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Appointments, Innovation, and the Judicial-Political Divide

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APPOINTMENTS, INNOVATION, AND THE JUDICIAL-POLITICAL DIVIDE

GILLIAN E. METZGER†

ABSTRACT

*The federal appointments process is having its proverbial day in the sun. The appointment and removal of federal officers figured centrally in the Supreme Court's two major recent separation-of-powers decisions, *Free Enterprise Fund v. Public Company Accounting Oversight Board* and *National Labor Relations Board v. Noel Canning*. The appointments process has featured even more prominently in the political sphere, figuring in a number of congressional-presidential confrontations. Such simultaneous top billing in the judicial and political spheres is hardly coincidental. After all, it was President Obama's use of the Recess Appointments Clause in response to pro forma sessions that triggered the Court's engagement with the Clause in *Noel Canning*. But the relationship between the Clause's judicial and political manifestations is more complicated, and more fraught, than mere practical causality. The Roberts Court's approach to appointments and separation of powers issues stands out for its Burkean resistance to innovation. By contrast, the dominant characteristic of appointments in the political sphere is novelty and embrace of new institutional arrangements.*

This Article explores these differing judicial and political approaches to innovation, and the implications of the emerging contrast for federal administration. Although the Court's resistance to innovation might appear a useful prophylactic against efforts to bend the Constitution in the name of political expediency, the constitutional basis for such a general suspicion of innovation is lacking. Particularly given the political transformations occurring in response to polarization, a stance of suspicion sets the Court on a course of confrontation with the other two branches that is hard to justify. A more nuanced approach that pays greater attention to political reality would allow the Court to both better titrate its interventions to constitutional structure and minimize the disruptive effects of its decisions.

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TABLE OF CONTENTS

Introduction	1608
I. Appointments in the Courts	1611
A. The Roberts Court and the Appointments Process: <i>Free Enterprise Fund</i> and <i>Noel Canning</i> Compared	1612
B. Against Institutional Innovation	1619
II. Appointments in the Political Branches.....	1623
A. Contemporary Politics and the Separation of Powers	1624
1. <i>Appointments</i>	1624
2. <i>Broader Separation-of-Powers Trends: Defaults, Shutdowns, and Executive Unilateralism</i>	1627
B. Innovation and Political Polarization	1630
1. <i>Political Polarization, Divided Government, and Innovation</i>	1630
2. <i>Political Polarization, United Government, and Regulatory Innovation</i>	1633
III. Assessing the Judicial–Political Divide	1636
Conclusion.....	1643

INTRODUCTION

The federal appointments process is having its proverbial day in the sun. The appointment and removal of federal officers figured centrally in the Supreme Court’s two major recent separation-of-powers decisions, *Free Enterprise Fund v. Public Company Accounting Oversight Board*¹ and *National Labor Relations Board v. Noel Canning*.² To be sure, appointment and removal have long played a major role in judicial analysis of the scope of presidential power.³ But for over two decades these issues had lain largely

1. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

2. *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014). A third contender for this status was *Department of Transportation v. Association of American Railroads*, 135 S.Ct. 1225 (2015), which involved separation-of-powers and due-process challenges to the Passenger Rail Investment and Improvement Act of 2008. The D.C. Circuit had held that the Act represented an unconstitutional delegation of standard-setting authority to a private entity, Amtrak, but the Supreme Court reversed, reaffirming its earlier decision in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), that Amtrak is a governmental actor for constitutional purposes. *Assoc. of Am. R.R.s.*, 135 S. Ct. at 1228. In so doing, the Court remanded for the D.C. Circuit to consider “substantial questions . . . implicating the Constitution’s structural separation of powers and the Appointments Clause,” *id.*, and thus the case may return to the Court in the future.

3. *See, e.g., Myers v. United States*, 272 U.S. 52, 106–07, 161, 173–74 (1926).

judicially dormant, which alone makes their recent star turn notable. Moreover, the net result is that the Roberts Court has used appointments, and more broadly the issue of control over federal officers, as the frame for articulating its separation-of-powers vision.

The appointments process has featured even more prominently in the political sphere, figuring in a number of congressional-presidential confrontations. Again, the use of appointments as an occasion for political contestation has a long historical pedigree.⁴ But appointments have become the brave new world of American politics. Senators have used their confirmation role to resist presidential initiatives in new ways, such as delaying key executive-branch appointments and holding pro forma sessions to prevent recess appointments.⁵ The President has responded in kind, wielding the recess-appointments power assertively and experimenting with White House policy czars and other executive-branch positions.⁶ Moreover, these growing political confrontations over appointments have provoked a major change to the appointments process, with the Senate changing rules to free executive-branch and judicial appointments from the filibuster.⁷

Such simultaneous top billing in the judicial and political spheres is hardly coincidental. After all, it was President Obama's use of the Recess Appointments Clause in response to pro forma sessions that triggered the Court's engagement with the Clause in *Noel Canning*. But the relationship between the Clause's judicial and political manifestations is more complicated, and more fraught, than mere practical causality. The Roberts Court's approach to appointments and separation-of-powers issues stands out for its Burkean resistance

4. See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (Duke Univ. Press rev. ed. 2003) (providing a comprehensive analysis of the presidential-senatorial conflicts over executive appointments since the Early Republic).

5. See *infra* Part II.A.

6. See generally Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 *FORDHAM L. REV.* 2577 (2011) (describing the emergence of White House policy czars in the Obama administration); *Lawfulness of Recess Appointments during a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 *Op. O.L.C.*, 2012 WL 168645 (2012) (presidential use of recess appointments during pro forma Senate sessions); *Whether the Special Master for Troubled Asset Relief Program Executive Compensation Is a Principal Officer under the Appointments Clause*, 34 *Op. O.L.C.*, 2010 WL 4963118 (2010) (assessing the constitutionality of the appointments process for the TARP "pay czar," who is charged with reviewing executive compensation at companies receiving TARP funds).

7. See Jeremy W. Peters, *In Landmark Vote, Senate Limits the Use of the Filibuster*, *N.Y. TIMES*, Nov. 21, 2013, at A1.

to innovation.⁸ New institutional arrangements or assertions of power at the federal level are presumed constitutionally suspect; structural experimentation is a cause for concern rather than celebration. By contrast, the dominant characteristic of appointments in the political sphere is novelty and innovation. This characteristic holds true of national politics and legislation writ large. Established norms and conventions that governed Congress have fallen by the wayside, replaced by new arenas of political contestation and dispute. Innovation is even clearer in the executive branch, with the President responding to congressional inaction and resistance with new administrative measures. Innovation has been a significant feature of recent periods of united government as well, with the dominant party taking advantage of rare alignment of the branches to pass significant legislative measures.

This contrast between judicial conservatism and political innovation is striking. Whether the Court is responding to the political climate or acting independently is hard to know. But these contrasting approaches suggest that disagreement between the Court and the political branches on matters of governmental structure is likely to continue. That the Court's decisions fail to engage with current political realities is as troubling. The signal characteristic of national politics today is increasing political polarization, what some call hyperpolarization.⁹ Political polarization has a close relationship to political innovation. Not only has deepening polarization instigated many novel congressional and executive measures, but efforts to mitigate polarization in Congress are also likely to entail further structural changes. Yet recognition of the current polarized political environment is notably absent from the Court's separation-of-powers analysis.

The Court's resistance to innovation might appear a useful prophylactic against efforts to bend the Constitution in the name of political expediency. But such a general suspicion of innovation lacks a constitutional basis. Particularly given the political transformations occurring in response to polarization, a stance of suspicion sets the Court on a course of confrontation with the other two branches that is

8. For discussions of the Burkean approach to constitutional interpretation, see Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 509–15 (1996); Cass R. Sunstein, *Constitutional Personae*, 2013 SUP. CT. REV. 433, 443–45, 454–55.

9. See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276–81 (2011).

hard to justify. A more nuanced approach that pays greater attention to political reality would allow the Court to both better titrate its interventions to constitutional structure and minimize its decisions' disruptive effects.

Part I examines the Court's recent appointments decisions, identifying resistance to innovation as a theme running throughout the Roberts Court's structural jurisprudence. Part II turns to the political sphere, examining polarization trends and the relationship between polarization and political innovation. Part III then assesses the relationship between these judicial and political trends, analyzing their likely combined effect and potential normative implications.

I. APPOINTMENTS IN THE COURTS

The federal appointments process is no stranger to constitutional litigation. Historically, the Appointments Clause surfaced only occasionally and then primarily with respect to the question of who counted as a government officer, reflecting the nation's heavy reliance on private individuals working on a fee basis to carry out the work of government.¹⁰ Over the twentieth century, the Clause made a more regular appearance. A few cases traced the line between principal and inferior officers,¹¹ while others addressed the limits of Congress's role in appointments.¹² But most prominent judicial discussions of the constitutional scheme governing officers have long focused more on removal from office rather than appointment to it. Although much scholarly ink has been spilled debating the scope of the President's removal power, the Court upheld for-cause removal protections in the early New Deal and adhered to that position fifty years later in its next serious engagement with the issue.¹³

10. See U.S. CONST. art. II, § 2, cl. 2; see also, e.g., *Auffmordt v. Hedden*, 137 U.S. 310, 319, 326–27 (1890) (addressing whether a merchant appraiser, whose fee was imposed on the plaintiff importer, was an officer); *United States v. Germaine*, 99 U.S. 508, 510, 511–12 (1878) (addressing whether a surgeon examining pensioners on request for a fee was an officer). See generally NICHOLAS PARRILLO, *AGAINST THE PROFIT MOTIVE* (2014) (analyzing the evolution of the constitutional norm against profiteering by government officials).

11. See, e.g., *Edmond v. United States*, 520 U.S. 651, 661–65 (1997); *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

12. See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 289–90 (1991); *Buckley v. Valeo*, 424 U.S. 1, 141 (1976).

13. See, e.g., *Morrison*, 487 U.S. at 691–92; *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627–29 (1935); *Myers v. United States*, 272 U.S. 52, 132–33, 163–64 (1926).

The Roberts Court's decisions in *Free Enterprise Fund* and *Noel Canning* thus served to move the President's power to appoint and remove government officers back into the constitutional limelight. More than this, both decisions showcase the Roberts Court's approach to separation of powers writ large. The two opinions are a striking pair, linked by more similarities than immediately meets the eye. Perhaps their most dominant shared theme is a Burkean resistance to innovation.

A. *The Roberts Court and the Appointments Process: Free Enterprise Fund and Noel Canning Compared*

Free Enterprise Fund fits neatly within the vein of decisions assessing presidential control over officers solely through a removal lens. There, the Roberts Court addressed a challenge to the constitutionality of the Public Company Accounting Oversight Board (PCAOB), which exercises regulatory, enforcement, and disciplinary authority over the accounting industry. Created by the Sarbanes-Oxley Act and statutorily denominated a nonprofit corporation, the PCAOB initially was composed of five members appointed by the Securities and Exchange Commission (SEC) and strongly protected from removal except for good cause.¹⁴ By a vote of five to four, the Court held that this arrangement violated the Constitution's vesting of the executive power in the President and the Take Care Clause because the members of the SEC were themselves protected from removal except by cause.¹⁵

According to Chief Justice Roberts's majority opinion, the PCAOB's double for-cause protection crossed the constitutional line because it eviscerated the President's control over the Board and thereby impaired his ability to ensure that the laws be faithfully executed.¹⁶ On this view, the ability to remove officers is the linchpin for accountability in government, and no other system of oversight—not the ability to determine an agency's budget, approve its rules, or review its determinations and decisions—matters in constitutional separation-of-powers analysis.¹⁷ Indeed, the majority even downplayed the significance of presidential appointment, concluding that once the PCAOB members' for-cause protection was severed

14. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483–88 (2010).

15. *Id.* at 483, 494–99.

16. *Id.* at 495–99.

17. *Id.* at 497–506.

from the statute and they were rendered removable at will by the SEC, they became inferior officers whose selection did not need to be vested in the President.¹⁸

The Court's 2014 decision in *Noel Canning* is a more unusual beast, not only addressing the separation-of-powers implications of appointment directly but doing so in the course of an exegesis of the Recess Appointments Clause, rarely the subject of sustained judicial attention.¹⁹ The narrow issue in *Noel Canning* was the constitutionality of President Obama's use of the recess-appointments power when the Senate was in a pro forma session.²⁰ But, responding to the D.C. Circuit's decision below, the Court ruled more broadly, holding (again five to four) that the Clause could be used during intrasession as well as intersession recesses and with respect to vacancies that preexisted a recess as well as those that came into existence once the recess was underway.²¹ The Court then proceeded to rule that President Obama's recess appointments nonetheless were unconstitutional because a pro forma session counts as a session if the Senate says so, provided that it retains the ability to do Senate business.²² As a result, only a three-day recess existed when the President made his appointments, and that was too short to trigger the Recess Appointments Clause.²³

Far more important than these specific holdings, however, are what the decisions signal about separation-of-powers analysis under the Roberts Court. *Free Enterprise Fund* and *Noel Canning* appear at the outset to be analytic opposites, decided by reversed 5-4 lineups and contrasting methodologies, with the difference in majorities chalked up to Justice Kennedy's changing allegiances. Separation-of-powers opinions are often distinguished by whether they reflect a formalistic emphasis on literal constitutional text and distinct branches and categories of power or a functionalist attention to actual power relationships, underlying balance, flexibility, and efficacy.²⁴ On

18. *Id.* at 509-11.

19. *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (noting that the Court was "interpret[ing] the Clause . . . for the first time in more than 200 years").

20. *Id.* at 2557.

21. *Id.* at 2556-67, 2561, 2573.

22. *Id.* at 2574-77.

23. *Id.* at 2557.

24. For discussion of the difference between formalist and functionalist approaches to the separation of powers, see generally M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136-47 (2000); Peter L. Strauss, *Formal and Functional*

this score, as Professor Ronald Krotoszynski has argued, *Free Enterprise Fund* appears to offer a formalistic take on the separation of powers.²⁵ It viewed the Vesting and Take Care Clauses as mandating a clear line of removal authority from the President down and dismissed the many administrative mechanisms through which the SEC in fact exercised broad control as irrelevant, insisting that “[t]he Framers did not rest our liberties on such bureaucratic minutiae.”²⁶ A similar formalist cast is evident in *Stern v. Marshall*,²⁷ in which the Court drew a sharp line between adjudication of private and public rights and identified the former as the constitutionally protected terrain of Article III courts.²⁸

In *Noel Canning*, by contrast, functionalism reigned triumphant. Now writing for the majority, Justice Breyer repeatedly concluded that the relevant constitutional text was ambiguous and put prime emphasis instead on achieving its underlying purposes.²⁹ That purpose, in the majority’s eyes, was to “ensure the continued functioning of the Government while the Senate is away.”³⁰ This functionalist bent was reinforced by the majority’s express reliance on the historical practice as an important interpretive guide, cautioning that the Court “must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”³¹ Here the formalist analysis was relegated to Justice Scalia’s opinion concurring in the judgment, which insisted that the relevant text was clear and rejected reliance on political practice in resolving separation-of-powers disputes.³²

Approaches to Separation of Powers Questions—A Foolish Inconsistency?, 72 CORNELL L. REV. 488 (1987).

25. Ronald J. Krotoszynski, Jr., *Cooperative Federalism, The New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1605–07, 1615–18 (2012).

26. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010).

27. *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

28. *Id.* at 2608–09 (2011); *see also id.* at 2619 (“It goes without saying that ‘the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.’” (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983))); Krotoszynski, *supra* note 25, at 1619–20.

29. *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2564, 2567–69 (2014).

30. *Id.* at 2553.

31. *Id.* at 2560.

32. *Id.* at 2592 (Scalia, J., dissenting).

Combined with the consistent and even split among the other Justices, this shift in methodological approach suggests that the Roberts Court is deeply divided on separation-of-powers matters. But more analytic similarity exists across these decisions than first appears. Despite its overall formalistic stance, the *Free Enterprise Fund* majority also heavily emphasized more functionalist concerns with political accountability and the dangers of political diffusion.³³ It was careful to avoid disrupting existing governance relationships, expressly distinguishing other potential examples of double for-cause arrangements.³⁴ Moreover, the Court’s remedial approach—simply excising the for-cause protection enjoyed by the PCAOB—both served to preserve the Sarbanes–Oxley regulatory scheme and signaled that the Court was unlikely to call into question established independent-agency structures with only one level of for-cause protection.³⁵ Meanwhile, the *Noel Canning* Court unanimously held that a pro forma session is not a recess, despite the fact that the Senate’s use of pro forma sessions to preempt the recess-appointments power would appear equally at odds with the Recess Appointments Clause’s concern to ensure that “the President . . . obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.”³⁶ Further, the majority justified its

33. See John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 43–48 (2014) (“[T]he Court in *Free Enterprise Fund* ultimately relied on fairly high-level functional considerations to draw the constitutional line at issue.”); see also Krotoszynski, *supra* note 25, at 1617–18 (noting how practical concerns with political accountability surface in the majority opinion, despite its formalist tone and orientation).

34. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506–07 (2010).

35. For a contrary view, see generally Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014). A similar concern with not disrupting established administrative relationships is evident in *Stern*, with the Court there again carving out administrative agencies from the decision’s scope by *ipse dixit*. See *Stern v. Marshall*, 131 S. Ct. 2594, 2612 n.6, 2615, 2619 (2011). *But see* *New Process Steel, L.P. v. Nat’l Labor Relations Bd.*, 560 U.S. 674, 678, 679–83, 688 (2010) (holding that the National Labor Relations Board’s (NLRB’s) effort to delegate decisionmaking power to just two board members to address the lack of additional board members was invalid under the National Labor Relations Act, thereby nullifying nearly 600 NLRB decisions).

36. *Noel Canning*, 134 S. Ct. at 2568; see Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1533–42 (2015) (emphasizing *Noel Canning*’s mixed formalist and functionalist character). Although minority political opposition was the barrier to confirmation of the NLRB nominees, what enabled that opposition to continue without the Senate majority forcing the issue so as to be able to recess was the option of pro forma sessions. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C., 2012 WL 168645 (2012).

decision to reject the pro forma recess appointments on formalist grounds, emphasizing that the Constitution's text grants broad discretion to the Senate to control its own operations and that the recess-appointments procedure is expressly limited to the recess context.³⁷

Both decisions share another trait: reluctance to engage with current governmental realities. In terms Professor Richard Pildes has recently used, these decisions represent instances of "institutional formalism," in that they approach the governmental institutions involved "at a high level of abstraction and generality," without reference to "more contingent, specific features of institutional behavior, or to the particular persons who happen to occupy the relevant offices, or to the ways in which the institution actually functions in particular eras."³⁸ This characteristic is particularly evident in *Free Enterprise Fund*, in which the majority zeroed in on removal over other control mechanisms and paid little heed to determining whether removal in practice served the pivotal role that the majority ascribed to it.³⁹ The majority did underscore the way agency insulation from the President could enhance congressional power, a somewhat realist perspective on independent agencies. But it never examined whether enhancing congressional power was a realistic outcome with respect to the PCAOB, given the SEC's broad authority over the PCAOB's operations.⁴⁰

Noel Canning, by contrast, appears much more attuned to the details of governmental functioning, with lengthy discussion of actual recess-appointments practice and nuanced assessments of institutional interactions.⁴¹ Indeed, the majority itself proclaimed that it was "look[ing] to the actual practice of Government to inform [its] interpretation" of the Recess Appointments Clause.⁴² But most of this contextual sensitivity has a distinctive historical flavor. Current

37. *Noel Canning*, 134 S. Ct. at 2574–75. The majority added a functionalist aspect by requiring that the Senate be available to conduct Senate business, but made clear that this element is to be determined in a formalist fashion by examining the terms of Senate rules. *Id.*

38. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2014 SUP. CT. REV. 1, 2.

39. *Free Enter. Fund*, 561 U.S. at 494–502.

40. *Id.* at 499–500.

41. See, e.g., *Noel Canning*, 134 S. Ct. at 2570–73 (discussing past practice and institutional interactions with respect to recess appointments for preexisting vacancies); *id.* at 2569 (noting that "[a]cting officers may have less authority than Presidential appointments.").

42. *Id.* at 2578.

political realities only enter in the discussion of the status of pro forma sessions, and there the discussion has a remarkably anodyne quality.⁴³ From reading the opinion, it would be difficult to get a sense of the growing polarization and collapse in institutional norms that underlay the Senate Democrats' first use of the pro forma session to forestall recess appointments in 2007 and the Republicans' decision to adopt the strategy in 2011.⁴⁴ The closest the majority came to acknowledging that backdrop was its dismissal of the Solicitor General's concerns with disruption to the constitutional separation-of-powers balance by noting that "the Recess Appointments Clause is not designed to overcome serious institutional friction."⁴⁵

One particular manifestation of this reluctance to engage with governmental realities is both decisions' lack of attention to high-level positions below the top of the agency. Many such officials enjoy senior executive service (SES) or general civil-service protections against termination except for cause, and thus would seem (as Justice Breyer argued in dissent) to present the same double for-cause problem. Moreover, evidence exists that the agency staff level—noncareer SES or what are known as Schedule C appointees—is where loyalty is injected into agencies.⁴⁶ But *Free Enterprise Fund* simply carved such high-level agency officials out of its constitutional analysis, noting that "none of the positions [the dissent] identifies are similarly situated to the [PCAOB]" and "[n]othing in our opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system."⁴⁷ *Noel Canning* similarly ignored the presence of lower-ranked agency staff in its consideration of the scope of the recess-appointments power, including only a passing

43. *Id.* at 2575–77.

44. On this backdrop, see generally Harvard Law Review Ass'n, *Developments in the Law—Presidential Authority: V. Executive Appointments*, 125 HARV. L. REV. 2135, 2144–53 (2012) (tracing the significant conflicts of the last several decades over the power of the American presidency, including the appointments power and the use of pro forma sessions). A similar political backdrop underlay the NLRB's loss of a quorum in 2008 and again went unmentioned by the Roberts Court in its decision striking down the NLRB's effort to keep operating by delegating power to two members. See *New Process Steel, L.P. v. Nat'l Labor Relations Bd.*, 560 U.S. 674, 676–78 (2010).

45. *Noel Canning*, 134 S. Ct. at 2577.

46. See David E. Lewis & Richard W. Waterman, *The Invisible Presidential Appointments: An Examination of Appointments to the Department of Labor, 2001-11*, 43 PRES. STUD. Q. 35, 51 (2013).

47. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 507 (2010).

reference to the lesser status of acting heads.⁴⁸ Yet the presence of agency personnel, including high-level officers whose tenure is unaffected by a vacancy at the top, seems quite relevant to assessing the extent to which allowing recess appointments during intrasession breaks or for preexisting vacancies is necessary to realize the constitutional goal of “preserv[ing] ‘the vigour of government’ at times when . . . [the Senate] is in recess.”⁴⁹

To be fair, in ignoring agency personnel below the agency-head level, *Free Enterprise Fund* and *Noel Canning* were simply following a long line of Supreme Court precedent. Other than appointments cases that address whether a particular officer is an inferior or principal officer, the separation-of-powers jurisprudence pays little attention to agencies’ internal structure and staffing.⁵⁰ By contrast, internal agency design and developments such as politicization of agency personnel are an increasing focus of political debate and scholarship.⁵¹ In particular, delays in filling high-level agency posts that require Senate confirmation are identified as undermining agencies’ ability to function even when agency heads are in place.⁵² Moreover, scholars have documented not only a “staggering” increase in the number of agency positions requiring Senate confirmation, mostly “occurring at secondary and tertiary levels and

48. *Noel Canning*, 134 S. Ct. at 2569.

49. *Id.* at 2577 (quoting THE FEDERALIST No. 1, at 5 (Alexander Hamilton)); see also *id.* at 2609–10 (Scalia, J., dissenting).

50. See Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1859–63 (2015).

51. For scholarly interest, see, for example, DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 1, 13–19 (2008) (detailing political appointments, particularly outside the cabinet or agency-head level); Jacob Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010). For political interest, see Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007) (adding a requirement that approval by agency regulatory-policy officers ordinarily be required for rulemaking to commence and that such officers be presidential appointees chosen in consultation with the Office of Management and Budget (OMB)); Jonathan Weisman, *Liberal Treasury Nominee’s Wall St. Prowess May Be a Vulnerability*, N.Y. TIMES, Nov. 27, 2014, <http://www.nytimes.com/2014/11/28/business/economy/liberal-treasury-nominees-deal-making-prowess-could-be-a-liability.html> (noting Senator Elizabeth Warren’s efforts to prevent the confirmation of the undersecretary for domestic finance).

52. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 922, 935–46 (2009).

below,” but also an increase in political opposition to such subcabinet-level nominees.⁵³

B. *Against Institutional Innovation*

The strongest similarity between *Free Enterprise Fund* and *Noel Canning*, however, lies in their shared resistance to innovation in government. Both majority decisions treat such novelty as constitutionally suspect. In *Free Enterprise Fund*, the majority repeatedly characterized the PCAOB as presenting a “novel structure” and “a new situation not yet encountered by the Court.”⁵⁴ The Court openly expressed its constitutional skepticism about innovation, agreeing with the dissenting judge below that “the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent” for Congress’s action.⁵⁵ And the majority’s excision of established governance structures from the scope of its holding is yet another signal of its institutional conservatism, in the Burkean sense of resistance to change and support for the status quo.⁵⁶ Strikingly, even Justice Breyer’s dissent appeared to resist institutional innovation. Instead of defending the PCAOB on the ground that novel structures were needed to respond to failures in accounting oversight, he argued that the double for-cause structure of the PCAOB was not new at all and contended that the decision called into question the constitutionality of “hundreds, perhaps thousands,” of high-level positions.⁵⁷

In *Noel Canning*, novelty was doubly present: first, with respect to the D.C. Circuit’s holding that the recess-appointments power was only available for vacancies that arose during intersession recesses;

53. See Joel D. Aberbach & Bert A. Rockman, *The Appointments Process and the Administrative Presidency*, 39 PRES. STUD. Q. 38, 41, 48–49 (2009); see *infra* notes 88–94 and accompanying text. See generally PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF RESPONSIBILITY (1995) (describing the creeping accretion of bureaucrats in the federal administration, which decreases the efficacy of administrative institutions through a diffusion of responsibility).

54. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483, 496 (2010); see also *id.* at 501 (“[W]e deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure.”); *id.* at 514 (“[T]he Act before us imposes a new type of restriction.”).

55. *Id.* at 505 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff’d in part and reversed in part*, 561 U.S. 477).

56. See *supra* notes 34, 47 and accompanying text; see also *supra* note 8.

57. *Free Enter. Fund*, 561 U.S. at 540–41 (Breyer, J., dissenting).

and second, in President Obama's use of the recess-appointments power when the Senate was formally in session. The majority repeatedly emphasized this first manifestation, assigning longstanding historical practice substantial weight in separation-of-powers analysis.⁵⁸ By contrast, the majority made no mention of the fact that the President had used the recess-appointments power as it had never been used before.⁵⁹ The majority's silence on this point is somewhat surprising, given its holding that this use of the power was unconstitutional and its reliance elsewhere on historical practice. One reason may be that emphasizing the novelty of Obama's actions flagged the equally novel character of pro forma sessions, a feature of the case the majority sidestepped by focusing on the broad textual grants to the two houses of Congress to control their own internal operations.⁶⁰

This Burkean stance has surfaced elsewhere in the Roberts Court's jurisprudence, most prominently in *National Federation of Independent Business v. Sebelius (NFIB)*,⁶¹ in which the Court addressed the constitutionality of the Affordable Care Act's (ACA's) individual mandate.⁶² In the course of holding that the individual mandate fell outside of the commerce power, Chief Justice Roberts portrayed it as unprecedented, arguing that "Congress ha[d] never attempted to . . . compel individuals not engaged in commerce to purchase an unwanted product."⁶³ According to the Chief Justice, such "new conceptions of federal power" at least created good reason for careful consideration of their implications: "Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action."⁶⁴

58. *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559–60, 2564, 2573, 2577 (2014).

59. *Id.* at 2573–77.

60. Another factor may be that the *Noel Canning* majority was composed largely of Justices who had resisted attacks on innovation in decisions such as *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2625 (2012) (Ginsburg, J., dissenting).

61. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

62. *Id.* at 2577.

63. *Id.* at 2586.

64. *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)); see also *id.* at 2599 (distinguishing the "novel course of directing individuals to purchase insurance" under the commerce power from "Congress's use of the Taxing Clause to encourage buying something," which was "not new").

Such resistance to innovation is not a dominant trait of the Roberts Court's constitutional jurisprudence writ large.⁶⁵ In its first years, the Roberts Court seemed inclined in a more minimalist direction, opting for narrow constitutional decisions that severed a constitutionally troublesome application or read a statutory provision in such a way as to avoid invalidation.⁶⁶ But the Court soon demonstrated it was quite willing to act more dramatically. Its narrow as-applied limitation of the Bipartisan Campaign Reform Act of 2002 (BCRA) in *FEC v. Wisconsin Right to Life*⁶⁷ became a broadscale rejection of the BCRA's constitutionality and the constitutionality of longstanding bans on direct corporate campaign contributions in *Citizens United v. FEC*.⁶⁸ Similarly, the Court's limited expansion of the Voting Rights Act's (VRA's) bailout provision in *Northwest Austin Municipal Utility District Number One v. Holder*⁶⁹ evolved in *Shelby County v. Holder*⁷⁰ into an invalidation of the VRA's coverage formula, which in practice undid the law's core preclearance process. Notwithstanding the Court's efforts to defend the decisions in *Citizens United* and *Shelby County* as in keeping with original understandings,⁷¹ it is hard to view decisions striking down longstanding regulatory arrangements as Burkean or anti-innovation. Similarly, the Roberts Court's willingness to overturn longstanding constitutional precedent fits poorly with an account of its

65. For the somewhat contrasting view that “[t]he Roberts Court has regularly relied on traditionalism in constitutional cases,” see Louis Virelli, Jr., *Constitutional Traditionalism and the Roberts Court*, 73 U. PITT. L. REV. 1, 39–61 (2011).

66. See generally Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773 (2009) (analyzing the Roberts Court's conservative preference for as-applied challenges over facial challenges); see also Sunstein, *supra* note 8, at 444–45 (noting that “on prominent occasions, [Roberts] seems to write as a self-conscious Burkean”).

67. *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007).

68. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 347–56 (2010) (overturning federal prohibition on corporate campaign contributions); see also *id.* at 394–95 (Stevens, J., dissenting) (noting that national restrictions on corporate political contributions date back to 1907).

69. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

70. See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625–29 (2013) (holding Section 4 of the 1965 VRA unconstitutional); *Nw. Austin*, 557 U.S. at 204 (noting, in dicta, that “[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions”); see also Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714 (2014).

71. See *Shelby Cnty.*, 133 S. Ct. at 2623–25; *Citizens United*, 558 U.S. at 353–54; *id.* at 386–93 (Scalia, J. concurring).

jurisprudence as legalistic or dominated by a commitment to the rule of law.⁷²

How then to explain the anti-innovation theme of *NFIB*, *Free Enterprise Fund*, and *Noel Canning*? Notably, all three decisions address matters of constitutional structure more than individual rights, suggesting that the Roberts Court may be particularly reluctant to countenance innovation in the federal government's institutional arrangements or assertions of authority. This explanation is not fully satisfying, given that *Shelby County* similarly addressed questions of structure and authority, specifically the federal government's power to subject state governments to preclearance of any changes to their voting arrangements. Yet a striking feature of *Shelby County* is the majority's insistent characterization of the VRA as the truly radical innovation—an “extraordinary” and “drastic departure from basic principles of federalism” made necessary by “exceptional conditions.”⁷³ On this view, *Shelby County* falls into line with the other three structural cases, as an instance when the Court resisted the political branches' willingness to reenact innovative structures and assertions of power. Moreover, the Court has invoked novelty as grounds for constitutional suspicion of governance measures in the past, particularly with respect to measures that affect federal–state relationships.⁷⁴

Yet another cause of the Court's resistance to innovation is its constitutional interpretive methodology. That constitutional innovation fits poorly with originalism is hardly a surprise given originalism's rejection of the idea that constitutional meaning evolves over time.⁷⁵ More surprising perhaps is that a similar resistance to innovation results from an approach that does accept evolving meaning and accords constitutional significance to political practices that have emerged over time. This was the approach of the *Noel Canning* majority, which self-consciously assigned pride of place to “long settled and established practice” in separation-of-powers

72. For a condemnation of the Roberts Court as failing to adhere to rule-of-law values, see generally Eric J. Segall, *Is the Roberts Court Really a Court?*, 40 STETSON L. REV. 701 (2011).

73. *Shelby Cnty.*, 133 S. Ct. at 2618; see Hasen, *supra* note 70, at 726–28.

74. See, e.g., *Alden v. Maine*, 527 U.S. 706, 743–45 (1999); *Printz v. United States*, 521 U.S. 898, 905–17, 925 (1997).

75. See Randy Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412–18 (2013) (describing originalism's theoretical commitments and identifying its central normative claim as being that “the original meaning of the text provides the law that legal decisionmakers are bound by or ought to follow”).

analysis as against the dissent’s originalist analysis.⁷⁶ The prime justifications for an emphasis on historical practice are that it respects the separation-of-powers understandings and agreements of political branches.⁷⁷ Ironically, however, one unintended cost of such an approach may be a diminution of the political branches’ ability to craft new understandings, given that by definition such emergent views would lack the lengthy provenance identified as critical to constitutional legitimacy.⁷⁸

II. APPOINTMENTS IN THE POLITICAL BRANCHES

Turning from the courts to politics, a very different image of appointments emerges. Filling vacancies, rather than removing sitting officeholders, is the central challenge. Moreover, the defining characteristic of the current appointment process, and of congressional–executive interactions more broadly, is novelty. Established mechanisms for policymaking and compromise are being cast aside, the casualties of increasing polarization in Congress combined with divided government and presidential political imperatives. New norms and governing approaches are emerging, with a heavy emphasis on executive action. Although prior practices may return with a switch to unified government, good reason exists to expect innovation even then.

76. *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). Perhaps the most famous articulation of this mode of analysis is Justice Frankfurter’s statement that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). For a detailed and sophisticated assessment of historical practice in separation-of-powers analysis, see generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

77. *Noel Canning*, 134 S. Ct. at 2559–60 (identifying such practices as “liquidat[ion]” of the meaning of separation of powers by the political branches that deserve deference in part because of the branches’ representative legitimacy) (quoting James Madison, *Letter to Spencer Roane* (Sept. 2, 1819), in 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908)); *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”); see also Bradley & Morrison, *supra* note 76, at 343–47 (describing justifications based on acquiescence, waiver, and institutional competency).

78. Alternative justifications offered in defense of this approach are that it represents a Burkean respect for the status quo and legitimizes constitutional analysis by tying it to operational reality, see Bradley & Morrison, *supra* note 76, at 356–61, but these goals may be in some tension if operational reality is in a process of change.

A. *Contemporary Politics and the Separation of Powers*

1. *Appointments.* Perhaps the most notable feature of the appointments process today is the difficulty involved in filling top positions. As Professor Anne Joseph O’Connell notes in a leading study, “The length of federal agency vacancies is staggering,” with “Senate-confirmed position[s] . . . empty (or filled by acting officials), on average, one quarter of the time over th[e] administrations” of President Jimmy Carter through President George W. Bush.⁷⁹ These vacancies represent a combination of delays in initially filling positions to delays in filling offices once initial appointees leave. The relatively short tenure of appointees, estimated at one to two years, exacerbates the frequency of unfilled vacancies.⁸⁰ Other contributing causes are complicated White House and Senate processes for nomination and confirmation, statutory qualifications for offices that limit the pool of qualified candidates, and statutory confirmation requirements for appointments that the Constitution would treat as inferior officers.⁸¹ The effect, particularly when combined with limitations on appointment of acting heads during vacancies, is to undermine agencies’ ability to function and take action on major issues.⁸² Given that Presidents are often judged on their ability to govern effectively, delays in appointment may well be a more burning issue for presidential control of the administrative state than restrictions on removal.⁸³

79. See O’Connell, *supra* note 52, at 922, 950–59.

80. *Id.* at 919 & n.23 (noting a Government Accountability Office report finding a median appointee tenure of 2.1 years from 1981–1991, and a RAND study reporting an eleven to twenty month tenure for high-level defense officials from 1947–1999, along with other similar estimates); see also Matthew Dull, Patrick S. Roberts, Michael Keeney & Sang Ok Choi, *Appointee Confirmation and Tenure: The Succession of U.S. Federal Agency Appointees, 1989–2009*, 72 PUB. ADMIN. REV. 902, 904–05 (Nov.–Dec. 2012) (providing a slightly longer average of 2.8 years, with 3.3 years on average for agency heads).

81. See O’Connell, *supra* note 52, at 927–32, 965–74; see also *infra* note 92 and accompanying text.

82. See O’Connell, *supra* note 52, at 936–52 (assessing costs and benefits to agency functioning from vacancies).

83. See *id.* at 921 (“Participants in debates over the unitary theory of the executive might want to spend less time assessing the legitimacy of restrictions on the president’s removal power and instead pay more attention to analyzing the absence of presidential appointments at the front end of the process.”); see also LEWIS, *supra* note 51, at 55 (noting the abysmal federal response to Hurricane Katrina, specifically the role of political appointees, and arguing that “[s]ince voters and history judge presidents for the performance of the entire federal government during their tenure, this creates incentives for presidents to ensure that policy outcomes, both legislative and administrative, are under their control”); Jerry L. Mashaw,

Delays in staffing agencies are not a new phenomenon, but several recent developments have made the problem worse. One is the expansion in senators' use of holds on nominees. Holds are an informal Senate custom under which senators—in a group or individually—can “stop . . . floor consideration of legislation or nominations simply by making requests of their party leaders not to take up such matters.”⁸⁴ Senators can place any number of temporary or indefinite holds, and until recently could do so largely in secret.⁸⁵ Even senators of the President's own party have wielded this power against nominees, as Senator Claire McCaskill's hold on President Obama's nomination for the U.S. Space Command demonstrates.⁸⁶ A hold signals the senator's intention to object to consideration of the matter, and Senate leaders know that measures such as a filibuster or other tactics may result if floor consideration nonetheless goes forward.⁸⁷ Although holds have a long pedigree, their regular use for executive-branch nominees is a more recent phenomenon. In previous eras, the Senate deferred more to the President's choices.⁸⁸ Another new trend is the practice of “holding nominations hostage in order to extract concessions on other matters from the administration,” even while acknowledging the nominee's

Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. ECON. & ORG. 81, 95 (1985) (asserting that Presidents, unlike legislators, are judged based on the effect of general government policies); Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 239 (John E. Chubb & Paul E. Peterson eds., 1985) (explaining that Presidents are motivated by “political support and opposition, political strategy, and political tradeoffs,” and therefore value “‘responsive competence,’ not neutral competence”).

84. WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 256 (9th ed. 2014); BARBARA SINCLAIR, *UNORTHODOX LAWMAKING* 60–62 (4th ed. 2012) (providing examples of hold letters).

85. See OLESZEK, *supra* note 84, at 256–60. The Senate passed a measure in 2011 to eliminate secret holds and require holds to be made public within two days, but its success in curbing secret holds remains to be seen, and prior reforms have not had much effect. See *id.*; see also Alexandra Arney, *The Secret Holds Elimination Act*, 48 HARV. J. ON LEGIS. 271, 273–75, 278–85 (2011) (describing past practice and reforms).

86. See Craig Whitlock, *Senator Continues To Block Promotion of Air Force General*, WASH. POST, June 6, 2013, http://www.washingtonpost.com/world/national-security/senator-continues-to-block-promotion-of-air-force-general/2013/06/06/bb9ea0a-ccc3-11e2-ac03-178510c9cc0a_story.html.

87. See OLESZEK, *supra* note 84, at 257.

88. GERHARDT, *supra* note 4, at 164–68; see also THOMAS MANN & NORMAN ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* 91–98 (1st ed. 2012) (providing data on Senate delays on executive-branch appointments); WALTER J. OLESZEK, CONG. RESEARCH SERV., RL31685, *PROPOSALS TO REFORM “HOLDS” IN THE SENATE* 1–2 (2011) (noting that holds first became widespread in 1970s).

qualifications.⁸⁹ A recent example is the Senate hold-up of U.S. ambassador confirmations to protest general filibuster reform.⁹⁰ Nor are holds the only devices senators now use to prevent appointments from going forward; the pro forma sessions at issue in *Noel Canning* are another technique, as is refusing to attend committee hearings on nominees to deprive the committee of a necessary quorum.⁹¹

These practices combine to create even longer confirmation delays, with high-level officials below the cabinet-secretary level suffering the most.⁹² Such delays led the Democratically controlled Senate to adopt a change to the filibuster in 2013, preventing its use on executive-branch and judicial nominees other than to the Supreme Court.⁹³ Nonetheless, the appointments process continues to move slowly.⁹⁴ Moreover, these delays and the increasingly contentious and burdensome appointments process have taken on a life of their own, serving to dissuade top candidates from agreeing or seeking to be nominated in the first place.⁹⁵

Expanded use of indefinite and secret holds on executive officials also signals a collapse of established norms governing the appointments process. Professor Michael Gerhardt has argued that given the thinness of constitutional requirements on appointments, “the driving force of the appointments process are the norms developed by Presidents and senators to constrain or guide their decision making.”⁹⁶ Perhaps the most well known of these

89. SINCLAIR, *supra* note 84, at 64; *see also* MANN & ORNSTEIN, *supra* note 88, at 98–100.

90. Anne Gearan & Ed O’Keefe, *Senate Turf Fight Hurts Approval of Obama’s Diplomatic Nominees*, WASH. POST, Mar. 6, 2014, available at http://www.washingtonpost.com/world/national-security/senate-turf-fight-hurts-approval-of-obamas-diplomatic-nominees/2014/03/06/f9640e72-a320-11e3-b865-38b254d92063_story.html.

91. *See* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 943–45 & n.6 (2013); THOMAS E. MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH* 162–69 (2009) (describing presidential deviation from judicial-appointment norms).

92. *See* MANN & ORNSTEIN, *supra* note 88, at 95; Juliet Eilperin, *Chances for Obama Nominees to be Confirmed are Falling, Even with Over Two Years to Go*, WASH. POST, Mar. 26, 2014, http://www.washingtonpost.com/politics/chances-for-obama-nominees-to-be-confirmed-are-falling-even-with-over-two-years-to-go/2014/03/26/73a87b84-b107-11e3-9627-c65021d6d572_story.html; *see also* Weisman, *supra* note 51 (documenting the Senate’s rejection of Obama’s nominees to fill administration positions).

93. *See* Peters, *supra* note 7.

94. *See* Eilperin, *supra* note 92.

95. *See id.*; Norman Ornstein, *Slow Confirmation Process is Hurting U.S. Government*, ROLL CALL, June 24, 2009, available at 2009 WLNR 12062010.

96. GERHARDT, *supra* note 88, at 3.

appointments norms is senatorial courtesy, or the norm that a President will defer to the views of senators from his or her party in a state when deciding whom to nominate for federal offices for that state.⁹⁷ Other longstanding norms are senatorial deference to presidential nominations to subcabinet offices and presidential notification before making recess appointments. Although these norms have proved resilient over the years, recent experience signals that many are eroding and are no longer reliable controls on the process.⁹⁸

2. *Broader Separation-of-Powers Trends: Defaults, Shutdowns, and Executive Unilateralism.* These appointments norms are part of a much wider network of constitutional conventions, or “emergent, quasi-legal norms that organize the workings of government.”⁹⁹ Even outside of the appointments context, many of the norms and conventions governing interbranch relationships—separation-of-powers conventions, in Professor David Pozen’s terminology¹⁰⁰—have eroded significantly in recent years.

One prominent instance is the debt-ceiling crisis of 2011. Despite prior battles over raising the debt ceiling, “the mid-2011 political crisis was the first time that it appeared that Congress might just refuse to increase the debt ceiling” to cover the costs of spending it had already authorized.¹⁰¹ Instead, the expectation had always been that Congress would respond to the imperative of honoring national debts and protecting the financial markets against the harm of a U.S.

97. *Id.* at 143–45; Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 284–85 (2013).

98. *See* MANN & ORNSTEIN, *supra* note 88, at 91–100 (identifying greater resistance to executive-branch appointees); GERHARDT, *supra* note 88, at 145–53, 166–79 (describing failed presidential efforts to move away from senatorial courtesy); *see also* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 40–41 (2014) (observing that the norm against impeachment for nonfelony offenses is resilient).

99. Pozen, *supra* note 98, at 27. In David Pozen’s words, “[c]onstitutional conventions are often analogized to the rules of the game. They are rules that distribute responsibilities and facilitate cooperation among ‘the major organs and officers of government.’” *Id.* at 30 (quoting GEOFFREY MARSHALL, *CONSTITUTIONAL CONVENTIONS* 1 (1984)); *see also* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181–94 (2013) (describing constitutional conventions).

100. Pozen, *supra* note 98, at 27.

101. Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1186–88 (2012); *see also* MANN & ORNSTEIN, *supra* note 88, at 5–8.

default. In fact, Congress did so again in 2011, but with strong statements of continued resistance from congressional leaders and not until the country's credit rating had been downgraded.¹⁰² The 2011 battles over spending were then replicated in 2013, resulting in a sixteen-day government shutdown before a budget deal was reached.¹⁰³ Other examples of interbranch contestation and deviation from longstanding conventions are the significant increase in use or threatened use of the filibuster on legislation, dramatically expanded congressional investigations, and assertive congressional exercise of its contempt and subpoena powers.¹⁰⁴ Moreover, even when legislation gets enacted, it increasingly takes an "unorthodox" route, with Congress using reconciliation bills and other measures to avoid the filibuster threat.¹⁰⁵

The President, too, has begun to set domestic policy in new ways. A major example is the Obama administration's expanded use of waiver. In several critical policy contexts—such as healthcare, education, and welfare—the administration has waived key parts of governing statutes, for example waiving the adequate yearly progress requirements of the No Child Left Behind Act.¹⁰⁶ Although waivers are statutorily authorized and have been used previously, their employment to dramatically alter a statutory regime is a new development.¹⁰⁷ The Obama administration has also used its immigration-enforcement discretion to create affirmative programs granting relief from deportation for millions of aliens.¹⁰⁸ Moreover,

102. See Buchanan & Dorf, *supra* note 101, at 1178–79; Budget Control Act of 2011, Pub. L. No. 112-25, § 401, 125 Stat. 240, 259–63 (2011) (establishing Joint Select Committee on Deficit Reduction to recommend legislation that would reduce deficit by \$1.5 trillion by 2021).

103. See Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, N.Y. TIMES, Oct. 16, 2013, at A1.

104. See SINCLAIR, *supra* note 84, at 5, 80–84; John Bresnahan & Seung Min Kim, *Attorney General Eric Holder Held in Contempt of Congress*, POLITICO, June 26, 2012, <http://www.politico.com/news/stories/0612/77988.html> (noting the House vote "to hold Attorney General Eric Holder in contempt of Congress over his failure to turn over documents related to the Fast and Furious scandal, the first time Congress has taken such a dramatic move against a sitting Cabinet official"); Ezra Klein, *Let's Talk: The Move to Reform the Filibuster*, NEW YORKER, Jan. 28, 2013, at 24 ("From 1917 to 1970, the majority sought cloture fifty-eight times. Since the start of President Obama's first term, it has sought cloture more than two hundred and fifty times.").

105. See SINCLAIR, *supra* note 84, at 101–06; Jacobi & VanDam, *supra* note 97, at 299–315.

106. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 279–81 (2013).

107. See *id.* at 267–68; Pozen, *supra* note 98, at 5.

108. See Jeh C. Johnson, Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain

many of these measures came in response to congressional failure to enact legislation sought by the President, giving them even more of an interbranch aspect.¹⁰⁹ Interestingly, the threatened debt default also led to calls for the President to act unilaterally by ignoring the debt ceiling, raising it under the authority of Section 4 of the Fourteenth Amendment, or achieving the same result by minting two one-trillion-dollar platinum coins.¹¹⁰ Here, however, the Obama administration did not pursue executive action to fill a congressional void, insisting that only Congress had authority to raise the debt limit.¹¹¹

These moves have a punch–counterpunch quality. Actions by Congress and the President trigger responses that in turn trigger further reprisals. The recess-appointments saga is a prime example. There, Democrats initially instituted pro forma sessions as retaliation against what they perceived as President Bush’s failure to adequately consult on judicial appointments. Republicans during the Obama administration adopted the same technique to prevent appointments they opposed on policy grounds. President Obama then responded by asserting the right to make recess appointments during a pro forma session, the action *Noel Canning* rejected. These contests are alternatively referred to as constitutional showdowns, constitutional hardball, or constitutional institutional self-help.¹¹² But however

Individuals Whose Parents are U.S. Citizens or Permanent Residents 3 (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; Jeh C. Johnson, Memorandum on Enforcement Priorities and Prosecutorial Discretion 3–6 (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

109. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 787–92 (2013) (describing Obama’s actions as a response to the failure of the DREAM Act to get adopted); Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 114–15 (2012) (noting that the Obama administration included terms in waivers that it had sought in reform legislation).

110. See Buchanan & Dorf, *supra* note 101, at 177–81 (gathering suggestions and arguing that the President should have continued to borrow and ignored the debt ceiling as the least unconstitutional option).

111. Letter from George W. Madison, Gen. Counsel, Treasury Dep’t, to N.Y. Times (July 8, 2011), available at <http://www.treasury.gov/connect/blog/Pages/Fact-Check-Treasury-General-Counsel-George-Madison-Responds-to-New-York-Times-Op-Ed-on-14th-Amendment.aspx> (stating that Secretary Geithner had “always viewed the debt limit as a binding legal constraint that can only be raised by Congress”).

112. See, e.g., Eric Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 991–93 (2008); Pozen, *supra* note 98, at 7; Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

denominated, their main feature is fluidity and dynamism, as each branch responds to new moves by the other.

B. Innovation and Political Polarization

The contemporary political reality of appointments, and congressional–executive relations more generally, is thus characterized by change and innovation. Many factors contributed to this situation, ranging from the Senate’s increased individualistic character, to greater centralized power in House party leaders, to particular politicians and their agendas, the permanent campaign, money in politics, transformations in media, and so on.¹¹³ But the single most important cause is growing polarization in national politics, particularly combined with divided government. Polarization not only leads to breakdowns in established norms; it also creates incentives to adopt novel governance strategies. Recognition of the polarization dynamic thus suggests that institutional innovation is only likely to grow at the national level.

1. Political Polarization, Divided Government, and Innovation.

Political scientists have documented significantly increased political polarization in Congress. The ideological gap between the two parties is growing, with increasingly consistent party divides across a range of policy issues. Although the Democratic Party has become somewhat more liberal, the main contributor to this ideological gap is a significant conservative shift in the Republican Party.¹¹⁴ Polarization is most acute among political elites, but there is also corresponding polarization in each party’s electoral base, with Americans developing more internally consistent ideological and policy views, and electoral units becoming more homogeneously partisan.¹¹⁵ A well-recognized reason for this newfound ideological consistency within parties is the movement of southern Democrats to the Republican

113. For different accounts, see, for example, MANN & ORNSTEIN, *supra* note 88, at 8–15, 31–80; SINCLAIR, *supra* note 84, at 134–65; Nolan McCarty, *The Policy Effects of Political Polarization*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 224–32 (Paul Pierson & Theda Skocpol eds., 2007); Pildes, *supra* note 9, at 286–88, 295–96, 319–21.

114. See NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 3, 23–31 (2006); Gary C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 *PRES. STUD. Q.* 688, 690–700 (2013); Pildes, *supra* note 9, at 276–81.

115. Jacobson, *supra* note 114, at 691–97; Nathaniel Persily, *Introduction*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* (Nathaniel Persily ed., 2015) (draft at 4–10).

Party over the twentieth century's later decades.¹¹⁶ A less commonly identified contributor is rising income inequality, with high-income voters increasingly identifying as Republicans and poorer voters as Democrats.¹¹⁷

The effects of political polarization are intensified by divided government, in which at least one of the houses of Congress is in the hands of one party and the presidency is in the hands of the other. Divided government has become our national norm, occurring in two-thirds of Congresses between 1955 and 2015.¹¹⁸ Moreover, differences in the distribution of the two parties' voters makes divided government likely in the future. Republican voters are more efficiently distributed from their party's perspective, in that they are spread more evenly across areas, whereas Democratic voters are concentrated in urban areas. According to political scientist Gary Jacobson, this distribution makes Republicans likely to continue to control the House. At the presidential level, Republican voters represent shrinking demographic categories, whereas Democrats have attracted growing ones. This suggests Democrats may continue to win at the presidential level, with ongoing divided government the result.¹¹⁹

Debate exists on whether—and to what extent—divided government alone impacts Congress's productivity, with recent scholarship arguing that it substantially lowers enactment of significant legislation.¹²⁰ But adding in political polarization makes

116. See MANN & ORNSTEIN, *supra* note 91, at 44–54; Pildes, *supra* note 9, at 287–95.

117. MCCARTY ET AL., *supra* note 114, at 71–109 (advancing income inequality as a major factor in polarization).

118. See Pildes, *supra* note 9, at 326; see also *A Visual Guide: The Balance Of Power Between Congress and The Presidency*, ABOUT.COM, http://uspolitics.about.com/od/usgovernment/l/bl_party_division_2.htm (containing data on divided government by Congress going back to 1945).

119. See Jacobson, *supra* note 114, at 704–05.

120. See Stephen Ansolabehere, Maxwell Palmer & Benjamin Schneer, *Divided Government and Significant Legislation: A History of Congress from 1789-2010*, at 2–6, 17–27 (Apr. 23, 2014) (unpublished manuscript) (describing scholarship and concluding that divided versus unified government does have a substantial impact on production of significant legislation, but cannot explain broad trends in legislation throughout Congress's history); see also Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-96*, 93 AM. POL. SCI. REV. 519, 527 (1999) (concluding that divided government affects the “ability of the political system to address major policy issues”). But see DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002*, at xii, at 220–26 (2d ed. 2005) (finding that divided government did not affect the overall volume of major legislation, but noting greater conflict and more investigations during the period 1991–2002).

“periods of divided government especially prone to conflict and stalemate.”¹²¹ As Professor Pildes notes, earlier eras when divided government did not preclude significant legislation “occurred before the historical transformation and purification of the political parties” that exists today.¹²² Whether the resultant legislative inaction represents congressional dysfunction and gridlock, or instead the appropriate workings of our separation-of-powers system, is also disputed.¹²³ Either way, however, the likely net effect is increased pressure on the President to address issues unilaterally and increased presidential willingness to do so in order to achieve desired policy.¹²⁴

A critical point to note is that even if political polarization and divided government lead to legislative inaction and gridlock, they nonetheless may spur innovation—although often the innovation they generate may lead to more inaction and gridlock. In particular, senators’ growing refusal to defer to the President’s executive nominations and their increased willingness to use holds to forestall confirmation reflect growing ideological divides.¹²⁵ Indeed, political scientists Nolan McCarty and Rose Razaghian identify political polarization as a major factor behind increasing delays in Senate confirmation.¹²⁶ Polarization also means that the President is more likely to have to win on a measure with just his or her party’s support,

121. See Jacobson, *supra* note 114, at 700–02; see also SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE INACTION* 95–96 (2003) (concluding that “the higher the level of partisan polarization, the less likely issues are to be enacted into law” and that “[d]ivided party control of Congress and the presidency, in contrast, has little effect on an issue’s fate”).

122. Pildes, *supra* note 9, at 326.

123. Compare DAVID R. MAYHEW, *PARTISAN BALANCE: WHY POLITICAL PARTIES DON’T KILL THE U.S. CONSTITUTIONAL SYSTEM* 14, 190 (2011) (arguing that Presidents had a success rate of around 60 percent under both unified and divided government), Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2081–82 (2013) (arguing that current legislative inaction reflects lack of strong majority support, not dysfunction), and R. Shep Melnick, *The Conventional Misdiagnosis: Why “Gridlock” is not Our Central Problem and Constitutional Revision is not the Solution*, 94 B.U. L. REV. 767, 768–69, 775–81 (2014) (detailing recent major legislation and arguing that the problem is not gridlock but programmatic overload), with MANN & ORNSTEIN, *supra* note 88, at 101–03 (arguing that dysfunction is created from combining the U.S. constitutional system with parliamentary-style parties and the parties’ asymmetric polarization), and Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2218–21 (2013) (detailing evidence of legislative inaction and arguing Congress is gridlocked because it is unable to make substantive policy decisions).

124. McCarty, *supra* note 113, at 246.

125. SINCLAIR, *supra* note 84, at 63.

126. Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996*, 43 AM. J. POL. SCI. 1122, 1136 (1999).

and an opposing party representative has little incentive to cooperate.¹²⁷ To the contrary, refusing to compromise serves to win points with the party's now more ideological faithful.¹²⁸ Furthermore, when lack of cooperation forestalls legislation—whether as a result of legislative mechanisms such as the filibuster or because of the impossibility of getting bicameral agreement when the opposition party controls one house of Congress—the President has turned to new forms of unilateral action to achieve policy reform. In sum, to a large extent the recent innovations in how the branches operate and interact can be traced to political polarization and divided government.

2. *Political Polarization, United Government, and Regulatory Innovation.* Interestingly, political polarization may contribute to innovation in periods of united government as well. To begin with, dilatory tactics like the filibuster may become even more important mechanisms for the minority party to wield, as it cannot rely on control of one chamber to prevent the enactment of legislation. Hence, new or more extreme uses of such tactics may emerge. At the same time, the majority party may itself utilize new legislative methods in order to constrain or avoid minoritarian resistance.¹²⁹

A prime example of these dynamics is the growing use of reconciliation bills as the means to legislative enactment. Reconciliation developed as a technique for imposing discipline on the congressional budgeting process, and involves enactment of an omnibus bill that aligns spending targets with policy proposals.¹³⁰ The key feature of reconciliation is that all debate on a reconciliation bill or its amendments is limited to twenty hours, thereby precluding a filibuster threat.¹³¹ As a result, the reconciliation process has proved crucial in passing contentious legislation for which there is majority support but less than sixty votes in the Senate. Two prominent recent examples are the Bush income tax cuts in 2001 and the ACA in 2009.¹³² But the procedural requirements of reconciliation, in

127. SINCLAIR, *supra* note 84, at 163; Jacobson, *supra* note 114, at 700.

128. See, e.g., MANN & ORNSTEIN, *supra* note 91, at 8–29 (describing stances of key congressional leaders in the 2011 debt-ceiling crisis).

129. See SINCLAIR, *supra* note 84, at 164.

130. See Jacobi & VanDam, *supra* note 97, at 294–95, 297–98 (describing reconciliation procedures).

131. *Id.* at 295.

132. *Id.* at 308–15.

particular the Byrd Rule, can significantly affect the shape of policy adopted through this route.¹³³ The Byrd Rule, which can only be waived by a three-fifths vote, prohibits inclusion of extraneous provisions in a reconciliation bill.¹³⁴

A second reason to expect innovation is that Congress is unlikely to do much checking of the President in periods of high polarization and unified government. As Professors Daryl Levinson and Richard Pildes argue, the checks in our separation-of-powers system result more from party and political identification than institutional loyalty. Members of Congress are more likely to check overreaching by a President of the opposite party than a President of their own.¹³⁵ Polarization is only likely to intensify this dynamic, and unified government means that the President's party can prevent congressional investigations into new presidential assertions of authority. Indeed, some scholars point to the unified government that existed during most of the first six years of the George W. Bush presidency as proof of this phenomenon, noting for example that no congressional committee subpoenaed the White House in that period.¹³⁶

Lastly, innovation seems likely with respect to regulatory substance. The legislation that gets enacted may represent more dramatic regulatory changes in periods of united government and polarization. One reason is because polarization pulls each party away from the center and makes moderating bipartisan compromises less likely to occur.¹³⁷ In addition, the lower possibility of bipartisan support means that passage turns on getting all party members on board, thereby increasing the leverage of members pushing for more radical measures. As McCarty argues, to pass in a polarized environment "policies must generate overwhelming support within the majority party Because it is difficult to replace the votes of more extreme elements with those of moderates from the other party, . . . policy outcomes may be more extreme relative to the political center."¹³⁸ The extent of a party's majority in the Senate

133. See SINCLAIR, *supra* note 84, at 187, 210–22 (describing the impact of reconciliation on the ACA); McCarty, *supra* note 113, at 236.

134. See SINCLAIR, *supra* note 84, at 126–27.

135. See Daryl A. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313–15 (2006).

136. See Pildes, *supra* note 9, at 327 n.214; MANN & ORNSTEIN, *supra* note 91, at 151.

137. See Jacobson, *supra* note 114, at 697–702.

138. McCarty, *supra* note 113, at 244.

should affect whether this result actually obtains, however, as more extreme legislation also seems likely to trigger a filibuster.¹³⁹

Here, too, recent legislative experience may offer some support, but the evidence is much more ambiguous. The last period of unified government, during President Obama's first term in office, witnessed the enactment of two major federal regulatory statutes, the ACA and the Dodd–Frank Wall Street Reform Act.¹⁴⁰ Included within these statutes were notably innovative measures—the individual mandate deemed suspiciously novel in *NFIB*, novel regulatory structures involving the states, a new resolution process for too-big-to-fail banks, and creation of a new consumer financial protection agency with a unique organizational structure and many levels of political insulation.¹⁴¹ Significantly, the ACA passed on a straight party-line vote.¹⁴² Only a few Republicans—three in the House and three in the Senate—broke party ranks to vote for Dodd–Frank, and accounts detail the extensive efforts by party leaders to keep all Democrats on board.¹⁴³ On the other hand, many of the more radical proposals included in the initial measures—most notably the public option for health insurance and a tax on big banks and hedge funds—did not make it into the final bills.¹⁴⁴ Moreover, a confluence of separate factors could explain the successful enactment of these major reform measures, such as that this period marked the first time that the Democrats were in unified control in fourteen years.¹⁴⁵ And the issues involved carried particular public salience, given the recent financial disaster and longstanding calls for healthcare reform. Hence, drawing

139. See BINDER, *supra* note 121, at 97–98.

140. See Melnick, *supra* note 123, at 779–80.

141. See Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 572–94 (2011) (describing the ACA, Dodd–Frank, the Consumer Financial Protection Bureau, and the Recovery Act); David Zaring, *A Lack of Resolution*, 60 EMORY L.J. 97, 121–29 (2010) (describing Dodd–Frank's new resolution authority).

142. See SINCLAIR, *supra* note 84, at 218–30 (describing the vote on the ACA).

143. See Mike Ferrullo, *Regulatory Reform: House Clears Financial Reform Bill Along Party Lines, Senate Action Delayed*, 95 BNA BANKING REP. 5, 5 (July 6, 2010) (reporting that Dodd–Frank passed by a vote of 237–192 in the House, with three Republican votes in favor); Mike Ferrullo et al., *Regulatory Reform: Senate Sends Financial Regulatory To White House for President's Signature*, 95 BNA BANKING REP. 90, 90 (July 20, 2010) (reporting that Dodd–Frank passed by a vote of 60–39 in the Senate, with votes from three Republican senators (Senators Scott Brown, Susan Collins, and Olympia Snowe)).

144. See SINCLAIR, *supra* note 84, at 205–06, 215–16; David M. Herszenhorn, *Bank Tax is Dropped in Overhaul of Industry*, N.Y. TIMES, June 30, 2010, at B1.

145. See BINDER, *supra* note 121, at 27. *But see* Ansolabehere, *supra* note 120, at 25–26 (finding that the previous party in control had no effect on rates of legislation).

any reliable conclusions about whether polarization and unified government may yield substantive innovative measures in this fashion requires a more solid empirical foundation, tracing legislative enactments over multiple periods of unified government.¹⁴⁶

III. ASSESSING THE JUDICIAL–POLITICAL DIVIDE

In short, examination of appointments in the judicial and political branches reveals a notable contrast: the political branches currently embrace innovation in the mechanisms of governance, while the courts view such innovation as constitutionally suspect. Should this judicial–political disconnect be a cause of concern? Or is it actually a signal of the constitutional system’s checks and balances working effectively?

On the positive view, the courts’ reluctance to sanction institutional innovation is an important counterweight to the political branches’ inclinations to pervert the constitutional structure for partisan gain. Judicial resistance is offered as the constitutional protection against the dangers of political polarization. *Noel Canning* is Exhibit A in support of this account, with the Court there unanimously rejecting a novel presidential assertion of the recess-appointments power that on its face was incompatible with the Constitution’s text. A similar argument animates other fabled separation-of-powers decisions, such as *Youngstown Sheet & Tube Co. v. Sawyer* and *Immigration and Naturalization Service v. Chadha*, in which one political branch failed to curb unconstitutional overreach by another.¹⁴⁷ As Justice Scalia stated in his *Noel Canning* dissent, “policing the ‘enduring structure’ of constitutional government when the political branches fail to do so is ‘one of the most vital functions of this Court.’”¹⁴⁸

Although not without appeal, this positive account of the current judicial–political disconnect is simply too sanguine. It ignores the real

146. Generating such data is difficult at the federal level, given the dominance of divided government. But unified government is much more common at the state level.

147. See *INS v. Chadha*, 462 U.S. 919, 942 n.13, 944 (1983) (emphasizing that neither the convenience of the legislative veto nor the fact that the President signed legislation containing it should affect analysis of its compatibility with constitutional separation of powers); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952) (noting that the President informed Congress of his action in seizing the steel mills and that Congress did not act).

148. *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2559, 2593 (2014) (Scalia, J., dissenting) (quoting *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment)).

risk that the courts may intervene asymmetrically and in ways that amplify rather than dampen the harmful effects of polarization. One point worth noting at the outset is that many, if not most, of the innovations in congressional–executive interactions will avoid judicial review. As the Court noted in *Noel Canning*, the Constitution “explicitly empowers”¹⁴⁹ each house to “determine the Rules of its Proceedings,”¹⁵⁰ and “all matters of method are open to [its] determination,”¹⁵¹ provided the method chosen is rationally related to the goal sought and does not violate constitutional rights.¹⁵¹ Executive-branch actions, in turn, may escape review because no one has standing to sue.¹⁵²

In addition, judicial review is likely to be asymmetrical when it occurs. Judicial review is more probable when action by Congress or the President affects individuals outside of the political branches.¹⁵³ It is also more likely to be available to police legislative or executive action than inaction.¹⁵⁴ Thus, delaying and dilatory tactics in Congress will avoid scrutiny, but novel measures used to enact policy in the face of such tactics will not. This privileging of legislative inaction holds real potential for worsening the gridlock often viewed today as lying at the root of Congress’s dysfunction.¹⁵⁵ Worse, given the possibility that legislative measures enacted in periods of higher polarization may be more radical, the judicial resistance to innovation raises a real risk of judicial invalidation of those measures that do manage to be enacted. The net result is again a privileging of inaction and of judicial impediments to majoritarian government. Moreover, although there have been instances in which legislative inaction has worked in the direction of greater regulation—the failure to extend

149. *Id.* at 2574 (majority opinion).

150. *Id.* (quoting U.S. CONST. art. I, § 5, cl. 2),

151. *Id.* (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)); see U.S. CONST. art. I, § 5, cl. 2; see also *Nixon v. United States*, 506 U.S. 224, 230 (1993) (meaning of “try” with respect to impeachment is a political question and thus left to the Senate to determine).

152. See, e.g., Robert Pear, *Suit on Health Law Puts Focus on Funding Powers*, N.Y. TIMES, Nov. 30, 2014, at A25 (noting a significant standing hurdle to a House effort to sue on ACA waivers).

153. Cf. *INS v. Chadha*, 462 U.S. 919, 952 (1983) (identifying as legislative actions those that “had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch”).

154. See *Heckler v. Chaney*, 470 U.S. 821, 831–33 (1985).

155. This is, to be sure, a matter of debate. See, e.g., David G. Savage, *Justice Scalia: Americans “Should Learn to Love Gridlock,”* L.A. TIMES, Oct. 5, 2011, <http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005>.

the Bush tax cuts for high-income earners or the failure to enact legislation overturning Environmental Protection Agency (EPA) greenhouse-gas regulations—judicial resistance to innovation seems likely to work to the advantage of those opposing major new regulatory initiatives.

A final reason to be concerned is that major innovations in governance structures may represent the best available countermeasures to hyperpolarization in Congress. Reform proposals run the gamut, but focus in particular on changes to core features of our political system.¹⁵⁶ Examples include mandating open primaries, getting rid of first-past-the-post election systems, or mandating redistricting reform.¹⁵⁷ Many of these measures would mark a dramatic change from longstanding practices. A Supreme Court that views innovation with suspicion, accepting changes that have emerged incrementally over time and are supported by historical practice, is unlikely to be a receptive audience for such reform measures. Hence, the danger is that rather than serve as a bastion defending the constitutional separation-of-powers system against newfound partisan threats, the Court will impede the very innovations needed to make that system continue to function.

These risks might be unavoidable if the Constitution embodied the anti-innovation principle that animates the Roberts Court's separation-of-powers jurisprudence. But the constitutional basis for such resistance to structural and governance innovation is quite dubious. As Justice Ginsburg remarked, dissenting in *NFIB*, "For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing

156. An alternative route is to move the focus away from Congress toward other policymakers, such as administrative agencies and states or even private actors, accepting that Congress is unlikely to be the first mover in addressing critical policy issues. See Melnick, *supra* note 123, at 782–89; Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1399–1401 (2013). Such a change in focus would accord with broader regulatory trends—for example, toward privatization and delegation of increasing programmatic discretion to the states. See Metzger, *supra* note 141, at 568–71; Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 517–19 (2015).

157. See, e.g., MANN & ORNSTEIN, *supra* note 91, at 131–76. But see Nolan McCarty, *Reducing Polarization: Some Facts for Reformers*, 2015 U. CHI. LEGAL F. (forthcoming 2015) (manuscript at 2–4, 26, 32–33), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564372 (questioning whether opening primaries will reduce polarization and suggesting that strengthening party organization, as well as creating more politically homogenous districts, is better suited to achieving this goal).

economic and financial realities.”¹⁵⁸ The ability to design innovative governmental structures or regulatory measures is a flexibility the Constitution’s Necessary and Proper Clause gives to Congress.¹⁵⁹ Professor John Manning argues that this textual assignment to Congress calls into question the Court’s refusal to defer to “Congress’s implementation strategies on the basis of abstract structural inferences about which reasonable people can doubtless differ.”¹⁶⁰ But one can accept judicial reliance on abstract structural inferences and still conclude that a judicial default rule against novel congressional measures is at odds with the constitutional allocation of implementation authority to Congress.¹⁶¹

Importantly, however, this constitutional defense of innovation only operates with respect to congressional measures. Executive-branch novelty, such as President Obama’s invocation of the recess-appointments power during a pro forma session, cannot be vindicated on the basis of the Necessary and Proper Clause. This is all the more true given that the President justified his actions as a response to Congress’s innovative use of pro forma sessions to prevent recess appointments. But even executive-branch innovation should not trigger automatic suspicion. David Pozen contends that such unilateral executive measures may be an effort to restore the constitutional separation-of-powers balance rather than undermine it: “[M]any of the most pointed ways in which Congress and the President challenge one another can plausibly and profitably be modeled as self-help . . . efforts to enforce constitutional settlements,” in particular settlements in the form of established conventions of “comity and cooperation in governance” that are central to the

158. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2625 (2012) (Ginsburg, J., dissenting).

159. See Manning, *supra* note 33, at 6–7.

160. *Id.* at 48.

161. Some read the Necessary and Proper Clause in a more limited fashion than Manning, as only supporting grants of incidental powers or institutional structures that comport with general federalism and separation-of-powers principles. Compare William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749, 1750–55 (2013) (distinguishing between great and incidental powers and arguing the Necessary and Proper Clause only incorporates the latter), and Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297–326, 330–33 (1993) (arguing that the Necessary and Proper Clause is limited by traditional federalism and separation-of-powers principles), with Manning, *supra* note 33, at 5–7, 54–60. But even these more limited readings of the Clause do not support a general suspicion of innovation.

functioning of our separation-of-powers system.¹⁶² From this perspective, President Obama's recess appointments can be seen as an effort to respond to the Senate's deviation from constitutional conventions governing the appointments process, and to intense congressional obstruction more generally.¹⁶³ To be sure, accepting the self-help description does not make the President's actions constitutional, and there are good reasons—particularly in an age of ever-expanding unilateral presidential power—to resist countenancing such moves.¹⁶⁴ Whether or not the institutional self-help justification is persuasive as a matter of constitutional analysis, however, it highlights the contemporary political context that is strikingly absent from the *Noel Canning* decision.

These criticisms suggest that the Court should adopt a more fine-grained approach, one that assesses each measure without a predisposition against innovation and pays more attention to political realities. One central feature that deserves greater play in a more nuanced analysis is whether the innovation represents a unilateral action by the President or a measure on which the two branches agree. Although both types of innovation may be constitutional (or not), the threats they represent to constitutional structure are significantly different, and the Court's elision of this distinction is a sign of its mistaken approach. The Court also would do well to engage more directly with the polarization and dysfunction that mark politics today, so that its analysis fully engages with the dynamics at play in instances of structural and governance innovations. This does not mean that the Court should sanction otherwise unconstitutional measures on the grounds that the current political climate renders such matters practically necessary. *Noel Canning* demonstrates that even the more functionalist members of the Court are unwilling to go

162. Pozen, *supra* note 98, at 8–9; *see also* Jody Freeman & Davin B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) (“[C]ongressional dysfunction invites agencies and courts to do the work of updating statutes [A]gencies are better suited than courts to do that updating work and . . . because the agency is the legally designated custodian of the statute (so designated by the enacting Congress), the agency has the superior claim to interpret the statute’s application to new problems during periods of congressional quiescence.”).

163. Pozen, *supra* note 98, at 6–7, 39–48.

164. *See* William P. Marshall, *Warning! Self-Help and the Presidency*, 124 YALE L.J. F. 95, 95–97 (2014); *see also* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 6 (2010) (“[T]he presidency represents the graver threat: while Schlesinger was prophetic in sounding the alarm, it has become a far more dangerous institution during the forty years since he wrote *The Imperial Presidency*—and these threatening trends promise to accelerate over the decades ahead.”).

so far, and with good reason.¹⁶⁵ But contemporary political challenges and broader context seem a legitimate factor to take into account in assessing constitutionally uncertain innovations, just as contemporary regulatory challenges and economic realities underlie current assessments of the scope of Congress’s commerce power.¹⁶⁶ At a minimum, the Court should acknowledge the practical effect of its decisions, and seek to limit disruptive impacts where possible. Thus, for example, the Court could do more to resuscitate the de facto officer doctrine, which “confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient,” so as to limit the disruptive potential of decisions like *Noel Canning*.¹⁶⁷

Furthermore, the Court could also signal what constitutional options may be available to the President or Congress to combat the other branch’s excesses. Indeed, despite its failure to engage with the political background behind President Obama’s recess appointments, the *Noel Canning* majority provided such a signal, underscoring that “[t]he Constitution . . . gives the President . . . a way to force a recess” by adjourning Congress when the two houses disagree “with Respect to the Time of Adjournment.”¹⁶⁸ It also cautioned that for the Senate to legitimately claim to be in session it needed to be able to conduct business under its rules and meet quorum requirements, thereby identifying how the President’s allies could challenge a pro forma session.¹⁶⁹ In short, the *Noel Canning* Court implicitly recognized the need to respond to new political realities, but no reason exists to keep

165. For an earlier refusal, see *Bowsher v. Synar*, 478 U.S. 714, 732, 736 (1986) (invalidating novel budgetary measures adopted to help reduce growing deficits).

166. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 123–29 (1942).

167. See *Ryder v. United States*, 515 U.S. 177, 180–84 (1996) (discussing the de facto officer doctrine and limiting its scope). The issue of the de facto officer doctrine as a means of limiting the practical impact of overturning the recess appointments was raised at oral argument in *Noel Canning*. See Brian J. Leitch, *NLRB v. Noel Canning: The Separation-Of-Powers Dialogue Continues*, 2014 CATO SUP. CT. REV. 221, 253–54.

168. *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014).

169. *Id.* at 2575–76 (“If any present Senator had raised a question as to the presence of a quorum, and by roll call it had become clear that a quorum was missing, the Senators in attendance could have directed the Sergeant at Arms to bring in the missing Senators.”); see also Tom Goldstein, *Can a President (with a Little Help from One Senator of His Party) Circumvent Most of the Court’s Limitation on the Recess Appointments Power?*, SCOTUSBLOG (June 25, 2014, 8:29 AM), <http://www.scotusblog.com/2014/06/can-a-president-with-a-little-help-from-one-senator-of-his-party-circumvent-most-of-the-courts-limitation-on-the-recess-appointments-power>.

this recognition implicit. Indeed, more forthright recognition might better protect the separation-of-powers system, both by creating disincentives for the political branches to push the limits of their powers and by publicly flagging the constitutional threat that political brinkmanship may pose.

Both of these moves are of particular relevance to current struggles over appointments. As noted above, despite the focus on principal officers in *Free Enterprise Fund* and *Noel Canning*, the real battles today center on appointments to inferior officer positions that require Senate confirmation. Although Congress has the power to require such Senate approval, the fact that a Senate role is not constitutionally mandated, and the importance of such appointments for the executive branch to function, should affect the Court's response to political branch innovations affecting inferior officer appointments. This seems a prime context for expansive invocation of the de facto officer doctrine to minimize disruption of a finding of invalidity. Doing so does not sanction a direct constitutional violation or deny the Senate its constitutionally protected role, which were prime concerns in *Noel Canning*.¹⁷⁰ Indeed, *Free Enterprise Fund* supports taking a limited response to inferior officer appointments that meet constitutional but not statutory requirements. There, the Court cured the constitutional violation it identified with the PCAOB by simply severing Board members' additional removal protection. The Court concluded that transforming them into inferior officers appointed and removed at will by a department head best served Congress's intent in enacting Sarbanes-Oxley.¹⁷¹ In like vein, acceptance of past decisions by improperly appointed inferior officers can be justified as the remedial response that best serves congressional intent underlying the substantive statutes these officers implement.

More dramatically, perhaps the Court should be more willing to sustain novel presidential actions installing nominees to these positions—in either an acting or full capacity—in the face of Senate refusal to vote on their nominations. Such actions represent an easier constitutional case than the recess appointments in *Noel Canning* because they do not violate constitutional appointment requirements. Thus, the executive branch's need for these officers in order to

170. *Noel Canning*, 134 S. Ct. at 2558–59, 2574–77.

171. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508–10 (2010).

perform its constitutional and statutory responsibilities should enjoy greater weight in the constitutional analysis.

CONCLUSION

Perhaps it is no surprise that judicial interpretation of an over-220-year-old document displays suspicion of innovation in governance arrangements. But this judicial tendency bodes ill for the nation's ability to respond to the highly politically polarized world in which we live. In such a world, governance innovation is inevitable and often beneficial. Rather than discourage innovation, the courts should seek to foster it in the hope that the political branches will construct measures that allow for a return to more effective government.