

INCAPACITATING THE STATE

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I. THE RISKS AND REWARDS OF STATE-BUILDING

The state is arguably the most powerful technology ever created by man. The invention of the modern state in Europe half a millennium ago revolutionized life for many on the planet. By consolidating control over the means of violence, the state imposed social order and provided its citizens with security and protection against both internal and external threats.¹ By securing property rights, enforcing contracts, establishing financial systems, and organizing markets, the state has facilitated economic growth and prosperity. And by providing collective goods like education, scientific knowledge, public health, and social welfare programs, the state has further improved the life prospects of its citizens and created new opportunities for human flourishing. Hobbes had a point: without the state, life for many in the world would be much more “solitary, poore, nasty, brutish, and short.”²

Like other powerful technologies, however, the state can be used not just for good but for evil. Rather than investing in the human capital of its citizens, the state can subject them to totalitarian oppression. Rather than creating wealth, the state can confiscate it. The same control over the means of violence that can be used to keep the peace can also be used for mass warfare or brutal repression. Whatever else the modern state has accomplished, it is also responsible for the Holocaust and Stalin’s Soviet Union.

Indeed, the modern state was originally invented and designed to kill. In Charles Tilly’s memorable summation, “states make war and war makes states.”³ Engaged in perpetual warfare and desperate for resources to bolster their military might, European kings came to see that they could support large armies by extracting

1. Steven Pinker credits the state with playing a leading role in the historical decline of violence over recent centuries. STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 680-82 (2012).

2. THOMAS HOBBS, *LEVIATHAN* 88-89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

3. CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1992* (1992); Charles Tilly, *War Making and State Making as Organized Crime*, in *BRINGING THE STATE BACK IN* 169 (Peter B. Evans et al. eds., 1985).

wealth from populations under their control and protection.⁴ This led them to build bureaucratic infrastructures for the purposes of taxation and conscription of military manpower.⁵ Eventually, kings figured out that by creating a legal system and supporting trade, they could increase their tax base and thus grow their resources for fighting wars and accumulating territory.⁶ Over time, administrative capabilities built up for fiscal and military purposes found new uses, and the state provided additional public goods to meet the demands of its citizens and to ensure their ongoing cooperation.⁷ At the end of this developmental road stands the modern state as we know it: capable of delivering the quality of life of contemporary Denmark; but also of North Korea.

Viewed as a technology of social organization, then, the state is a decidedly mixed blessing. Like other potentially valuable but also dangerous technologies—think of nuclear energy, biotechnology, or the Internet—the state comes with enormous upsides, but also with rather significant downside risks. We might call this the fundamental dilemma of state power: a state that is powerful enough to deliver valuable goods is also powerful enough to inflict great harms.⁸

The dilemma of state power is confronted both by those who live within the boundaries of the state and those who are outside of it. What we call “the state” has two faces, one international and one domestic. From an international perspective, the sovereign nation-state is the primary organizational unit of the Westphalian order.⁹ From a domestic perspective, the “state” is synonymous with an

4. Borrowing was the revenue-generating strategy of first resort, but kings could not procure credit without demonstrating the ability eventually to repay debt through tax revenues. See Tilly, *supra* note 3, at 172.

5. See *id.*

6. See *id.*

7. See *id.* at 175-76.

8. As Barry Weingast puts it, “[t]he fundamental political dilemma of an economic system” is that “[a] government strong enough to protect property rights ... is also strong enough to confiscate the wealth of its citizens.” Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1, 1 (1995). Of course, the point is hardly limited to property. Any government powerful enough to provide security and promote prosperity for its citizens is also powerful enough to immiserate and oppress them.

9. See, e.g., Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 *FORDHAM L. REV.* 769 (2006).

institutionalized system of government that exercises compulsory control over a territory and a population. Both the international and domestic faces of the state can be friendly or threatening.

Internationally, foreign states are both potential enemies and allies; often both at once. The traditional realist view of international relations emphasizes the former, portraying sovereign states as above all else rivals competing for relative gains in economic and military power.¹⁰ But states also pursue mutual benefits through various forms of cooperation, ranging from security alliances and cross-border trade to multilateral efforts to address global warming. Any sensible foreign policy, therefore, will balance the benefits of cooperation with economically or militarily powerful partners against realist concerns about relative power and vulnerability. This is how the fundamental dilemma of state power plays out on the international stage. Domestically, the dual examples of Denmark and North Korea should suffice to illustrate the dilemma posed by states with substantial control over the life prospects of their citizens.

Not surprisingly, then, we are often of two minds about state power. Sometimes we see states as an obvious good—so much so that we are willing to invest enormous resources in projects of “state-building.” As has become increasingly clear in the post-9/11 world, “weak” or “failed” states not only threaten their own populations, but also export harms to people in other parts of the world.¹¹ The absence of effective state power can result in ethnic conflict, genocide, and famine; it can also breed global terrorist organizations, drug trafficking networks, and pandemic diseases. America’s ambitious state-building projects in Iraq and Afghanistan are a testament to the perceived value of well-developed states.¹² So, too, are the investments of the international community in state-building as a strategy of economic development. In recent decades, the World Bank, the International Monetary Fund, and other development policy leaders have emphasized the importance

10. See, e.g., Robert W. Cox, *Social Forces, States and World Orders: Beyond International Relations Theory*, 10 *MILLENNIUM: J. INT’L STUD.* 126, 130-31 (2009).

11. Francis Fukuyama, *The Imperative of State-Building*, 15 *J. DEMOCRACY* 17, 17-18 (2004).

12. See *id.* at 18.

of building political institutions capable of enforcing property rights and the rule of law, delivering education and health care, and performing other basic governmental functions that facilitate economic growth.¹³ The catch phrases are “governance matters” and “getting to Denmark.”¹⁴

But building powerful states is far from an unambiguous good. Certainly from an American foreign policy perspective, and perhaps also from a global humanitarian one, there are some states that are *too* powerful. Think of China today or the Soviet Union a generation ago. (Of course, many people in the rest of the world would think of the United States.) In fact, the very same states the United States is helping to build may someday evolve into threats. As much as the United States could benefit from strong and cohesive governments in Iraq and Afghanistan, it is far from clear that these states will be American allies rather than enemies. If Iraq emerges as a “Frankenstein’s monster” of the Gulf,¹⁵ as some fear, then the United States might look back on its state-building efforts there with some measure of regret.

State-building as a strategy of economic development also carries risks. The recent emphasis on strengthening political institutions is a striking reversal of the “Washington Consensus” that prevailed in the 1980s and 1990s. Driven by fears that a well-developed state apparatus would be used to suppress or distort free markets,

13. See Daniel Kaufmann et al., *Governance Matters* (World Bank Institute, Policy Research Working Paper No. 2196, 1999).

14. *Id.*; see FRANCIS FUKUYAMA, *STATE-BUILDING* 22 (2004). From this perspective, the poverty that afflicts most of Africa is attributed increasingly to state failure, which, in turn, is at least partially attributable to a historical path of development that did not include the continuous warfare and demands for militarization that characterized early modern Europe. See JEFFREY HERBST, *STATES AND POWER IN AFRICA* (2000); see also PAUL COLLIER, *WARS, GUNS, AND VOTES* 182-85 (2009) (considering the possibility that the path to development in contemporary sub-Saharan Africa, following the example of European state-building, might be to encourage greater military rivalry among states).

15. See Kenneth M. Pollack et al., *Unfinished Business: An American Strategy for Iraq Moving Forward* 6 (Saban Center for Middle East Policy at Brookings Analysis Paper No. 22, 2010) (“Washington needs to remain wary of building another Iraqi Frankenstein’s monster, as it did to some extent with Saddam himself in the 1980s.”). Osama bin Laden and the Taliban in Afghanistan could also be described as America’s Frankenstein, inasmuch as their power was built through American aid to bin Laden and other mujahideen fighting against Soviet occupation. See *A Bitter Harvest*, *THE ECONOMIST*, Sept. 15, 2001, at 19.

development policy leaders had embraced the mantra of “privatize, privatize, privatize.”¹⁶

In these and other contexts, the double-edged sword of state power makes state-building a questionable goal. Indeed, when the risks of state power are sufficiently great, state-building may be moving in the wrong direction; *state-unbuilding* might be the better course. Two historical examples illustrate the point.

A. Morgenthau Versus Marshall

The most celebrated state-building project of the twentieth century is the post-World War II Marshall Plan. The Marshall Plan is widely credited for the successful reconstruction of Europe after the devastation of the war, and, beyond that, for the lasting peace and prosperity of the Pax Europaea and the emergence of an economically and politically integrated European Union with Germany at its center.¹⁷ At the close of the war, however, the rebuilding of Germany was far from a foregone conclusion. The best way to handle a German state that had displayed its belligerence twice in a generation and had just brought about global catastrophe on an unprecedented scale was by no means obvious.¹⁸

Two competing positions emerged among President Roosevelt’s advisors. State Department officials made the case for the economic reconstruction of Germany, along with the rest of Western Europe.¹⁹ They argued that rebuilding European economies was crucial, not just for the well-being of the European people, but also for U.S.

16. See FUKUYAMA, *supra* note 14, at 19 (quoting Milton Friedman). No doubt there is some truth to both views: development can be hindered by states that are too weak or too strong. See Daron Acemoglu, *Politics and Economics in Weak and Strong States*, 52 J. MONETARY ECON. 1199 (2005).

17. See William I. Hitchcock, *The Marshall Plan and the Creation of the West*, in 1 THE CAMBRIDGE HISTORY OF THE COLD WAR 154, 154, 160, 173-74 (Melvyn P. Leffler & Odd Arne Westad eds., 2010).

18. See Hans-Peter Schwarz, *The Division of Germany, 1945-1949*, in THE CAMBRIDGE HISTORY OF THE COLD WAR, *supra* note 17, at 133, 133-34.

19. See Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture, and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT’L L. 401, 414 (2005).

trade.²⁰ They also pointed out that an impoverished Europe would be fertile grounds for the growth of communism.²¹

Treasury Secretary Henry Morgenthau, Jr. took a different view. His single-minded focus was to permanently destroy Germany's war making capacity. Morgenthau's "Program to Prevent Germany from Starting a World War III" included not just complete demilitarization, but also the destruction of the nation's industrial capacity and dismemberment of its territory.²² Rather than rebuilding Germany, the Morgenthau Plan called for demolishing its factories, flooding its mines, clear-cutting its forests, reallocating strategically important territories to France and Poland, and dividing what was left of the country into two independent states, South and North.²³ The goal was to transform the remnants of Germany into a small, pastoral state populated by peaceful farmers.²⁴

This is the program that President Franklin Delano Roosevelt was initially persuaded to embrace.²⁵ (Roosevelt had fond memories of a bucolic Germany from his rambles around the German countryside as a child.)²⁶ Fairly quickly, however, the United States reconsidered.²⁷ Confronted with a slowly starving population reliant on U.S. aid to survive and dim prospects for economic recovery in Europe without the engine of German industry, American officials questioned the wisdom of Morgenthauian immiseration.²⁸ And then there was the increasingly urgent goal of preventing the spread of Soviet communism.²⁹ As Occupation General Lucius Clay put it, "There is no choice between becoming a Communist on 1500

20. *Id.*

21. *Id.*

22. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, THE CONFERENCE AT QUEBEC 1944, at 128-43 (1944).

23. *Id.*

24. As Winston Churchill would describe the basic thrust, Germany was to be changed "into a country primarily agricultural and pastoral in its character." See JOHN DIETRICH, THE MORGENTHAU PLAN 64 (2d ed. 2013).

25. See MICHAEL BESCHLOSS, THE CONQUERORS: ROOSEVELT, TRUMAN AND THE DESTRUCTION OF HITLER'S GERMANY, 1941-1945, at 132 (2003).

26. See JAMES MCALLISTER, NO EXIT: AMERICA AND THE GERMAN PROBLEM, 1943-1954, at 52 (2002).

27. *Id.* at 55.

28. *Id.* at 78-79.

29. See *id.* at 79.

calories and a believer in democracy on 1000 calories.”³⁰ By the time President Truman appointed retired general George Marshall as Secretary of State in January of 1947, a consensus was building against the Morgenthau approach and in favor of reversing course.

So the Morgenthau Plan was out and the Marshall Plan was in. From 1948 to 1951, the United States poured billions of dollars of financial aid into Europe.³¹ By the time Marshall Plan support ended, the economic output of every European state had grown to surpass pre-War levels, and political stability had been restored.³² West Germany’s remarkable economic growth in the 1950s is now described as the *Wirtschaftswunder*, or economic miracle.³³ But of course, Europeans were not the only beneficiaries. European economic growth was a boon to the U.S. economy, making Europeans wealthy enough to buy U.S. exports and facilitating international trade.³⁴ Marshall Plan aid was also earmarked for rebuilding the militaries of Western Europe as a line of defense against Soviet expansion.³⁵

As Germany has grown into an economic and political powerhouse, doubts about the Marshall Plan program have from time to time resurfaced. Echoing Morgenthau, opponents of Germany’s 1990 reunification saw a renewed threat of militarism and Nazism. Margaret Thatcher, who carried in her purse a map of Germany’s bloated wartime borders, warned European leaders at a summit in 1989, “We have beaten the Germans twice. Now they’re back.”³⁶ Similar grumblings were heard during the recent European

30. BESCHLOSS, *supra* note 25, at 273.

31. See Hitchcock, *supra* note 17, at 154.

32. See *id.* at 161, 165-66. How much credit the Marshall Plan deserves for post-War economic growth is a topic of ongoing debate. See Lucrezia Reichlin, *The Marshall Plan Reconsidered*, in *EUROPE’S POST-WAR RECOVERY* 39, 40-41 (Barry Eichengreen ed., 1995).

33. Hitchcock, *supra* note 17, at 163.

34. See *id.* at 172-73.

35. See MICHAEL J. HOGAN, *THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952*, at 337-38 (1987). Starting in the mid-1950s, Germany itself would eventually build a new military force under the command structure of NATO. The reborn German military was designed as a strictly defensive force, aimed at deterring a Warsaw Bloc attack. See Jonathan M. House, *The European Defense Community*, in *REARMING GERMANY* 73, 90-91 (James S. Corum ed., 2011).

36. Luke Harding, *Kohl Tells of Being Battered by Iron Lady*, *THE GUARDIAN* (Nov. 2, 2005), <http://www.theguardian.com/world/2005/nov/03/germany.past> [<http://perma.cc/JTF5-K3VE>].

financial crisis, as newspapers in Southern Europe ran cartoons depicting Chancellor Angela Merkel wearing a Hitler moustache.³⁷ Nonetheless, after decades of normalization, democracy, and integration into an increasingly unified Europe, Germany is now widely, if warily, accepted by its European confederates and the United States as a peaceful ally and a partner in economic prosperity. The Marshall Plan has gone down in history as a great triumph of state-building.

B. Anti-Federalists Versus Federalists

The design and ratification of the U.S. Constitution was also an ambitious project of state-building. Many Americans at the Founding sought a strong, centralized government capable of standing toe-to-toe with developed European states and asserting America's commercial and territorial interests.³⁸ Such a government would need the power to borrow (and repay) money, raise taxes, regulate commerce, promote trade, and fight wars. These were the definitive powers of the European "fiscal-military" state of the eighteenth century, focused on the tasks of revenue raising and war making.³⁹

Held to that standard, the national state created under the Articles of Confederation was pathetically weak—if it could even be considered a state at all. Dependent upon unenforceable requisitions from the state governments, the Continental Congress was unable to repay its debts.⁴⁰ Deprived of a permanent military presence, America was vulnerable to foreign aggression and domestic insurrection. Unable to bind the states to a common trade policy or

37. See Medhi Hasan, *Angela Merkel's Mania for Austerity is Destroying Europe*, NEW STATESMEN (June 20, 2012), <http://www.newstatesman.com/politics/politics/2012/06/angela-merkels-mania-austerity-destroying-europe> [<http://perma.cc/5EGC-6M7G>] ("Cartoons in the newspapers of Germany's neighbours have depicted the chancellor with a Hitler moustache").

38. See, e.g., THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (promoting "energy in the executive" to prevent "feeble execution of the government").

39. See MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT 8-9, 48 (2003); see also Keith E. Whittington, *Recovering "From the State of Imbecility,"* 84 TEX. L. REV. 1567, 1578 (2006) (book review) ("The United States needed to build a better war machine, and the U.S. Constitution was it.").

40. See generally EDLING, *supra* note 39, at 73-76 (discussing shortcomings of the national government under the Articles of Confederation).

treaty commitments, the nation had no coherent foreign policy and no ability to negotiate access to markets for international trade. The Constitutional Convention's ambition was to create a centralized government powerful enough to fulfill these minimal military and economic requirements of respectable statehood.⁴¹

But the constitutional state-building project ran up against deep suspicions of centralized state power. The United States had not so long ago come into being by fighting a revolution against the oppressive power of a fiscal-military behemoth. The prospect of recreating "[s]tanding armies, centralized taxing authorities, the denial of local prerogatives, [and] burgeoning castes of administrators" on American soil did not strike many Americans as an obviously great idea⁴²—much as resurrecting Germany had not seemed an obviously great idea to Morgenthau.⁴³

Anti-Federalists fanned these flames of doubt. They were quick to remind their fellow citizens of "the uniform testimony of history, and experience of society ... that all governments that have ever been instituted among men, have degenerated and abused their power."⁴⁴ Anti-Federalists prophesied that the fearsome powers of a fiscal-military state here at home would inevitably be turned against its own citizens.⁴⁵ An expansive federal tax bureaucracy would appear in "every corner of the city, and country—It will wait upon the ladies at their toilet[,], and will not leave them in any of their domestic concerns."⁴⁶

The prospect of a standing army was also alarming. A prominent feature of "all the monarchies of Europe," standing armies had proven themselves a "bane to freedom," propping up "tyrants, and their pampered minions."⁴⁷ Anti-Federalists believed that the United States would be no exception. Armed with a professional military, a dictatorial president or an oligarchical cabal of senators

41. *See id.* at 73-81.

42. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 20 (1982).

43. *See* discussion *supra* notes 22-30 and accompanying text.

44. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 152 (1996).

45. SAUL CORNELL, THE OTHER FOUNDERS 95 (1999).

46. *Id.*

47. *See* EDLING, *supra* note 39, at 44.

would be able to rule “at the point of the bayonet,” like “Turkish janizaries enforcing despotic laws.”⁴⁸

Federalist defenders of the Constitution acknowledged that “in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused,”⁴⁹ but they urged their fellow Americans to keep in mind the *good* side of state power. If the fiscal and military capabilities of the state seemed threatening, they were also the “powers by which good rulers protect the people.”⁵⁰ Without a large measure of centralized coercive authority, there could be no national defense, domestic security, or effective governance of any kind. “If we mean to have our natural rights and properties protected,” Federalists argued, “we must first create a power which is able to do it.”⁵¹

Standing armies were a perfect example. Publius asked incredulously whether

[w]e must expose our property and liberty to the mercy of foreign invaders and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty by an abuse of the means necessary to its preservation.⁵²

A state that was not permitted to maintain an established defense would “exhibit the most extraordinary spectacle, which the world has yet seen—that of a nation incapacitated by its Constitution to prepare for defense before it was actually invaded.”⁵³ Federalists argued that the Anti-Federalist prescription would be tantamount to “cut[ting] a man in two in the middle to prevent his hurting himself.”⁵⁴

48. *See id.* at 110.

49. THE FEDERALIST NO. 41, *supra* note 38, at 255-56 (James Madison).

50. EDLING, *supra* note 39, at 100 (quoting Oliver Ellsworth, *Landholder*, CONN. COURANT, Dec. 3, 1787, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 334, 336 (John P. Kaminski et al. eds., 1983)).

51. *Id.*

52. THE FEDERALIST NO. 25, *supra* note 38, at 166 (Alexander Hamilton).

53. *Id.* at 165.

54. *See* EDLING, *supra* note 39, at 93 (quoting Oliver Ellsworth, Speeches in the Connecticut Convention (Jan. 4, 1788), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 277-78 (John P. Kaminski et al. eds., 1984)).

For the Federalists, it was not Americans but European rivals who should fear “our resources to become powerful and wealthy” and who “must naturally be inclined to exert every means to prevent our becoming formidable.”⁵⁵ In fact, however, the posture of England and France toward American state-building ambitions was as much Marshall as Morgenthau. England and France had long been frustrated by the weakness of an American proto-state that lacked the centralized power to uphold treaty obligations or repay debt.⁵⁶ From their perspective, as well as from that of the Federalists, a more powerful American state might be a risk worth taking.

II. THREE APPROACHES TO MANAGING STATE POWER

Confronting the conjoined risks and rewards of state power, we have several options at our disposal. Again, think of the state as a powerful technology, like nuclear energy. One strategy is to assert *control* over how the technology is used—attempting to ensure that it will be used for good but not for ill. We might do so by establishing rules about its use (e.g., nuclear fission can be used for energy, but not for weapons; or for weapons, but only in narrowly prescribed circumstances). Alternatively, or in addition, we might vest authority over how it will be used in well-motivated or accountable decision makers (for example, by giving possession of the nuclear “football” to the President of the United States, while attempting to prevent untrustworthy decision makers—like the government of Iran—from developing nuclear capabilities). However, if we have doubts about the reliability of these mechanisms of control, then we may resort to banning the technology altogether, or prohibiting its development (for example, a complete ban on nuclear energy). Controlling a powerful technology—harnessing its upside rewards while avoiding its downside risks—is obviously preferable to going without. But when perfect control is impossible and the risks are

55. See *id.* at 98 (quoting James Madison from the Virginia Ratifying Convention).

56. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 955-57 (2010). For their own part, Federalists saw the Constitution as a step toward recognition and acceptance as a full-fledged member of the Europe-centered society of states. *Id.* at 935-36.

great, the nuclear (or *no*-nuclear) option of jettisoning the technology altogether becomes a live one.

A. Political and Legal Control

The development of state power has gone hand-in-hand with the development of strategies for controlling it. One method of control is to vest decision-making authority over how state power will be used in those who are vulnerable to harm.⁵⁷ Thus, systems of representation and electoral democracy are designed to select decision makers who are likely to put the power of the state to good uses and to make them accountable to those who will be subject to that power. Even in the absence of formal institutions of representation or elections—or in addition to them—informal methods of political control may be available. Social unrest, threats of revolution, refusals to cooperate, and other extra-institutional expressions of public sentiment and sanction can serve the same basic purpose of making those who wield state power responsive to the interests of those who are affected by it.

A second method of controlling state power is to subject it to rules about what it can and cannot be used to accomplish. This is the core idea of constitutionalism: that state power can be constrained by legal rules and rights that specify and limit how it may be used.⁵⁸ If representation and democracy are supposed to control state power indirectly, by putting it in the right hands, constitutional rules and rights are supposed to control it directly, by prohibiting some of its potential uses.

These two methods of state control are conventionally labeled *political* and *legal*—as in, democratic politics and constitutional law. Couching the distinction in these terms is not strictly accurate because the rules and institutional frameworks of democracy are created by constitutional and other forms of law. Nonetheless, the nomenclature of “legal” versus “political” is an intuitive and familiar way of marking the functional difference between control-

57. See generally Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286 (2012) (describing this method of control, and contrasting it with rights or substantive prohibitions on state behavior).

58. In a more expansive sense, constitutionalism is also the idea that states and governments are *constituted* by law.

ling state power by regulating its *uses*, and controlling state power by regulating who its *users* will be and how they will be incentivized.

Constitutionalism and democracy are sometimes viewed as working at cross-purposes: constitutional rules and rights place extrapolitical limitations on democratic decision making, thus giving rise to the kinds of “countermajoritarian” or anti-democratic objections that constitutional theorists obsess over. From a simple-minded functional perspective, however, democratic political institutions and constitutional rules and rights can be usefully understood as somewhat interchangeable tools for performing the same basic job: namely, protecting citizens against the downsides of state power. Vulnerable groups can be given influence on the front end over how state power is used; or they can be protected on the back end by bans on particularly harmful uses.⁵⁹ But at some level of abstraction the basic idea is essentially the same: to control how state power is used in the hope of enjoying its benefits while minimizing its costs.

Constitutionalism and democracy are features limited to the domestic state. The mechanisms of control over state power available to outsiders, operating in the international arena, are somewhat different. Yet these can also be divided into similar categories of political and legal.⁶⁰ The political category encompasses the domain of international relations, in which states attempt to influence one another’s behavior through a variety of different channels. These include formal institutions of global governance (for example, the United Nations and the European Union), bilateral and multilateral diplomacy, threats or the actual deployment of military force, terrorism, trade relationships and sanctions, and myriad forms of soft power. The political domain of international relations blurs into the legal domain of international law, in which states attempt to control one another’s behavior by means of treaties, custom, and the decision-making authority of international tribunals. At the international level, as well as the domestic, state power is managed, more or less effectively, by some

59. See generally Levinson, *supra* note 57.

60. Here again, the important conceptual caveat is that many types of “political” control are underwritten by law.

combination of (political) influence over users and (legal) regulation of uses.

B. Incapacitation

Democracy and constitutionalism; representation and rights; international relations and international law: these are the most familiar and time-honored techniques for navigating the dilemma of state power. There is, however, a different approach. Rather than attempting to control a state whose power is taken for granted, we might choose to reduce that power, or to prevent it from being developed in the first place. I will refer to this alternative strategy as *incapacitating* the state. The terminology of “incapacitation” invokes the penal strategy of preventing a dangerous person from committing future crimes by incarceration, execution, or physical dismemberment (as in cutting the hands off thieves). The idea here is roughly the same as applied to the state. Like locking up recidivist criminals or lopping off their heads or hands, incapacitating the state is a potentially effective, albeit costly, method of preventing the state from inflicting future harms.

A bit less metaphorically, the idea of state incapacitation stems from the concept of state “capacity.” A term of art in development economics and political science, state capacity means the ability to accomplish the kinds of things states might be good for: providing domestic order and protection from violence, raising revenue, adjudicating disputes, enforcing property rights and contracts, building transportation and communications networks, providing health care and education, and so on.⁶¹ Put differently, state

61. See, e.g., Timothy Besley & Torsten Persson, *State Capacity, Conflict, and Development*, 78 *ECONOMETRICA* 1, 1-2 (2010); Jonathan K. Hanson & Rachel Sigman, Leviathan’s Latent Dimensions: Measuring State Capacity for Comparative Political Research 1-4 (Aug. 2013) (unpublished manuscript), available at <http://perma.cc/QL4E-H4G3>. There is a close relationship, if not complete overlap, between state “capacity” in this sense and what Michael Mann has termed the “infrastructural” power of the state. See Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms, and Results*, 25 *EUR. J. SOC.* 185, 185, 189 (1984).

It is also common to characterize states as “strong” or “weak,” but this vocabulary has taken on a variety of specific and contradictory meanings. For example, owing to features of our constitutional design like the separation of powers and federalism, and also to legal and sociocultural boundaries on the sphere of legitimate government intervention, the United States is sometimes described a “weak” state. The contrast is to an ideal type of “strong”

capacity is what state-building is supposed to build. Concretely, this means assembling the resources and infrastructure that states use to effectuate capacity and project power: a military or armed police force; a competent, well-organized bureaucracy; a coherent and decisive system of lawmaking; a reliable judiciary; and the like.⁶²

State capacity can also be built by making the populations and territories that states aspire to govern more manageable. Thus, Tilly describes early modern states as “work[ing] to homogenize their populations and break down their segmentation by imposing common languages, religions, currencies, and legal systems, as well as promoting the construction of connected systems of trade, transportation, and communication.”⁶³ These efforts at social organization and rationalization can penetrate down to the fine details of day-to-day life. For example, the familiar urban grid turns out to be a powerful and multi-faceted tool of governance that facilitates “[d]elivering mail, collecting taxes, conducting a census, moving supplies and people in and out of the city, putting down a riot or insurrection, digging for pipes and sewer lines, finding a felon or conscript ... and planning public transportation, water supply, and trash removal.”⁶⁴ Modern states have developed ever more effective tools for monitoring and managing their populations, ranging from conventions of permanent surnames,⁶⁵ to elaborate systems of information collection and management,⁶⁶ to the extensive data

state, characterized by a centralized, professional bureaucracy and a unified, hierarchical structure, and based on the Weberian model of modern European nation-states like absolutist France. But the “weakness” of our domestic governance structure may be in large part responsible for the economic and military capacity that makes us a global superpower while extremely “strong” fascist and communist states have fallen by the wayside. See William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752 (2008). Likewise, eighteenth-century England, possessed of a “weak” domestic government by the standards of Continental European absolutism, was the world’s preeminent power. See Ira Katznelson, *Flexible Capacity: The Military and Early American Statebuilding*, in SHAPED BY WAR AND TRADE: INTERNATIONAL INFLUENCES ON AMERICAN POLITICAL DEVELOPMENT 82, 85 (Ira Katznelson & Martin Shefter eds., 2002).

62. See Hanson & Sigman, *supra* note 61, at 3-4.

63. TILLY, *supra* note 3, at 100.

64. JAMES C. SCOTT, SEEING LIKE A STATE 57 (1998).

65. See *id.* at 65 (“Tax and tithe rolls, property rolls, conscription lists, censuses, and property deeds recognized in law were inconceivable without some means of fixing an individual’s identity and linking him or her to a kin group.”).

66. See, e.g., JACOB SOLL, THE INFORMATION MASTER: JEAN-BAPTISTE COLBERT’S SECRET STATE INTELLIGENCE SYSTEM (2009) (describing the efforts under the reign of Louis XIV, led

mining, video surveillance, and DNA databasing operations of the contemporary “National Surveillance State.”⁶⁷

Here again, it is important to keep in mind that these tools can be used for good or for ill. The very same surveillance and intelligence gathering capabilities that can be used to target terrorists can also be aimed at political dissidents or vulnerable minorities. Political scientist James C. Scott points to an exquisitely detailed map produced by the City Office of Statistics of Amsterdam in 1941 entitled “The Distribution of Jews in the Municipality.”⁶⁸ Tragically, of course, the map was put to use by the Nazis to round up and deport the city’s Jewish population.⁶⁹ Scott reminds us, however, that the same cartographical capacity “could as easily have been deployed to feed the Jews as to deport them.”⁷⁰ Put differently, “[a]n illegible society ... is a hindrance to any effective intervention by the state, whether the purpose of that intervention is plunder or public welfare.”⁷¹

Here is the idea of incapacitation: Incapacitating a state simply means eliminating or withholding some of the tools or resources that contribute to state capacity—reversing or stunting the process of state-building. The Morgenthau Plan for post-WWII Germany and the Articles of Confederation’s limitations on the power of the national government of the United States offer some vivid examples: demilitarization, deindustrialization, and denying the power of coercive taxation are obvious ways of effecting severe reductions

by his chief minister, Jean-Baptiste Colbert, to strengthen the French monarchy and realize its absolutist ambitions by creating an elaborate system of information gathering and management).

67. See Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3 (2008).

68. SCOTT, *supra* note 64, at 78 (“If one reflects briefly on the kind of detailed information on names, addresses, and ethnic backgrounds ... and the cartographic exactitude required to produce this statistical representation, the contribution of legibility to state capacity is evident.”).

69. *Id.*

70. *Id.*

71. *Id.* The 1994 Rwandan genocide probably could not have been perpetrated in most African states, which lack Rwanda’s high level of bureaucratic capacity. See ALISON DES FORGES, “LEAVE NONE TO TELL THE STORY”: GENOCIDE IN RWANDA 8-9, 231-41 (1999) (describing how the Rwandan government, in order to effect an extermination campaign of such scope and swiftness, enlisted administrative officials to collect and distribute information about targets, mobilize citizens for attacks, maintain records of who had been killed, and dispose of the corpses).

in state capacity.⁷² But state power can also be limited in more incremental and less dramatic ways.

Thus, on the international stage, states routinely take steps to reduce the military, economic, or internal governance capacity of their rivals. Patterns of trade, investment, and foreign aid are structured to hinder the growth of enemies while fostering the growth of allies. Strategic air strikes, arms embargos, cyberattacks, and outright wars are designed to reduce the military power of adversaries. Support for rebel groups or military proxies, economic sanctions, and propaganda campaigns can serve the purpose of destabilizing or weakening competitor states. In all of these ways, states seek not just to influence and control one another's behavior, but to reduce the capacity of actual or potential enemies to inflict harm.

Incapacitation is also an important strategy of domestic statecraft. One need only think of the disintegration of the Soviet state or the reforms implemented by Margaret Thatcher and Ronald Reagan to get a sense of all the ways in which domestic governance capacity might be rolled back or destroyed. Bureaucratic structures and administrative capacity can be dismantled. Surveillance and information-gathering capabilities can be legally or technologically curtailed. Access to revenues can be impeded or denied ("starving the beast"). Governmental responsibilities and powers can be fragmented, making coordinated action more difficult. The size and scope of the central state can be reduced by reallocating governmental powers to international or sub-national entities, or by privatization.

Some types of incapacitating measures, like those in the Morgenthau Plan, can be given effect through military force or physical destruction. Others are effected through law, in particular, through constitutional law, which will be the focus of much of what follows. In thinking about incapacitation as a legal strategy, it may be helpful to clarify how it is different from the mechanisms of legal control described above. After all, there is a sense in which any constitutional, or international law, rule or right could be looked upon as a selective incapacitating measure. We might say, for instance, that the government is incapacitated from locking up

72. *See supra* Part I.A-B.

enemies of the state without any legal process. How, if at all, is this different from a constitutional regime that denies the government a standing army, or that impedes the development of the intelligence, administrative, and coercive capabilities necessary to identify and apprehend enemies of the state in the first place?

The categorical distinction I have in mind tracks similar distinctions in nonconstitutional contexts. For example, antitrust law distinguishes between “conduct” remedies that mandate or forbid discrete behaviors (like an order not to raise prices or discriminate against a rival) and “structural” remedies that might go so far as to break up a large company like AT&T or Microsoft into pieces.⁷³ Similarly, financial regulators concerned about the systemic risks created by banks that are “too big to fail” might impose rules and requirements along the lines of Dodd-Frank, or they might eliminate systemic risk by, as some have proposed, breaking up the banks into entities small enough to safely fail.⁷⁴ Gun violence can be prevented by the enforcement of criminal laws against murder, or by outright bans on gun possession. Sexual violence or terrorist attacks can be prevented by policing and punishing bad acts, or by preemptively detaining suspected sex offenders or terrorists.

The paired regulatory strategies in each of these contexts can be distinguished along two related dimensions. One is between regulation targeting behavior that is immediately harmful and regulation targeting behavior or arrangements that have the potential to cause harm some distance downstream. The latter kind of regulation is sometimes described as “preventative” or “prophylactic.”⁷⁵ Unlike regulation that is directly targeted at harm, preventative and prophylactic regulation prohibits some measure of harmless and even beneficial conduct. The banks and their

73. William H. Page, *Optimal Antitrust Remedies: A Synthesis* 21, 29-30 (May 7, 2012) (unpublished manuscript), available at <http://perma.cc/Z546-MARC>.

74. See, e.g., Jeff Kearns & Jesse Hamilton, *Fed's Fisher Urges Bank Breakup Amid Too-Big-to-Fail 'Injustice'*, BLOOMBERG (June 25, 2013, 3:33 PM), <http://www.bloomberg.com/news/2013-06-25/fed-s-fisher-urges-bank-breakup-amid-too-big-to-fail-injustice-.html> [<http://perma.cc/3V69-3DQA>].

75. See, e.g., ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* (2006); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988); cf. Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1172 (2010) (distinguishing between regulation targeted directly at preventing harm and regulation designed to decrease the likelihood of harm by shifting the relative power of injurers and victims).

customers are deprived of economies of scale and coordination; innocent people who would never engage in terrorist attacks lose their liberty.

Legal incapacitation of the state is similarly prophylactic and preventative.⁷⁶ Like breaking up banks or locking up potential terrorists, incapacitating measures deprive states of capacities that are potentially beneficial in order to preempt potential downstream harms. Depriving a state of a standing army is, as the Federalists were at pains to point out, a rather blunderbuss approach to harm-prevention that entails substantial spillover costs.⁷⁷

A second distinguishing characteristic shared by incapacitation and prophylactic and preventative regulation, generally, is greater *reliability* in ensuring that harms do not come to pass, as compared to more surgical alternatives. This is what arguably justifies the substantial spillover costs of these measures. If we were confident that antitrust conduct rules, Dodd-Frank regulatory rules, criminal prohibitions on homicide or terrorism, and the like, would be perfectly effective in preventing the prohibited conduct, there would

76. Compare Adrian Vermeule's notion of "precautionary constitutionalism" as an approach to dealing with "political risks." ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 2, 10 (2014). Vermeule defines precautionary constitutionalism as the view that:

[C]onstitutional rules should above all entrench precautions against the risks that official action will result in dictatorship or tyranny, corruption and official self-dealing, violations of the rights of minorities, or other political harms of equivalent severity. On this view, constitutional rulemakers and citizens design and manage political institutions with a view to warding off the worst case. The burden of uncertainty is to be set against official power, out of a suspicion that the capacity and tendency of official power to inflict cruelty, indignity, and other harms are greater than its capacity and tendency to promote human welfare, liberty, or justice.

Id. at 11. Vermeule's project is largely directed at criticizing the irrational risk-aversion that is built into this definition, much as proponents of cost-benefit analysis have criticized the irrational risk-aversion of the "precautionary principle" in environmental law and other regulatory settings. *See id.* at 11 & n.16. There is nothing necessarily irrational or risk-averse about state incapacitation as the concept is framed here, however. Nonetheless, Vermeule's perspective calls attention to a similar set of variables in assessing the utility of prophylactically limiting state power.

77. Of course, some degree of prophylactic over-inclusivity is also a feature of many run of the mill regulatory rules. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889-904 (1999); Strauss, *supra* note 75. In fact, any constitutional rule, as compared to a standard, is, by definition, somewhat over-inclusive relative to purpose. That said, there is a significant difference of degree between, say, imposing disclosure requirements and dissolving Goldman Sachs; or between the Third Amendment and an across-the-board prohibition on a standing army.

be no need to suffer the spillover costs of their prophylactic alternatives. In reality, however, we know that enforcement and compliance are often highly imperfect. Structural forms of incapacitation, like breaking up banks and locking up criminals, are supposed to create more reliable impediments to harm than bare legal prohibitions. The competitive market forces and transaction costs that raise the expense of collusion across firm boundaries, or the cell bars that raise the costs of committing a crime or an act of terrorism, are meant to create “physical” barriers more difficult to breach than legal rules backed by (more or less credible) threats of sanctions.⁷⁸

State incapacitating measures likewise rely upon structural disabilities that are more difficult to evade or ignore than free-floating legal prohibitions.⁷⁹ This is the logic behind the Anti-Federalists’ objections to the constitutional permissibility of standing armies. Compared to the alternative of permitting a permanent military force, but legally regulating its use, complete prohibition, while costly, might also be more reliable. The obvious concern is that once a tyrannical president gets his hands on an army he might not be long detained by the “parchment barriers” of ordinary constitutional rules and rights.⁸⁰

Of course, a tyrannical president might also ignore a constitutional prohibition on raising a peacetime army in the first place. As it happens, the first derogatory reference to “parchment barriers” in the Federalist Papers comes from Alexander Hamilton, precisely

78. Cf. LAWRENCE LESSIG, CODE: VERSION 2.0 (2006) (defining a similar category of regulation by “architecture” or “code” in cyberspace); Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 657 (2006) (distinguishing regulation by “structural laws,” which create physical constraints on behavior, from “regulati[on] by statutory commands alone”).

79. Structural or physical barriers are not always more effective impediments to wrongdoing than ordinary legal prohibitions. Compare two ways of preventing speeding: legally enforced speed limits versus the installation of physical speed bumps in the road; or two ways of preventing trespassing: legally enforced prohibition versus building a fence. Which is more effective will depend on the likelihood and severity of legal penalties, on the one hand, and the design of the speed bumps and fence on the other. Low fences or speed bumps might well be less effective barriers than frequent police patrols and severe penalties for trespassing or speeding.

80. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 658, 662 (2011) (citing THE FEDERALIST NO. 48, *supra* note 38, at 305 (James Madison)).

in reference to constitutional prohibitions on standing armies during peacetime.⁸¹ Hamilton cites the example of Pennsylvania, which, despite a constitutional declaration that standing armies are “dangerous to liberty, and ought not to be kept up in time of peace,” apparently could not resist the temptation to raise an army “in a time of profound peace” when confronted with “partial disorders in one or two of her counties.”⁸² The moral, for Hamilton, is that constitutional “rules and maxims calculated in their very nature to run counter to the necessities of society” will not be effective.⁸³

Certainly Hamilton was right to observe that any legal obstacle can be overcome if there is sufficient political or social will. But some obstacles are more effective impediments than others. Raising an army from scratch is likely to be more difficult than violating a rule against using an existing army in some abusive way. Building an army requires time and resources. People will see it happening and have opportunities to sound the alarm and mobilize resistance. It is at least plausible that a constitutional ban on standing armies would erect a much stiffer kind of parchment barrier than regulatory rules governing such an army’s use.

To summarize, two features distinguish what I am terming incapacitation from ordinary legal regulation: a broadly prophylactic approach to limiting state power, and the imposition of structural barriers that are more difficult to override or reverse than typical rules and rights. The relative costs and benefits of incapacitation follow straightforwardly from these distinctive features. The main advantage of incapacitation is that it promises greater efficacy and reliability in limiting the downside costs of state power.⁸⁴ The main disadvantage of incapacitation is the often considerable cost of losing the potential upside gains of state power.

C. Control and Capacity as Complements

In an ideal world, we would exercise perfect control over unlimited state power—enjoying all its benefits while avoiding all its

81. THE FEDERALIST NO. 25, *supra* note 38, at 167 (Alexander Hamilton).

82. *Id.* at 166.

83. *Id.* at 167.

84. The comparison here will ultimately be not just to ordinary constitutional regulatory rules, but also to political controls.

costs. It is only when control becomes imperfect, and state power consequently comes with downside risks, that the possibility of unbuilding, or incapacitating the state, emerges as a plausible, second-best alternative. Put the other way around, the more confidence we have in our ability to control the state, the more state capacity we will be willing to countenance.

This complementary relationship between control and capacity has been at the center of historical processes of state-building. Rulers of nascent states who wanted to build capacity by extracting tax revenues and soldiers often met with resistance from unenthusiastic populations. Forced to strike a bargain, rulers found that the purchase price of cooperation was greater popular control over state power, institutionalized through some combination of political accountability and rights.⁸⁵ Thus, in thirteenth-century England, bargaining between the Crown and local elites resulted in the Magna Carta, as well as the council of barons that evolved into the first Parliament.⁸⁶ In the late fifteenth and sixteenth centuries, redoubled efforts by the Tudors, and then the Stuarts, to expand the power and wealth of the central state led to Parliamentary pushback, and eventually to civil war and the Glorious Revolution of 1688.⁸⁷ With royal absolutism defeated, England moved forward with what is often described as a system of “limited government,” featuring a Bill of Rights, politically independent courts, and an invigorated role for Parliament—once again, rights and representation.⁸⁸

But limited government did not mean limited state capacity. Quite the opposite—with legal and political controls over state power more securely in place, popular and Parliamentary resistance to centralized state-building diminished and the English state proceeded to expand.⁸⁹ Tax revenues and state expenditures soared.

85. See TILLY, *supra* note 3, at 102-03; see also Lisa Blaydes & Eric Chaney, *The Feudal Revolution and Europe's Rise: Political Divergence of the Christian West and the Muslim World Before 1500 CE*, 107 AM. POL. SCI. REV. 16, 16-17 (2013).

86. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL 185 (2012).

87. *Id.* at 186-90.

88. See *id.* at 185-97; JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE, 1688-1783 (1988).

89. See ACEMOGLU & ROBINSON, *supra* note 86, at 196 (“Parliament had opposed making the state more effective and better resourced prior to 1688 because it could not control it. After 1688 it was a different story.”); see also Douglass C. North & Barry R. Weingast,

Unprecedented military might was mobilized for war against France.⁹⁰ An elaborate, professionalized bureaucracy was assembled, “[with] such a multitude of new officers, created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation.”⁹¹ In sum, post-revolution England became a

“consensually strong state” in the sense that the state ... [became] stronger with the consent of citizens; citizens (or in the British case, the merchants, gentry and some aristocrats) gave this consent precisely because they knew that they could rein in the power of the state if it deviated significantly from the course of action that they wanted to see implemented.⁹²

The Marshall versus Morgenthau debate turned in large part on the same logic.⁹³ The risks and rewards of rebuilding the power of the German state would obviously depend on the prospects of controlling Germany’s political direction and allegiances. The gamble of the Marshall Plan was that Germany could be brought into the fold of an economically interconnected Western Europe allied with the United States against Communism.⁹⁴ Viewed in this light, the Marshall Plan was of a piece with the creation of NATO in 1949 and the European Coal and Steel Community in 1951—a first step toward the eventual formation of the European Union.⁹⁵ From the close of World War II through the contemporary European Union, hopes for a lasting European peace have been focused on the economic, political, legal, and cultural integration—and thus control—of an enduringly powerful German state.⁹⁶ Looking back on the fears of Morgenthau and Thatcher, the project of controlling

Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England, 49 J. ECON. HIST. 803, 817 (1989) (“[I]n exchange for the greater say in government, parliamentary interests agreed to put the government on a sound financial footing ... [by] provid[ing] sufficient tax revenue.”).

90. North & Weingast, *supra* note 89, at 817.

91. See EDLING, *supra* note 39, at 64 (quoting Blackstone).

92. Daron Acemoglu, *Institutions, Factor Prices, and Taxation: Virtues of Strong States?*, 100 AM. ECON. REV. 115, 118 (2010).

93. See *supra* Part I.A.

94. See MCALLISTER, *supra* note 26, at 123.

95. See HOGAN, *supra* note 35, at 376, 378; Hitchcock, *supra* note 17, at 169.

96. See HOGAN, *supra* note 35, at 378.

Germany can be counted as a great success. Like England after the Glorious Revolution, Germany is now a “consensually strong” state from the perspective of the United States and its European allies.⁹⁷

Much of the debate between Federalists and Anti-Federalists over the United States Constitution likewise turned on predictive judgments about how effectively a powerful, central state could be politically and legally controlled by its citizenry.⁹⁸ For all of their rhetoric about the inherently dangerous qualities of government power, Anti-Federalists had no objection to powerful governments at the *state* level.⁹⁹ In contrast to the federal government, state governments were considered trustworthy recipients of power because they were responsive and accountable to the interests of their citizens.¹⁰⁰ In other words, state governments could be “consensually strong,” or as the Federal Farmer put it, “strong and well guarded.”¹⁰¹ The national government, however, would be much less well-guarded. In the Anti-Federalist imagination, it would be run by a group of distant and despotic aristocrats completely disconnected from “the body of the people.”¹⁰² This presumptive failure of political control led the Anti-Federalists to embrace the two

97. The same is true of the other great power defeated by the United States and its allies in World War II. Under General MacArthur’s command, occupied Japan was reconstructed pursuant to an agenda of “demilitarization and democratization.” See JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 73 (1999). The demilitarization prong was an incapacitation measure; the democratization prong was about control. *Id.* at 82-83. Occupation authorities mounted a multi-faceted campaign to turn Japan into a peaceful, democratic, and law-abiding country—to “insure that Japan will not again become a menace to the United States or to the peace and security of the world” and “[t]o bring about the eventual establishment of a peaceful and responsible government which will ... support the objectives of the United States.” *Id.* at 76-77 (quoting the United States’s Initial Postsurrender Policy for Japan). This would require “remaking the political, social, cultural, and economic fabric of a defeated nation, and in the process changing the very way of thinking of its populace.” *Id.* at 78. Toward that end, the Japanese government was forced to extend the franchise to women, prohibit former military officers from holding public office, promote labor unionization, reform its educational system, break up monopolies, implement agrarian land reform, decentralize the police force, and enact a constitution premised on popular sovereignty and liberal rights. See *id.* at 80-84.

98. See *supra* Part I.B.

99. See CORNELL, *supra* note 45, at 72-73, 85, 90.

100. See EDLING, *supra* note 39, at 181-82.

101. See *id.* at 182 (quoting Federal Farmer, *An Additional Number of Letters to the Republican*, in 17 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 356 (John P. Kaminski et al. eds., 1995)).

102. See RAKOVE, *supra* note 44, at 229-30.

predictable alternatives. First, they advocated for more stringent *legal* controls that could be created through a constitutional bill of rights.¹⁰³ Second, they preached incapacitation: limiting the oppressive power that the Federalists' Constitution proposed to grant.¹⁰⁴

Opposed to both of these possibilities, Federalists made the case that democratic political control would suffice. Ridiculing the Anti-Federalist vision of "Congress as some foreign body, as a set of men who will seek every opportunity to enslave us,"¹⁰⁵ Federalists insisted that "[t]he federal representatives will represent *the people*; they will be *the people*"; their "interest is inseparably connected with our own."¹⁰⁶ Federalists argued that if democracy worked as planned, there would be much less reason to worry about state power or to resist its expansion.¹⁰⁷

III. CONSTITUTIONAL STATE-BUILDING AND STATE-UNBUILDING

A common but perplexing observation is that constitutions both build and constrain state power. The preceding discussion of state-building, control, and incapacitation may help to shed some light on how these dual, and apparently dueling, ambitions of constitutionalism can be made to fit together. Three points in particular are broadly applicable to constitutional design and development. The first is the complementary relationship between building and

103. Actually, the Bill of Rights as originally conceived and, in part, enacted was as much about bolstering popular *political* control as it was about protecting discretely enumerated rights. Many of the rights it enumerated were meant to empower majoritarian governance by placing limits on the self-serving behavior of federal officials and by safeguarding institutions of state and local self-government to insulate citizens from these officials' despotic reach. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, at xii-xiii, 3-133 (1998).

104. As a specific example, the Constitution's two year sunset rule for military appropriations was designed to give Congress control over the existence and scope of a standing army. U.S. CONST. art. I, § 8, cl. 12. Had Anti-Federalists been convinced that Congress would be responsive to popular political will, this control mechanism might have sufficed.

105. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 545 (1969).

106. *Id.*

107. In fact, the Federalists' primary concern with democratic accountability was that it would work *too* well—that legislators would be *too* responsive to their constituents, allowing factions to seize control of government and substituting a debased kind of populism for high-minded deliberation about the public good. See RAKOVE, *supra* note 44, at 203-43.

constraining state power: the more power is built, the more the demand for constraints; and the more state power can be constrained, the more it will be welcome.¹⁰⁸ Recall the idea of a “consensually strong” state.¹⁰⁹ Following from this idea, the second point is that constraints on state power can take different forms. One way to constrain state power is to control it. This can be accomplished by creating a political framework that makes those with their hands on the levers of power democratically accountable or otherwise responsive to the interests of those who do not. It can also be accomplished by imposing regulatory rules and rights that place preconceived limits on what state power can be used to accomplish. Finally, it is important to recognize that constraints on state power need not be external to the constitutive, state-building function. The conventional, Hobbesian-Lockean understanding of constitutionally “limited” government portrays an omnipotent Leviathan whose behavior is regulated by specific limitations on how its power can be exercised. But another approach to limiting government is to make the Leviathan less potent—to *reduce* state power rather than building and binding it. State incapacitation should be placed alongside rights and representation as one of the basic tools of constitutional design.

The discussion that follows brings these ideas to bear on some of the central features of U.S. constitutional design: the legislative-executive separation of powers, the presidency, and federalism. These and other aspects of the “structural” constitution are supposed to provide the basic building blocks of national state power. At the same time, however, the structural constitution is supposed to *control* the power of the national state by creating an elaborate system of democratic politics. The structural constitution is also supposed to *limit* state power in crucial respects. These simultaneous state-building, state-controlling, and state-incapacitating ambitions have competed and, somewhat awkwardly, co-existed in the design of the American Constitution since the Founding. Viewing the Constitution through the lens of building, controlling,

108. This is an example of the more general observation that constitutional constraints can be “enabling,” increasing state power in a broader frame of reference. See STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY* 6-8 (1995).

109. See *supra* note 97 and accompanying text.

and unbuilding state power illuminates some recurring patterns in how we think about constitutional law, development, and design.¹¹⁰

A. Separation of Powers as Straightjacket

The Madisonian design of our system of constitutionally separated powers and checks and balances has long been celebrated by Americans as a work of political genius, credited with at least three major virtues. First, by assigning qualitatively different governance tasks to specialized institutions, the constitutional design is supposed to leverage the efficiency benefits of specialization and division of labor.¹¹¹ Separation of powers is supposed to increase the capacity of the national state in much the same way as Henry Ford's assembly line increased the capacity of automobile production. Furthermore, along the lines laid out in Madison's famous Federalist 10,¹¹² dividing powers is supposed to be conducive to a system of political pluralism, preventing a unified majority coalition (or "faction") from monopolizing control over the government and ensuring that multiple and minority interests are represented.¹¹³ In other words, separation of powers is supposed to facilitate broad-based political control over how the enhanced power of the national state is deployed.

At the same time, however, the most straightforward functional feature of separation of powers is its tendency to "preserve liberty by disabling government."¹¹⁴ By requiring the concerted action of

110. In discussing constitutional structure, it is obviously important to distinguish assessments of the power or capacity of a particular institutions of domestic governance from broader assessments of the power or capacity of the United States. Limits on the capacity of the President, for instance, may channel power to Congress or to state governments, with ambiguous effects on the power of the United States as a whole.

111. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 64 (2005); HOLMES, *supra* note 108, at 165.

112. THE FEDERALIST NO. 10, *supra* note 38, at 52, 54 (James Madison).

113. *See, e.g.*, AMAR, *supra* note 111, at 64 ("Different branches chosen at different times through different voting rules might together produce a more accurate and more stable composite sketch of deliberate public opinion.")

114. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 15-16 (1993); *see also, e.g.*, Myers v. United States, 272 U.S. 52, 193 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."). As Sunstein elaborates, "The system of checks and balances enabled the sovereign people to pursue a strategy of 'divide and conquer.'" SUNSTEIN, *supra*, at 16.

multiple institutions with often conflicting interests, the separation of powers multiplies veto points and raises the transaction costs of state action. This is the opposite of efficiency; it is a hard-wired *inefficiency*, designed to make it more difficult for the state to interfere with liberty—or to do anything else. This is why progressives and other proponents of vigorous government have long heaped scorn on the constitutional design for creating a government “divided against itself” and thus “deliberately and effectively weakened.”¹¹⁵ In recent years, the combination of polarized political parties and divided party control of government has exacerbated these structural tendencies.¹¹⁶ The inefficiency and gridlock of divided government in Washington is now more than ever a source of frustration for those who seek governmental solutions to pressing social problems.

Whether gridlocked government is a price worth paying for the preservation of (negative) liberty will depend on competing assessments of what an unfettered national state might use its power to accomplish. These assessments, in turn, will depend on how effectively we think we can control its behavior through some combination of law and politics. The incapacitating features of the separation of powers were originally conceived as a fail-safe to guard against the possibility that political control would break down entirely. As Madison explained, the “primary control on the government” would be its “dependence on the people” through a system of democratic politics.¹¹⁷ In the event that democratic accountability failed, however, the separation of powers would serve as a second line of defense against federal tyranny—an “auxilliary precaution[.]”¹¹⁸ So even if the Anti-Federalists’ worst fears were realized and each department of the national government became captured by corrupt and power-hungry officials, the separation of powers would pit rivalrous branches and chambers against one another in a stalemated competition for control over the government. This is the celebrated idea of “[a]mbition ... counteract[ing]

115. Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1383 (2012) (book review) (quoting HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 40 (1915)).

116. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

117. THE FEDERALIST NO. 51, *supra* note 38, at 322 (James Madison).

118. *Id.*

ambition,”¹¹⁹ conceived by Madison as a means of effectively incapacitating a corrupted national state running free of democratic control.

Moreover, Madison and other Federalists insisted that the structure of separation of powers would be a much more reliable safeguard than the Anti-Federalists’ beloved bill of rights. Attempting to impose legal controls on state power under these circumstances would be an exercise in futility because officials with despotic designs would simply ignore or override any “parchment barriers” that stood in their way.¹²⁰ As Roger Sherman bluntly put the point, “No bill of rights ever yet bound the supreme power longer than the honeymoon of a new married couple, unless the rulers were interested in preserving the rights.”¹²¹ The constitutional separation of powers, in contrast, would be effectively self-enforcing, converting the self-interested ambitions of rulers into “personal motives to resist the encroachments of the others.”¹²² Even if legal and political controls on national state power both failed, the system of separated powers would limit its capacity to do harm.¹²³

This was the Founders’ case for separation of powers as a system of state incapacitation. From the perspective of the present, it may be worth noting that the prospects for effective legal and political control of the national government now look somewhat more optimistic than they did to Madison and his compatriots. Democracy in this country has more or less succeeded. It is now harder to imagine government officials setting themselves up as monarchs or oligarchs and letting loose a reign of tyranny over the citizenry. What is more, *legal* controls over the national government also seem to have worked better than Madison would have anticipated. We now have a fairly robust regime of constitutional rights and other limitations on the power of the national government, undergirded by a long history of independent judicial review. Even as we have

119. *Id.*

120. THE FEDERALIST NO. 48, *supra* note 38, at 308 (James Madison).

121. Roger Sherman, *A Countryman, II.*, NEW HAVEN GAZETTE, Nov. 22, 1787.

122. THE FEDERALIST NO. 51, *supra* note 38, at 321-22 (James Madison).

123. Whether the separation of powers and other structural features of the constitutional design have, in fact, proven more reliable or enduring than rights protections, or precisely why they should be expected to, is not entirely clear. See Levinson, *supra* note 80, at 697-705.

consolidated political and legal control over the national state, however, the day-to-day operation of separation of powers, reinvigorated by party competition, has tightened its incapacitating grip.¹²⁴

To be sure, the American system of separation of powers can be defended, as well as criticized, on other grounds.¹²⁵ As compared to a unified system of parliamentary governance based on the Westminster model, the American system's constitutional structure continues to claim advantages relating to both democratic accountability and efficiency.¹²⁶ With respect to the former, although the separation of powers tends to diffuse responsibility among branches and chambers and in that respect hinders accountability,¹²⁷ it also may facilitate greater deliberation, moderation, and broad-based interest representation than parliamentary government.¹²⁸ In this regard, the original Madisonian imperative of preventing a momentary majority from taking complete control of government continues to play an arguably salutary role in the American system of government. The extreme gridlock induced by divided government might be viewed as an inevitable, or even desirable, byproduct of the kind of pluralist and minority representation that the separation of powers facilitates.¹²⁹ As for efficiency, while the pervasive comingling of powers in the administrative state has undermined the assembly line analogy, proponents of the American system now emphasize the unrivaled efficacy of presidential power.¹³⁰ Indeed, as discussed below, by creating legislative-executive gridlock, the separation of powers has encouraged Presidents to claim unilateral authority to meet pressing demands for national state power, giving rise to the "imperial" presidency.

There is much more to be said about the costs and benefits of the separation of powers along these and other dimensions. For present

124. More precisely, the grip has tightened and released depending in large part on whether the branches and chambers of the national government are divided or unified by political party. See Levinson & Pildes, *supra* note 116, at 2338-47.

125. See generally Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (discussing criticisms of the American system of separation of powers and surveying the political science literature on presidential versus parliamentary governments).

126. See Levinson & Pildes, *supra* note 116, at 2338-39, 2343-44.

127. *Id.* at 2326.

128. See *id.* at 2328.

129. See *id.* at 2339.

130. See *id.* at 2338-39.

purposes, however, it may be enough to observe that the Madisonian case for separation of powers as a mechanism for intentionally disabling, or incapacitating, the national state seems increasingly difficult to reconstruct in the modern world.

B. The Imperial (yet Plebiscitary) Presidency

Since the Founding, the presidency has been the focus of our greatest hopes for national state power and also our greatest fears. The Hamiltonian hope is that the presidency will be a source of “energy” in government and leadership on the world stage.¹³¹ Many progressives and contemporary proponents of activist government have likewise seen “the dominating, energetic leadership of a commanding President” as the only hope for turning the fragmented and enervated American government into “an instrument of effective power.”¹³² During the second Bush Administration, Vice President Richard Cheney made much the same argument in defense of unfettered executive power.¹³³ The fear, of course, is that the presidency will become, in the words of Edmund Randolph, “a foetus of monarchy.”¹³⁴ In the view of many civil libertarians, the Bush Administration’s war on terrorism took the office dangerously far in that direction.¹³⁵

These hopes and fears have been amplified in the modern era of the so-called “imperial” presidency.¹³⁶ Over the course of the twentieth century, with the emergence of the United States as a global superpower and the rise of the domestic regulatory state, the

131. See THE FEDERALIST NO. 70, *supra* note 38, at 423 (Alexander Hamilton) (“Energy in the executive is a leading character in the definition of good government.”).

132. Pildes, *supra* note 115, at 1383.

133. See *id.* at 1396.

134. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., 1911).

135. From this perspective, the experience of other presidential systems presents a cautionary tale. In many countries in the world, including all thirty of the Latin American presidential systems at various times, frustration with gridlocked government has led, at some point, to presidents seizing dictatorial powers, setting themselves up as *caudillos* and ruling by decree. See Ackerman, *supra* note 125, at 646; Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY 3, 43 (Juan J. Linz & Arturo Valenzuela eds., 1994).

136. See ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (Mariner Books 2004) (1973).

executive branch has ballooned in size and strength.¹³⁷ Presidents of both parties now stake claims to nearly exclusive authority over foreign affairs and broad latitude for unilateral action in the domestic realm as well.¹³⁸ They have at their disposal a massive bureaucracy that is increasingly politicized and centrally controlled from the White House; not to mention the most powerful military in the world.

For modern-day Hamiltonians, the growth of the imperial presidency is cause for celebration. For example, in a recent book entitled *The Executive Unbound*, Eric Posner and Adrian Vermeule applaud modern presidents for seizing nearly complete hold over the power and direction of the national state, and for casting off antiquated constraints like constitutional limitations and the separation of powers.¹³⁹ This laudatory perspective on presidential power reflects two predictable premises. The first is that the upside benefits of presidential power are high enough to warrant any downside risk. For Posner and Vermeule, “the complexity of policy problems, ... the need for secrecy in many matters of security and foreign affairs, and the sheer speed of policy response necessary in crises” threaten social welfare and create governance challenges that only the executive branch is equipped to solve.¹⁴⁰

The second premise is that the downside risk of presidential power is mitigated by effective mechanisms of control. As it happens, another common characterization of the modern presidency, besides imperial, is “plebiscitary”—meaning that Presidents are directly democratically accountable to the American people and continuously responsive to public opinion and popular demands.¹⁴¹ Posner and Vermeule argue that the plebiscitary accountability of

137. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4 (2010).

138. *Id.*

139. *Id.* (describing the modern presidency as having entered “an age after the separation of powers” and the “legally constrained executive” as “a historical curiosity”).

140. *Id.* at 9.

141. See THEODORE J. LOWI, *THE PERSONAL PRESIDENT*, at xi (1985); Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 875-76 (1997); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001). “Plebiscitary” is sometimes used in a different and nearly opposite sense to mean accountable only at election time but unaccountable to Congress, the press, or the public while actually governing. This was how Schlesinger used the term in *The Imperial Presidency*. See SCHLESINGER, *supra* note 136, at 255.

the presidency makes a mockery of the kind of “tyrannophobia” expressed by Edmund Randolph and civil libertarian critics of the Bush Administration.¹⁴² Tyrants and dictators do not spend their time obsessing over reelection prospects and approval ratings. For Posner and Vermeule, the combination of democratic elections and the president’s ongoing need to maintain political support and public credibility should be sufficient to keep executive power harnessed to the public interest.¹⁴³

Tyrannophobes might find it more reassuring if Presidents were effectively controlled not just by politics but also by law. Posner and Vermeule categorically deny the efficacy of legal controls,¹⁴⁴ but in another recent book about the presidency, Jack Goldsmith points to a robust array of legal as well as political constraints that bind modern Presidents.¹⁴⁵ Goldsmith’s argument is that the enormous power of the post-9/11 presidency has provoked the suspicious attention of courts, Congress, journalists, human rights advocates, and lawyers who monitor, publicize, and check the President’s every move.¹⁴⁶ According to Goldsmith, this “synoptic” network of “watchers” keeps the President accountable to the rule of law as well as to the American people, legitimating and further strengthening executive power.¹⁴⁷ Here again, capacity and control—or in the book’s synonymous title, *Power and Constraint*—are complements.¹⁴⁸ So

142. See POSNER & VERMEULE, *supra* note 137, at 176.

143. See *id.* at 204-05.

144. See *id.* at 205.

145. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 207-11 (2012).

146. *Id.* at xi-xiii.

147. *Id.* at xv.

148. Stephen Skowronek sees a similar pattern in the broad sweep of American political development with respect to the presidency. In Skowronek’s view, throughout American history, each major expansion of presidential power has been accompanied by a corresponding effort to increase democratic accountability and control. Starting as early as the Jeffersonians and then Jacksonians, and extending through the Progressives and New Dealers, new claims of executive authority and increases in executive power have been coupled with new mechanisms for linking the presidency to the public will—whether popular mobilization, political parties, pursuit of the public interest, or interest group pluralism. See Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009); see also Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256 (2006). Mashaw describes a “three-step process of building and binding administrative capacity”:

First, something happens in the world. Second, public policymakers identify

long as the imperial presidency is also a plebiscitary or synoptic one, we have nothing to fear.

Those who *do* see something to fear in presidential power have correspondingly less faith in the efficacy of political and legal controls. In yet another recent book about the modern presidency, Bruce Ackerman warns of the impending *Decline and Fall of the American Republic* at the hands of a “runaway presidency.”¹⁴⁹ As the image of a runaway presidency suggests, Ackerman believes that both political and legal controls over the presidency are in the process of breaking down, paving the way for a de facto dictatorship.¹⁵⁰ Ackerman argues that democratic accountability is being undermined by the decline of party elites and the professional press as gatekeepers, clearing a path to the presidency for extremist demagogues who will be responsive only to a small segment of the electorate on the far right or left.¹⁵¹ To make matters worse, Presidents have become adept at using the media to manipulate public opinion, creating a “politics of unreason” that further undermines meaningful democratic decision making.¹⁵² Ackerman further predicts that the rule of law will fall into a legal black hole as Presidents increasingly follow the lead of the Bush Administration by claiming a popular mandate to ignore congressional statutes while relying on “elite lawyers in the executive branch to ... vindicate the constitutionality of their most blatant power grabs.”¹⁵³

that happening as a problem, or an opportunity, and initiate new forms of governmental action to take advantage of or to remedy the new situation.

Third, these new forms of action generate anxieties about the direction and control of public power. Means are thus sought to make the new initiative ... accountable to law.

Id. at 1337. As Mashaw’s examples make clear, accountability to “law” encompasses not just legal but also political controls over the bureaucracy. From this perspective, judicial review of administrative action is of a piece with political control strategies such as congressional oversight and specificity in delegation, the Administrative Procedure Act, interest representation in administrative policymaking, and the centralization of regulatory policymaking in the Office of Management and Budget. All have been efforts to ensure that burgeoning executive authority is adequately controlled, whether through the oversight of politically accountable actors or legal limitations.

149. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 6 (2010).

150. *Id.* at 3-4.

151. *Id.* at 9.

152. *Id.*

153. *Id.*

The constructive ambition of Ackerman's project is in part to reinvigorate legal and political controls on the presidency. Thus, Ackerman proposes a package of reforms aimed at "enlightening politics" and "restoring the rule of law."¹⁵⁴ But Ackerman wants to go further than this: he wants not just to control the imperial presidency, but to disempower it, up to and including, eliminating the presidency altogether and switching to a modified parliamentary system of government.¹⁵⁵ Short of that, Ackerman suggests cutting the imperial presidency down to size, whether by cabining the executive's authority to initiate military action,¹⁵⁶ or by fragmenting the unitary and hierarchical structure that makes the executive such an efficient organ of governance.¹⁵⁷ For Ackerman and others who worry about out-of-control Presidents and the grave risks of executive power in the wrong hands, incapacitation is a logical pathway to pursue.

Logical, but costly: Even Ackerman's overwhelmingly pessimistic view of presidential power is tempered at times by his recognition that proponents of "activist government—dedicated to the ongoing pursuit of economic welfare, social justice, and environmental integrity"—have good reason to embrace executive efficacy.¹⁵⁸ Ackerman thus describes the decision to sacrifice presidential power as a "tragic choice[]." ¹⁵⁹ The original critic of the imperial presidency, Arthur Schlesinger, struggled with the same dilemma. Having warned of a "conception of presidential power so spacious and peremptory as to imply a radical transformation of the traditional polity,"¹⁶⁰ Schlesinger still could not bring himself to advocate divesting the presidency of its imperial power.¹⁶¹ He was

154. *Id.* at 119-40, 141-79.

155. See Ackerman, *supra* note 125, at 727-28.

156. See, e.g., ACKERMAN, *supra* note 149, at 165-74 (proposing a framework statute requiring congressional approval of presidential emergency powers).

157. See *id.* at 152-59 (proposing that Senate confirmation be required for all important White House staffers, preventing the President from surrounding himself with "superloyalists" who will work in a coordinated way to do his bidding); see also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2322, 2335-42 (2006) (describing mechanisms that could be used to create checks and balances within the executive branch in order to constrain presidential power).

158. ACKERMAN, *supra* note 149, at 124.

159. *Id.*

160. SCHLESINGER, *supra* note 136, at xxvi.

161. After considering a suite of reforms to curtail presidential power, Schlesinger backed

painfully aware that a President powerful enough to fight the Vietnam War could also fight a war on poverty; that for every Nixon there would be an FDR or a Kennedy. Rather than relinquish the irreplaceable power of the presidency, Schlesinger wanted to pursue the ideal of full-blooded executive power brought more fully under political and legal control.¹⁶² As he put it, we should preserve “a strong Presidency *within the Constitution*,” and seek a “means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control.”¹⁶³ For Schlesinger, as for many others, the power of the presidency is a lot to give up, even if it is also a lot to fear.

C. Federalism: Incapacitation by Substitution

Like the separation of powers, the American system of constitutional federalism has long been celebrated as a safeguard against the dangers of centralized state power. As courts and commentators frequently remind us, “the principal benefit of the federalist system is a check on abuses of government power,” one that “ensure[s] the protection of ‘our fundamental liberties.’”¹⁶⁴ Precisely what this means, however, is seldom made clear.

In fact, there are at least three ways in which federalism might protect us from the power of the central state. First, federalism allows groups to effectively *exit* the domain of national power and govern themselves independently. By turning over policy making authority in some areas to the states, the federal system allows

away with the worry that the “scheme of presidential subordination could easily be pressed to the point of national folly.” *Id.* at 405.

162. *Id.* at xxviii.

163. *Id.*; see also GOLDSMITH, *supra* note 145, at xvi (quoting this language and emphasizing that this was Schlesinger’s bottom-line).

164. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)); see also MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 55 (2008) (“Proponents of federalism often argue that federalism protects liberty, generally by diffusing government power.”); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380 (“Perhaps the most frequently mentioned function of the federal system is the one it shares ... with the [system of] separation of powers, namely, the protection of the citizen against governmental oppression—the ‘tyranny’ that the Framers were so concerned about.”).

groups that would be losing minorities at the national level to become self-governing majorities at the state level.

However, federalism is not just about exit; it is also about *voice*. Federalism is supposed to empower groups, not just to flee the national government, but also to influence its direction—that is, to exercise some measure of political control. This is the view famously elaborated by Publius in a series of Federalist Papers arguing that the system of constitutional federalism would allow “[t]he different governments ... [to] control each other, at the same time that each will be controlled by itself.”¹⁶⁵ One channel of state control over the national government would flow through the formal institutions of democratic politics: state representation in the Senate and the Electoral College, state legislative control over House electoral districts, and the like. This is the “political safeguards of federalism” idea, which dates back to the Founding and remains influential in contemporary constitutional law and theory.¹⁶⁶ At least from the perspective of the Founding generation, political control could also operate through other channels. Recall the importance of state militias in the Founding debates¹⁶⁷: state governments would stand ready to rally their citizens against federal tyranny and lead them in armed opposition if need be.¹⁶⁸ Whatever the precise pathway, the least common denominator idea is that states will have

165. THE FEDERALIST NO. 51, *supra* note 38, at 323 (James Madison).

166. See THE FEDERALIST NO. 45, *supra* note 38, at 291 (James Madison); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). A variation on this line of argument emphasizes the ways in which cooperative federalism and other governance arrangements give state-level and local-level minorities a “muscular form of voice” in setting national policy. Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 7, 108 (2010).

167. See CORNELL, *supra* note 45, at 60, 92.

168. See THE FEDERALIST NO. 46, *supra* note 38, at 300 (James Madison) (“[S]chemes of usurpation [by national officials] will be easily defeated by the State governments, who will be supported by the people.”). The Founding generation believed that the defensive capacity of the states against national power would soon be bolstered by the Bill of Rights, which was initially conceived largely as a means of protecting state and local institutions of self-government—the aforementioned militias, but also juries, churches, schools, and legislatures. These institutions were supposed to serve as bulwarks against corrupt or tyrannical federal officials. See *supra* note 103; see also Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977 (1999) (reviewing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)) (elaborating this understanding).

sufficient political control over the national government to keep it safely in line.

But there is a third way that constitutional federalism is, or was, supposed to protect us against state power. At the time of the Founding, federalism was understood not just as a means of exiting or controlling the power of the national state, but also as a means of preventing that power from being developed in the first place. The idea was that the already well-developed governance capacity of states and localities would obviate any need for extensive national state-building. State and local governments would do most of the heavy lifting of governance work, allowing the national government to remain safely small and weak. We might call this a strategy of incapacitation by means of *substitution*: governance capacity at the state level would substitute for, and crowd out the development of, capacity at the national level.¹⁶⁹

As the Founding generation well understood, this kind of substitutionary dynamic is a common feature of state-building processes. A state that lacks adequate capacity to control its territory and population must choose between two options. One is to build its own capacity, which requires substantial investments of time and resources, as well as the ability to overcome entrenched resistance. An easier path, it often turns out, is to cede governance authority to some other entity that already possesses greater capacity and that can be induced to cooperate with the principal state.

This is the strategy of “indirect rule.”¹⁷⁰ For early states that lacked the means to govern directly, indirect rule was a necessity.¹⁷¹ Even as monarchs built professional military forces and began to monopolize the means of violence in their territories, none possessed, or could afford to build, a bureaucratic apparatus capable of

169. A similar phenomenon is the “sucking out” of state capacity that can occur in the context of state-building and international development efforts: “The international community ... comes so richly endowed and full of capabilities that it tends to crowd out rather than complement the extremely weak state capacities of the targeted countries. This means that while governance functions are performed, indigenous capacity does not increase.” FUKUYAMA, *supra* note 14, at 103.

170. See John Gerring et al., *An Institutional Theory of Direct and Indirect Rule*, 63 *WORLD POL.* 377 (2011).

171. See TILLY, *supra* note 3, at 104.

governing a population larger than that of a small city-state.¹⁷² So monarchs relied on collaboration with local magnates who were capable of exercising direct control over subsets of population and territory. This typically involved some sort of bargain through which the monarch secured a certain measure of political control over, and a flow of revenues from, local powerholders in exchange for protection and other benefits from the center. But the local powerholders under these arrangements maintained substantial autonomy over how they governed and were in a position to resist any demands from the center that did not serve their interests.¹⁷³ This placed severe limits on what the central state was able to accomplish or extract.

Indirect rule would later be replicated as a strategy of colonial governance.¹⁷⁴ Colonial powers that did not want to invest the resources required to build an elaborate governance infrastructure in their territories chose to devolve authority to preexisting local powerholders vested with “traditional” or “customary” authority.¹⁷⁵ Well known examples from the British Empire include the Princely States of India¹⁷⁶ and Lord Lugard’s Nigeria.¹⁷⁷ Even where British colonial governance was nominally direct, with a British official formally at the helm, the challenges of governing at long distance often resulted in substantial local autonomy on the ground. This was the case in the American colonies, where the British government lacked the resources and administrative capacity to exercise

172. *Id.*

173. *Id.*

174. See MATTHEW LANGE, LINEAGES OF DESPOTISM AND DEVELOPMENT: BRITISH COLONIALISM AND STATE POWER 21-33 (2009).

175. See *id.* at 24.

176. See generally Lakshmi Iyer, *Direct Versus Indirect Colonial Rule in India: Long-Term Consequences*, 92 REV. ECON. & STAT. 693 (2010).

177. See FREDERICK LUGARD, THE DUAL MANDATE IN BRITISH TROPICAL AFRICA (1922). Similar systems of indirect rule were established by Spain in the Americas, by the Dutch in the East Indies, and by France in Vietnam, Tunisia, and elsewhere. See LANGE, *supra* note 174, at 199-205.

The incapacitating effects of substitutionary government can be quite enduring. Lange finds that British colonies that had been subject to indirect rule continue to suffer, relative to directly ruled colonies, because their central state capacity remains under-developed. The advantage of direct rule was greater investment by the British in the construction of centralized, territory-wide political and bureaucratic infrastructure that could be bequeathed to the post-colonial state. Indirectly ruled states, by comparison, had to be built from scratch; many remain works in progress. *Id.* at 4-8.

direct, day-to-day control, leaving the colonies to a considerable extent self-governing.¹⁷⁸

Federal arrangements in contemporary states can also be understood as a form of indirect rule.¹⁷⁹ Federal systems tend to result from a pattern of political development in which the central state either lacks the power to subsume localized governments,¹⁸⁰ or lacks the motivation because these governments come with capabilities that the central state can put to good use.¹⁸¹ Thus, preexisting entities that possess the “infrastructural capacity” to “tax, maintain order, regulate society, and generally govern their societies” tend to be maintained as subsidiary governmental units even as they are absorbed into a larger state with a centralized government at its core.¹⁸²

From the perspective of the center, then, indirect rule is a means of leveraging third-party governance capacity in order to extend state power. From the perspective of the governed, however, indirect rule can be viewed as a strategy of *limiting* central state power. Indirect rule is not just a consequence of central state incapacity but also a *cause*. Rather than building its own capacity, the central state comes to rely upon the resources and capabilities of decentralized units. This in turn tends to entrench opposition to central state expansion on the part of decentralized powerholders, who are loathe to give up their power and have often built up enough of it to get their way. Contemplating the imposition of greater direct rule by the Crown over the American colonies in the late seventeenth century, the Earl of Sandwich cautioned that “they are already too strong to be compelled.”¹⁸³

Eventually the colonies would be strong enough to cast off British rule altogether and become independent—or United—states. By the time of the constitutional Founding, many Americans had come to appreciate the virtues of indirect rule and local autonomy as means

178. See J. H. ELLIOTT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA, 1492-1830*, at 140, 149-52 (2006); FEELEY & RUBIN, *supra* note 164, at 98.

179. See Gerring et al., *supra* note 170, at 404-11.

180. See WILLIAM H. RIKER, *FEDERALISM* 3-5 (1964).

181. See DANIEL ZIBLATT, *STRUCTURING THE STATE* 2-3 (2006).

182. *Id.* at 3; see also Gerring et al., *supra* note 170, at 385 (comparing preexisting political institutions to physical infrastructure—buildings, roads, railroads, telephone systems, and the like—which are more likely to be repurposed than destroyed and rebuilt from scratch).

183. See ELLIOTT, *supra* note 178, at 149.

of guarding against the predations of a central state. The lesson that Anti-Federalists took from the Revolution was that as long as state governments held on to greater governance and military capacity than the center, they could keep their citizens safe. This translated into a deep commitment to federalism: Anti-Federalists were obsessed with preventing the national government from “consolidating” the states into oblivion, sucking up their authority and resources and exercising unrivaled and unmediated power over the citizenry.¹⁸⁴

Consequently, Anti-Federalists fought along multiple dimensions to keep as much governance capacity as possible securely located in the states and localities and out of the hands of untrustworthy federal officials. Rather than allowing the national government a standing army of its own, it would remain dependent on state militias. Rather than sending hordes of federal tax collectors trampling through the country, the national government would rely on customs duties that could easily be collected at ports and, failing that, on state officials to do the work of tax collection.¹⁸⁵ Rather than appointing cadres of federal judges and building federal courthouses, state courts would do most of the work of enforcing federal law.¹⁸⁶ And more broadly, rather than building its own elaborate bureaucracy, the national government would rely on states and localities to administer its policies.¹⁸⁷ What the Supreme Court now calls “commandeering” and ironically sees as a violation of states’ rights, was originally conceived as a crucial safeguard of the primary role of states in carrying out national governance, in line with the longstanding logic of indirect rule.¹⁸⁸

184. See CORNELL, *supra* note 45, at 30; RAKOVE, *supra* note 44, at 148.

185. See EDLING, *supra* note 39, at 185-205.

186. See *id.* at 225; see also THE FEDERALIST NO. 27, *supra* note 38, at 177 (Alexander Hamilton) (“[T]he legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government ... and will be rendered auxiliary to the enforcement of its laws.”).

187. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 833 (1998) (“Anti-Federalists—quintessential defenders of state power—*wanted* the national government to rely *exclusively* on the state governments to implement national policy.”); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2005 (1993) (“[T]hose who feared that a gargantuan federal bureaucracy would overpower the states were reassured that existing state officers could carry out federal tasks.”).

188. See generally Wesley J. Campbell, *Commandeering and Constitutional Change*, 122

This is, to a considerable extent, how federalism in the early Republic developed. States and localities retained primary regulatory authority over economic and family life and carried most of the weight of governance. The peacetime standing army remained minuscule. In 1840, the national government employed approximately 20,000 people, 14,000 of whom worked for the post office.¹⁸⁹ In place of the centralized bureaucratic capacity that defined European states, America operated with a decentralized administrative framework constructed loosely through the locally-grounded institutions of courts and political parties.¹⁹⁰ Through the Civil War, the national government remained “a midget institution in a giant land.”¹⁹¹

Only in the late nineteenth century, when industrialization and the growth of an integrated national economy began to create functional demands for more centralized state power, did the size and capacity of the national government begin to grow. The Progressive Era saw the creation of the first federal regulatory agencies to implement national-scale economic regulation, as well as the establishment of a central bank (the Federal Reserve) and a national police force (the Federal Bureau of Investigation). The revenue-raising capacity of the national government was enhanced by the Sixteenth Amendment. The growth of the national state escalated through the New Deal, when the federal civil service nearly doubled in size and budget, and continued through World War II and the “Rights Revolution” of the 1960s and 1970s.¹⁹² The net result has been a wholesale transfer of power from the states to the national government and a greatly enhanced capacity for direct control over citizens by an increasingly centralized American state.

Even so, the idea of federalism as a means of limiting the capacity of the national government may not be entirely obsolete. States continue to command capabilities and resources including schools, police forces, and legal systems that might otherwise migrate to the national government. Our system of “cooperative federalism,” in which state and local governments play a pervasive

YALE L.J. 1104 (2013).

189. Katznelson, *supra* note 61, at 89.

190. See SKOWRONEK, *supra* note 42, at 19-35.

191. EDLING, *supra* note 39, at 228 (quoting historian John Murrin).

192. See SUNSTEIN, *supra* note 114, at 18-29.

role in implementing federal regulatory programs, continues to limit the direct governance capacity of the national state and empowers states and localities to become “uncooperative” when vital interests come under federal threat.¹⁹³ Of course, after the Civil War and the Civil Rights Era, the view of state governments as guardians of liberty has lost much of its luster. Nonetheless, for better or for worse, federalism as a mechanism of incapacitation remains recognizable as a living feature of our constitutional tradition.

CONCLUSION

I have tried to show how strategies of state-building, state-controlling, and—less familiar but equally important—state-unbuilding co-exist and interrelate in constitutional design and development, and more broadly in the realms of domestic and international statecraft. Let me conclude by returning to an example that was mentioned already in passing: the ongoing debates over National Security Agency (NSA) eavesdropping and data mining operations.

The ever more massive and comprehensive surveillance and information-gathering capacity developed by our National Surveillance State in the post-9/11 period presents a rather obvious set of benefits and risks. The state can make use of “surveillance, data collection, and data mining technologies not only to keep Americans safe from terrorist attacks but also to prevent ordinary crime and deliver social services” and to “protect[] key rights.”¹⁹⁴ At the same time, however, the Surveillance State threatens to erode privacy and civil liberties in ways that technologically primitive precursors, like the KGB and the Stasi, could only dream of. Recall the 1941 map of Amsterdam.¹⁹⁵

Concerns about these risks have led in two predictable directions. One is to call for greater legal and political control over otherwise unlimited intelligence-gathering capacities. Legal control could be bolstered by way of constitutional and other legal constraints on

193. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

194. Balkin, *supra* note 67, at 4.

195. See discussion *supra* notes 68-69 and accompanying text.

how information gathered by the NSA and other intelligence agencies can be used, or by adding teeth to the Foreign Intelligence Surveillance Act (FISA) court review process.¹⁹⁶ Political control could be enhanced by increasing transparency and dialing up oversight of the executive branch by Congress, inspectors general, or the public at large—enabling accountable officials if not citizens at large to “watch the watchers.”¹⁹⁷

The alternative, of course, is to dismantle or roll back the capacity of the National Surveillance State.¹⁹⁸ This might be accomplished through legal or technological limitations on the kind of data the NSA and other intelligence agencies are permitted to gather, as opposed to limiting only particular uses,¹⁹⁹ uninstalling

196. See, e.g., Bruce Ackerman, *A Better Surveillance Court*, L.A. TIMES, Sept. 24, 2013, at A11 (proposing a new selection process for the FISA court); James G. Carr, *A Better Secret Court*, N.Y. TIMES, July 22, 2013, at A21 (proposing that Congress authorize the FISA judges to appoint independent lawyers to oppose the government’s requests for warrants in certain situations).

197. See, e.g., Ackerman, *supra* note 196 (proposing the appointment of a powerful inspector general for the NSA); Adam Liptak & Jeremy W. Peters, *Congress and Courts Weigh New Attempts to Scale Back N.S.A. Spying*, N.Y. TIMES, Nov. 19, 2013, at A16 (describing a bill proposed by Senator Wyden that would “create a battery of new disclosure requirements for the intelligence agencies” but that “purposefully contains nothing about banning N.S.A. data collection methods”); Paul Rosenzweig, *The NSA Doesn’t Need Wholesale Reform, Just Greater Oversight*, THE NEW REPUBLIC (Oct. 23, 2013), <http://www.newrepublic.com/article/115392/nsa-reform-not-essential-congressional-oversight> [<http://perma.cc/73J7-X4CL>].

198. There is some historical precedent in this country for doing so. Just a decade ago the government abandoned John Poindexter’s Total Information Awareness program, a precursor to the NSA’s current data mining operations, in the face of public outrage. See Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435, 450-51 (2008). In the wake of the Rockefeller Commission and Church Committee investigations and subsequent reforms in the 1970s, the Central Intelligence Agency’s covert action capabilities were effectively gutted. See Tim Weiner, LEGACY OF ASHES: THE HISTORY OF THE CIA 346-49, 354 (2007); Arthur Herman, *The 35-Year War on the CIA: The Campaign to Discredit the Agency Continues to be a Leftist Obsession*, COMMENTARY, Dec. 1, 2009, at 9, 10-22.

199. See, e.g., Jonathan Weisman, *Momentum Builds Against N.S.A. Surveillance*, N.Y. TIMES, July 29, 2013, at A1 (describing a proposal in the House to defund the NSA’s telephone data collection program, the House Intelligence Committee’s consideration of requiring changes in the way data collected by the NSA is stored, and other Congressional efforts to curtail NSA surveillance); Brian Fung, *Sen. Feinstein Unveils Her Own Bill to Reform the NSA’s Spying Practices*, THE SWITCH (Sept. 26, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/26/sen-feinstein-unveils-her-own-bill-to-reform-the-nasas-spying-practices/> [<http://perma.cc/B4AC-FMJM>] (describing a bill proposed by Senator Ron Wyden that would put an end to the NSA’s metadata collection program).

the video cameras that now provide blanket surveillance of core areas of London and New York City;²⁰⁰ or resurrecting and reinforcing the legal, administrative, and cultural “walls” that have been used to separate intelligence from law enforcement operations and foreign from domestic intelligence gathering.²⁰¹

The case for incapacitating the National Surveillance State rests in part on skepticism about its utility combined with pessimism about the motivations of the modern-day equivalents of J. Edgar Hoover. The case also emphasizes doubts about the efficacy of legal and political controls, fomented by a record of congressional and judicial passivity and the difficulty of reconciling the need for secrecy with meaningful political accountability. On the other hand, the costs of incapacitation are potentially very high. As one prominent defender of the NSA recently put it: “Yes, I worry about potential government abuse of privacy from a program designed to prevent another 9/11 But I worry even more about another 9/11.”²⁰²

The structure of this debate should by now be familiar. State power is always a double-edged sword. In an effort to wield it safely, our first recourse is to some combination of legal and political control. When that fails, however, and the downside risks loom large, we may turn to strategies of *reducing* state power, or preventing it from developing in the first place. Even in an age of ambitious state-building projects—now, or at the time of the American Founding—the possibility of unbuilding, or incapacitating, the state is always also on the table.

200. See Cara Buckley, *Police Plan Web of Surveillance for Downtown*, N.Y. TIMES, July 9, 2007, at A1.

201. See David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 487-89 (2006).

202. Thomas L. Friedman, Op-Ed., *Blowing a Whistle*, N.Y. TIMES, June 12, 2013, at A27.