatuses—encourages loyalty to party over loyalty to Congress, then weakening the parties could have the salutary effect of strengthening loyalty to Congress. Campaign finance reform increases the likelihood that Congress will stand up to the imperial Presidency.

But in thus serving the separation-of-powers values associated with *The Federalist No. 51*, does campaign finance reform, by weakening the two-party system, lead in equal and opposite measure to the undermining of the anti-factionalist values associated with *The Federalist No. 10*? And, if so, how should the Court choose between these constitutional values? I do not pretend to have the answer to that last question, though I do have two further observations.

First, the Court's opinion upholding BCRA, in finding that the attenuated free speech right to make campaign contributions can be justifiably overridden in an effort to limit corruption or the appearance of corruption, stops short of addressing the fundamental questions. I do not disagree with the Court's analysis as a matter of free speech law, narrowly understood. But campaign finance regula-

103. See Michael C. Dorf, *The Supreme Court 1997 Term, Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61–69 (1998) (describing and advocating “provisional adjudication”).

tion is not exclusively—or even primarily—a matter of free speech. It is a matter of democracy writ large, and any persuasive account of why Congress can or cannot regulate campaign finance should accordingly be underwritten by an account of the place of money in our constitutional democracy.

Second, to the extent that the Court has, in other cases involving the political process itself, taken a stand on basic principles of democracy, the view the Court has seemingly endorsed is problematic. In particular, the Court's fear for the stability of our political system is overblown. One sees such fear in cases holding that the preservation of the two-party system is a valuable constitutional objective in its own right.¹⁰⁴ Professor Pildes has argued that this view is part of a broader worry on the Court's part that, absent judicial vigilance, the political system might become unstable; it is this concern with stability, he suggests, that also underwrote the Court's willingness to intervene in the 2000 Presidential election.¹⁰⁵ Professor Pildes suggests—and I tend to agree—that the fear is largely misplaced and that American democracy would benefit were it more tumultuous.¹⁰⁶ Opening up the two-party system to greater political competition need not place us on a slippery slope to the multi-party chaos of Weimar Germany. As Professors Issacharoff and Pildes explain by contrasting American and German constitutional doctrine, any number of handholds can be found to brake that descent.¹⁰⁷ Given geographic districts and winner-take-all elections, Duverger's Law already gives the two-party system a huge institutional advantage. Thus, in a close case, the fact that a measure strengthens the two-party system ought to count against it, rather than for it. And, conversely, the fact that a measure such as BCRA may weaken the two-party system ought not to count against it and might even count in its favor.

That is the upshot of my Blackian analysis. Examination of the institutional advantages our constitutional system gives to the two-party system suggests that this system can still play its faction-frustrating role, even if somewhat weakened by a regime of campaign finance reform that has the effect of making politicians somewhat less dependent on their parties' fundraising apparatuses. Perhaps I am wrong in that assessment, or perhaps making members of Congress less dependent on their parties will render them a collection of loose cannons, rather than shifting their loyalty from party to party to Congress as an institution. But, whatever the

104. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 579 (2000) (fearing California's blanket primary might lead to the destruction of a major political party); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–66 (1997) (validating the government interest in preventing “the destabilizing effects of party-splintering”).

105. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 *passim* (2001).

106. See *id.* at 717–18.

107. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 690–99 (1998). For example, a requirement that a minor party receive some substantial level of support before becoming eligible for judicial protection against oligopolistic practices by the major parties prevents unlimited proliferation of small parties. See *id.* at 692 (describing German legal requirement that a party receive at least five percent of the vote to attain representation in parliament and other bodies).

right answer, here as elsewhere, Black's structural method quite clearly focuses us on the right question—what will be the impact of campaign finance reform on the institutions of our democracy? That is more than can be said for the Court's efforts over nearly three decades to distinguish between campaign expenditures and campaign contributions on the grounds that the former are speech protected by the First Amendment, while the latter are (within limits) not.¹⁰⁸

CONCLUSION

To return to the question of congressional independence from the President, we should not kid ourselves that adjustments to judicial doctrine governing the rules of campaign finance will convert every member of Congress into a Robert Byrd.¹⁰⁹ On some matters, the combination of party loyalty and institutional timidity relative to the Executive appear to inhere in modern small-r republican government, across a wide range of institutional arrangements. How else to explain the ability of Tony Blair, Silvio Berlusconi, and Jose Maria Aznar to commit their countries to the U.S.-led war on Iraq in 2003, despite widespread public opposition?¹¹⁰

The fact that Congress will rarely insist on checking the President's de facto war making power is troubling, and it may lead us to try to retrofit a solution onto the Constitution. The War Powers Resolution of 1973¹¹¹ was one such effort, but it does not change the basic dilemma Congress faces. Members of Congress do not want to have to take the heat for a war that goes badly, so they rarely resort to a formal declaration of war. But the President's powers as Commander in Chief permit him—and in some circumstances obligate him—to commit forces without prior congressional approval,¹¹² and once troops are

108. See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) ("In summary, we sustain the individual contribution limits [but] conclude . . . that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm.").

109. Senator Byrd defends Senate prerogatives against Presidential encroachment, even if they come from Democratic Presidents. See, e.g., Steven J. Duffield & James C. Ho, Comment, *The (Still) Illegal Appointment of Bill Lann Lee*, 3 TEX. REV. L. & POL. 403, 405 & n.10 (1999) (citing letter from Byrd to Attorney General Janet Reno, and on file with authors, demanding "an explanation and analysis of the President's authority to install Lee without Senate confirmation").

110. See The Pew Research Center for the People & the Press, The Pew Global Attitudes Project, *America's Image Further Erodes, Europeans Want Weaker Ties* (Mar. 18, 2003) (showing opinion running against the war in Britain, Italy, and Spain by respective margins of fifty-one to thirty-nine percent, eighty-one to seventeen percent, and eighty-one to thirteen percent), available at <http://people-press.org/reports/pdf/175.pdf>. The question is especially interesting because it simultaneously shows the weakness of opposition to executive power over national defense and the limits of public choice theory. If politicians cared about nothing other than re-election or the good of their parties, then these men would not have taken such unpopular stands.

111. 50 U.S.C. §§ 1541–1548 (2000).

112. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative

engaged in combat, members of Congress are loathe to bring them home lest their action be seen as unpatriotic. Thus, Congress has a built-in incentive to sit on the fence.

Does this mean that we are entirely dependent on the wisdom and judgment of the President to protect us from misguided presidential policies, including military adventures? I think not. Perhaps we can rely somewhat upon the President's own incentives. A first-term President cares about re-election and a second-term President cares about his legacy. Accordingly, Presidents respond to political pressure, even (perhaps especially) in matters of war and peace. In this context, recall White House Chief of Staff Andrew Card's explanation for waiting until the Fall of 2002 to make the public argument for confronting Saddam Hussein with military force: "From a marketing point of view," he explained, "you don't introduce new products in August."¹¹³

I argued in Part II of this essay that for the structural method to be an acceptable mode of judicial interpretation of the Constitution, it must be connected to textual interpretation. I would conclude by positing a parallel point outside the domain of judicial enforcement of the Constitution: Analysis of the institutional incentives of constitutional actors is incomplete without connecting that analysis to the actors' legal powers. Thus, textual analysis of the Constitution shows, as Professor Black argued,¹¹⁴ that Congress has the tools to rein in the imperial Presidency. Institutional analysis shows why Congress is unlikely to use those tools especially often or effectively.

authority.”). The President's unilateral power would grow still further should his claimed right to treat potential military threats as justifying preemptive action go unchallenged. See The National Security Strategy of the United States 14 (Sept. 2002) (“We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.”), available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited May 8, 2004).

113. Elisabeth Bumiller, *Traces of Terror: The Strategy; Bush Aides Set Strategy To Sell Policy on Iraq*, N.Y. TIMES, Sept. 7, 2002, at A1.

114. See BLACK, *supra* note 1.

