

The New Authoritarianism in Public Choice

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### **Abstract**

Much early public choice theory focused on alleged pathologies of democratic legislatures, portraying them as irrational, manipulable, or subject to capture. Recent years have seen the emergence of a new strand of public choice arguments, reaffirming the old skepticism of legislatures but suggesting that enhanced executive power offers a solution to the alleged maladies. Just as the earlier prescriptions ignored the pathologies of the agencies empowered to check and constrain legislatures, so the new scholarship overlooks the pathologies of executive power. The primary sources of congressional dysfunction call for reforms that would strengthen Congress and the parties within it, instead of hobbling them in new ways that exacerbate the drift toward authoritarian presidentialism in the American system. Executive aggrandizement is a consequence of decades of institutional malfunction, worsened by right-wing attacks on legislative capacity. This has been the enduring impact of the public choice movement since the 1950s, but its twenty-first century offshoot is especially malign.

These are alarming times for democrats. The past two decades have seen declines in public confidence in democracy across the developed world. Numerous democracies have at least flirted with authoritarian presidentialism, including Hungary, India, Turkey, Poland, the Philippines, Brazil, and the United States. Authoritarian nationalism, under the aegis of charismatic leadership, is on the rise in countries like Austria and the Netherlands. Many of us used to think that this kind of politics was a relic of the 1930s, at least in the advanced democracies. Now we are not so sure. Book titles like *How Democracies Die*, *How Democracy Ends*, and *The Road to Unfreedom* capture the new sense of gloom.<sup>1</sup>

These developments have many causes. Growing inequality and wage stagnation, unpopular wars that have unleashed waves of refugees, and the erosion of industrial and, increasingly, service sector employment due to trade and technology are among the most frequently mentioned. No doubt they have all played their roles, but our focus here is elsewhere: on the ideological terrain on which the new authoritarianism is taking root. Perhaps impossible to quantify but nonetheless unwise to ignore, this terrain has been fertilized by the decades-long academic assault on the legitimacy of legislative politics that has recently taken a distinctly authoritarian turn. Scholars like Eric Posner and Adrian Vermeule, William Howell and Terry Moe, and Francis Fukuyama have made trenchant cases for enhanced executive power in democracies on the grounds that this can mitigate what they identify as inefficiencies of legislative politics.<sup>2</sup> They are dangerously misguided. Their arguments are unconvincing, but they erode the legitimacy of legislatures just as relentless accusations of “fake news” chisel away at the media’s public efficacy. This paper is an effort to push back.

Advocates of strong executive power should be careful what they wish for. Strong chief executives are more easily captured and manipulated than are legislatures, as the corruption that runs rife from Russia to Venezuela underscores. Executive aggrandizement facilitates clientelism

by streamlining patronage, personalizing politics, and weakening parties. However lacking in accountability legislatures might be, strong independent presidents are more so. The oldest trick in the book is to focus on demerits of the existing order to buttress romanticized solutions.

We begin by surveying the history of public choice, with a focus on its early libertarian orientation. In the 1950s and '60s, public choice and then so-called constitutional choice theorists typically prescribed checks and balances, and particularly judicial review, as the best remedy for the alleged irrationality of democratic legislatures. Then we document a series of recent arguments that have reoriented the critiques of legislatures into the service of arguments in favor of enhanced executive power. They document, and applaud, the historical growth of executive power. For them, presidential leadership can obviate the collective action problems that undermine legislatures, mitigate government failures, and restore democratic legitimacy.

We contest both the positive claims and the normative prescriptions of the new authoritarians, arguing that their focus on the U.S. Congress yields a misleading portrait of most legislatures while their core diagnosis in any case misses the most fundamental pathologies of Congress. Beyond the American context, we argue that transferring power from legislatures to executives should be expected to increase capture and clientelism, while diminishing political accountability. We also contend that the new authoritarians fail to recognize that executives cannot in fact be “unitary,” as is often contended. Major principal-agent problems, both within the executive and between voters and presidents, undermine the government’s effectiveness and legitimacy. Reforms are needed, we argue, that will strengthen congressional capacity, invigorate electoral competition, and foster accountable party government.

## **THE FIRST WAVE**

The early public choice literature provided ideological ballast for libertarian attacks on big government. This is not to say that the likes of Kenneth Arrow, Charles Plott, and Allan

Gibbard had ideological agendas; they did not.<sup>3</sup> But by showing that majority rule can produce arbitrary and sometimes manipulated outcomes, they provided ammunition for others who were determined to limit the power of Congress as much as possible. James Buchanan, Gordon Tullock, Barry Weingast, and others deployed their critiques of majority rule to argue that governments should only provide basic security, protect property rights, and enforce contracts.<sup>4</sup> Anything more than a “night-watchman state”—as Robert Nozick would dub it—involves inefficiencies at best.<sup>5</sup> More likely it will foster unfair spending on some at the expense of others, logrolling pork barrel politics, inflation, and various other pathologies of bloated government. The solution was to hem in legislatures by “constitutional” means, which in the U.S. context meant robust support for courts to limit legislative interference with markets and property rights.

If not ideological in motivation, there was a certain myopia to the early public choice literature, rooted in its—sometimes unspoken—acceptance of Jean-Jacques Rousseau’s construction of the challenge of democratic government: to discover a general will that embodies the “common interest.” Rousseau had famously, if vaguely, characterized this as “what remains” when we start with individual wills and then deduct the “pluses and minuses that cancel each other out.”<sup>6</sup> Arrow and his progeny unpacked this by reference to the concept of a social welfare function. This they conceived of as the collective analogue of individual welfare functions in economics, exhibiting standard features of economic rationality: it should express transitive orderings of social preferences. Majority rule’s infirmity derived from its alleged inability to converge, or remain, on a social welfare function thus defined.<sup>7</sup>

The early literature took this neo-Rousseauist construction of the problem for granted. As a result, it ignored defenses of majority rule in the tradition stretching from John Locke to the mature James Madison, Joseph Schumpeter, and modern pluralists following Robert Dahl and Adam Przeworski, for whom the value of majority rule has nothing to do with that definition of

collective rationality.<sup>8</sup> Indeed, writers in this tradition often see the possibility of Arrowian cycling as an advantage of majority rule. Some argue that democracy functions best when parties replace one another in government over time, institutionalizing contestation over policy.<sup>9</sup> Some defend it as more likely than the going alternatives to get the truth to influence decision-making in politics.<sup>10</sup> Some note that cycling provides present losers with incentives to remain committed to the system in hopes of prevailing later rather than reach for their guns.<sup>11</sup> Nicholas Miller has made the logic underlying these various arguments explicit by pointing out that the Arrowian and pluralist conceptions of stability contradict one another.<sup>12</sup> Those who deployed the early public choice findings to attack majority rule's irrationality really meant that it failed to meet their narrow, not to say stilted, test of collective rationality. For them, majority rule imposes arbitrary or manipulated outcomes on society and should be kept to a minimum. Full stop.

The libertarian case eventually drew flak for leaning on misleading dimensions of the social contract metaphor, in particular that the alternative to collective political action is no collective political action. In fact, a night-watchman state geared exclusively to ensuring peace, protecting private property, and enforcing contracts is itself a collective action regime, financed by and imposed on those who would prefer some alternative.<sup>13</sup> This characteristic libertarian blindness was dramatized in Nozick's assertion that the fundamental question of political theory is "whether there should be any state at all,"<sup>14</sup> which in the modern world is a bit like saying that the fundamental question of dental theory is whether people should have any teeth at all. The question is not whether there should be collective action, but rather what sort. Making it difficult for the government to act privileges the status quo or those with access to the resources needed to move it. It takes a lot of heft to move an elephant.<sup>15</sup>

During the 1980s and '90s, the analytical collective choice literature moved on to other topics and became less explicitly political. This was partly because it attracted a new generation

of scholars who were more interested in technical questions, partly because renewed attention to game theory and institutional analyses ushered in different research agendas, and partly because the advent of rational choice Marxism made the field less the preserve of the ideological right. Instead of inhabiting a few outposts like Washington University in St. Louis, George Mason, and Rochester, it swept the mainstream of political science, but in a more domesticated—if not scholastic—form.<sup>16</sup>

But in the real world the assault on legislatures continued. On January 20, 1981, President Ronald Reagan declared in his Inaugural: “In this present crisis, government is not the solution to our problem, government is the problem.”<sup>17</sup> This became the bumper sticker for the ascendant New Right on both sides of the Atlantic, fueled by the oil shocks and stagflation of the 1970s, expanding welfare states, and the prospect of growing dependent populations as the baby boom generation eyed retirement. In the U.S., the Republican revival fed on and bolstered the idea that out-of-control public spending had to be reined in no matter what—with Congress ritualistically lambasted as unequal to the task.

Reagan was a harbinger of things to come. In his 1986 State of the Union he demanded: “Give me a line-item veto this year. Give me the authority to veto waste, and I’ll take the responsibility, I’ll make the cuts, I’ll take the heat.”<sup>18</sup> Congress demurred, but a decade later Bill Clinton persuaded Congress to adopt the Line Item Veto Act. The Supreme Court struck it down two years later, however, as violating the Constitution’s Presentment Clause by letting Presidents make unilateral changes to parts of spending statutes.<sup>19</sup> George W. Bush and Donald Trump would both call for line item vetoes that could pass constitutional muster by sending statutes to the legislature for up-or-down votes once items had been struck out by the President. Ironically, Bush would get behind trillions in unfunded federal spending mandates by borrowing to fight wars in the Middle East and adding free prescription drugs to Medicare, while Trump’s

combination of tax cuts and defense spending hikes would add more than \$1 trillion to the deficit in his first fourteen months in office—scarcely evidence of fiscal rectitude in the executive branch.<sup>20</sup> The House did approve a new line item veto bill in 2006, but it never made it out of the Senate.

If Congress has had second thoughts about handing this much budgetary power to the President, the same is not true of the new authoritarians in public choice. As we argue below, its proponents have revived the old skepticism of majoritarian politics, added new critiques, and contend that the best solution is a powerful unitary executive. This term invokes the theory that the Constitution vests the entire executive power in the President, and that Congress cannot therefore organize agencies so as to dilute presidential control. In fact, the American Founders were skeptical of executive power and designed a constitution in which, they believed, the legislature would be the most powerful of the three branches. Soon after it was adopted, Thomas Jefferson and James Madison began sounding more like the anti-Federalists who had opposed its ratification and attacked John Adams and Alexander Hamilton as closet monarchists committed to concentrating executive power and protecting elites.<sup>21</sup> These fears were likely exaggerated,<sup>22</sup> but in any case the new authoritarians in public choice have not kept their fondness for executive power under wraps. They defend it with few if any qualifications as the best antidote to the pathologies of legislative politics.

There has always been an authoritarian undercurrent to the public choice literature, rooted in its portrayal of a minimal Weberian state as somehow prior to politics. If any more robust state involves illicit legislative behavior, that loads the dice in favor of a government that does nothing more than monopolize the use of violence, protect private property, and enforce contracts. But this undercurrent was obscured by social contract metaphors take for granted the conceit of organized collective life without government and technocratic arguments that ignore the



distributive dimensions of every regime of collective action or inaction. There were exceptions. Nancy MacLean notes that early on both Buchanan and Tullock argued explicitly that powerful executives are essential to limit the activities of democratic legislatures, and in 1980 Buchanan helped design a constitution and electoral system for Pinochet's Chile to achieve that.<sup>23</sup> But for the most part the early theorists ignored executive power, focusing mainly on alleged pathologies of legislative politics. If they talked at all about solutions, this was usually in the form of constitutional constraints—presumptively if not explicitly to be enforced by courts.

### **THE NEW AUTHORITARIANISM**

A new, neoconservative strand of public choice has now emerged, whose proponents defend executive power as the best antidote to malfunctioning legislatures. Like their classical predecessors, the new theorists indict Congress, attributing poor legislative performance to legislators' incentives to favor special interests at the collective expense. But they differ in contending that transferring power to the executive—and especially to the chief executive—is the answer. Posner and Vermeule, Howell and Moe, and Fukuyama all make arguments for executive concentration rooted in efficiency, though of different flavors. Posner and Vermeule appeal to expediency, arguing that legislative processes take too long to respond to pressing issues. Howell and Moe invoke coherence, arguing that legislative outcomes are substantively marred by the process of compromise between various interests. Fukuyama makes both arguments, claiming that U.S. executive weakness is “making the operation of the government as a whole both incoherent and inefficient.”<sup>24</sup>

Posner and Vermeule maintain that legislatures face collective action problems that are best obviated by a unitary executive. In the case of Congress, there are tensions between the individual interests of members and the collective interests of the body, whereas in the case of the unitary executive, they claim, there is no—or at least a much diminished—such tension. As

an empirical matter, they argue, we should expect to see increasing concentration of executive power at the expense of both legislative chambers and the courts. The founders might have intended ambition to counteract ambition, but the executive turns out to be a better counteractor than do the other branches. And that, we are told, is a good thing.

This claim is pressed into the service of a larger critique of Madisonian separation of powers in the age of the administrative state. Posner and Vermeule present themselves as sympathetic in principle to Madisonian checks and balances, and they set out to consider, in formal terms, what distribution of power across branches will produce the socially optimal level of checking. One result is that a proliferation of checks can work to the benefit of the most powerful branch, due to the free-riding tendencies of smaller branches. They also conclude that the legislature, as a diffuse institution, is poorly structured to resist executive encroachment. The interest of the president is more closely aligned with the institutional prerogatives of the presidency than the interest of an individual legislator is aligned with that of Congress. Legislators will therefore tend to free-ride on checking the expansion of executive power.

Posner and Vermeule make two predictive arguments for executive concentration on the basis of expediency, one based on its energy and the other on its capacity. The executive will tend to amass power first because it can respond rapidly to emerging crises. The legislature will defer to executive action at times of crisis, ratifying constitutional excesses after the fact.<sup>25</sup> What begins as the response to a crisis tends to become quickly enshrined in law, and the purview of the administrative state grows. Second, in the era of the administrative state, they note, 98% of US federal government employees work in the executive branch.<sup>26</sup> Congress simply lacks sufficient capacity to resist administrative encroachment.<sup>27</sup>

“Liberal legalism” (Posner and Vermeule’s punching bag) supposes that the abuse of government power is checked by the separation of powers and the rule of law. The separation of

powers no longer exists in practice, the authors claim, because the executive has accumulated ever more power that can be exercised without congressional approval. But they go further still, proclaiming even the obsolescence of the rule of law. In the era of executive government, it is public opinion, not law, that is “the major constraint on the executive.”<sup>28</sup> Regular elections mean that presidents must remain responsive to public demands, even if they are no longer subject to effective legal constraints.

On the normative front, Posner and Vermeule argue both that the president should control the activities of the executive branch without legislative oversight and that more authority should shift from the legislature to the executive. They argue for a unitary executive, wherein officials are accountable to the president in a strictly defined hierarchy. They also endorse a “plebiscitary presidency,” in which the president is subject to regular elections but governs unencumbered by checks and balances between elections, as optimal. Congressional oversight, to the extent it still exists, only hinders administrative efficacy. If the natural course is for Congress’s power to wane, Posner and Vermeule want to speed it up. Against Madison’s dire warning in *Federalist* 47, they argue that their plebiscitarian brand of presidentialism will not produce tyranny because of the check imposed by the president’s responsiveness to popular opinion.

Posner and Vermeule do pose compelling criticisms of checks and balances, long a staple of public choice prescriptions.<sup>29</sup> As George Tsebelis has noted, checks and balances impose a status quo bias.<sup>30</sup> They do not protect the interests of minorities so much as the interests of those who benefit from the status quo. And as Hacker and Pierson have argued, preserving the status quo often produces “policy drift:” policy becomes less effective as it fails to shift in order to meet the demands of changing social conditions.<sup>31</sup> In short, Posner and Vermeule are right that the proliferation of veto points hinders effective government action to address pressing social problems.

But as reviewers like Graham Dodds were quick to point out, Posner and Vermeule's positive case for increased executive power is notably more robust than their normative case.<sup>32</sup> They provide reasons why the executive will tend to accumulate power but not a compelling argument for why we should be happy about it. At times, they rely on the principle that "ought implies can:" if the executive is bound to encroach on legislative supremacy, then we might as well abandon it as a normative ideal.<sup>33</sup> But if Posner and Vermeule literally believed executive concentration to be inevitable, then it is not clear why they would be so concerned to mount a normative defense of it. So presumably they believe there are choices to be made and, where there are, they put their normative thumbs on the executive side of the scale.

Howell and Moe present a more thoroughgoing normative argument for executive empowerment, but their case also exposes more fully the defects of this stance. If Posner and Vermeule focus on the impotence of legislatures, Howell and Moe stress their maleficence. In contrast with the unitary executive, supposed to represent the whole of the public, the loyalty of the legislature is divided among multiple principals, with the consequence that legislation is the piecemeal product of negotiations among them. It is therefore unsurprising, they argue, that Congress produces hulking legislative packages that are too complex for voters to understand and packed with special interest giveaways.

According to Howell and Moe, legislators have incentives to be "parochial" and "myopic."<sup>34</sup> They expect presidents to be more attuned than legislators to the long-term implications of policy decisions, because presidents are more motivated by legacy concerns—indeed, they assert (citing only anecdotal evidence) that this is the "motivator that most forcefully drives presidential behavior."<sup>35</sup> Presidents, accountable to national constituencies, also have better incentives to consider the national interest rather than the interest of a particular constituency. Howell and Moe's argument that legislators are focused on parochial concerns

recalls a recurring trope of public choice: the choice that legislators face between allocating funding to public goods or targeted spending. Howell and Moe are concerned that legislators represent the interests of their constituents rather than those of the whole—whereas a president can allocate externalities in ways that produce coherent and holistic solutions to policy problems.<sup>36</sup> They thus see empowering the president as a means to bring about superior economic efficiency in policymaking.

Howell and Moe share the classical public choice preoccupation with rent-seeking, benefits that are extracted from the pie without generating productive activity. In this intellectual universe, any deviation from the smooth operation of markets, perhaps with occasional government intervention to correct market failures, is a sin. The provision of welfare to the poor can be regarded as the creation of a rent, as can tax breaks that come at the cost of reduced public investment. Part of their market-oriented bias results from the fact that public choice theorists often regard only government action as detracting from efficiency, but as Carpenter and Moss point out, regulatory capture can occur by preventing prudential regulation as well as by securing regulatory policies that cater to industry interests.<sup>37</sup> Howell and Moe speak the language of coherence and effectiveness, but their conclusions consistently lean toward less government—as they explicitly note.<sup>38</sup> Ordeshook put the sentiment starkly in arguing that, in a democracy, economic efficiency tends to be an “undersupplied public good.”<sup>39</sup> With public choice theorists relentlessly blaming legislatures for this alleged undersupply, it is perhaps unsurprising that the decline in public support for democracy has been particularly sharp among the wealthy, who are increasingly likely to endorse authoritarian leadership.<sup>40</sup>

It is telling that Howell and Moe cite the Affordable Care Act as illustrating legislative action run amok, a “cobbled-together patchwork that denies the country genuine reform” and contains “[o]ne special-interest victory after another, in a bill that is more than a thousand pages

long.”<sup>41</sup> The complexity of the ACA did indeed reflect the imperative to accommodate multiple interests—the messy reality of politics exacerbated by institutional constraints on majority rule. One consequence of supermajority rule is increasing the number of pivotal players capable of extracting rents in exchange for approving legislation, a dilemma worse in the case of the ACA where every Democratic vote was pivotal. Congress abandoned the public option, which would have kept private insurers honest in the short run and offered a path to a single-payer system, because Senator Joseph Lieberman, heavily funded by Connecticut insurance interests, threatened to pull his support for the bill unless it was dropped.<sup>42</sup> Surely it cannot be the authors’ contention that a single-payer plan could have passed in 2009 if only for stronger presidential leadership. Posner and Vermeule are more concerned with national defense while Howell and Moe are more focused on economic efficiency, but their arguments are twin prongs of a neoconservative program that fuses libertarian and authoritarian impulses.

Fukuyama attacks checks and balances in a like vein. He is especially critical of legislative oversight of administrative agency decisions. Fukuyama argues, plausibly, that “Madisonian democracy” has given rise to “vetocracy” that benefits special interests at the expense of the public and, less plausibly, that legislation is particularly subject to these pathologies.<sup>43</sup> The decision to abandon the ACA provision—that candidate Barack Obama had run on in 2008—to empower the federal government to control costs by negotiating drug prices with pharmaceutical companies was made in the White House in response to industry pressure in 2009, replicating the giveaway that the George W. Bush administration had created with Medicare Part D six years earlier.<sup>44</sup> Donald Trump ran on a similar promise to negotiate drug prices in 2016, but began backtracking in his first month in office and included big pharma benefits in his bill to replace NAFTA the following year.<sup>45</sup> As for empowering administrative agencies, one only has to mention the almost complete industry capture of financial and

mortgage regulators in run-up to the financial crisis of 2008 to make it obvious that, whatever the problems created by lobbying Congress, immunizing administrative agencies from legislative oversight is not the solution.<sup>46</sup>

From the 1950s to the 1980s, the favored strategy of public choice proponents was empowering courts to “constitutionalize” provisions that would protect property and contracts from legislative interference. But as the scholarship surveyed here demonstrates, the empirical premises of public choice theory can also be deployed to defend enhanced executive power. Fukuyama provides a motivation for this shift, claiming that, in the United States today, “[t]he courts, instead of being constraints on government, have become alternative instruments for the expansion of government.” He endorses the “ossification” thesis, also advanced by Posner and Vermeule, according to which the efficacy of administrative agencies is frustrated by excessive judicial review.<sup>47</sup> This might seem curious, since Fukuyama’s goal is “to cut the state back,” but judicial review can just as well frustrate a deregulatory agenda as advance it. Whether ossification exists is an empirical claim about which the jury remains out.<sup>48</sup>

As Elena Kagan observes, most legislative delegation to the executive by the 1980s had been from Congress to administrative agencies, not to the president.<sup>49</sup> The real transformation has not been increasing delegation by Congress but increasing administrative control by the president. Ostensibly, Congress is the principal to which federal agencies should be accountable, and congressional intent in delegating regulatory authority to administrative agencies has rarely been to transfer power to the president. But beginning with Reagan, presidents have moved aggressively to solidify control over the federal bureaucracy.<sup>50</sup> Faced with this unprecedented executive consolidation, Congress blinked. The key question for critics of executive concentration is why Congress has been so lax in its oversight responsibilities.<sup>51</sup>

Fiorina discusses one rationale for legislative delegation to administrative agencies:

shielding legislators from accountability.<sup>52</sup> Delegation might allow legislators to lessen public perceptions of their responsibility for adverse outcomes. This suggests that preferences for delegation should be proportional to the ability to claim credit for delegated policies and inversely proportional to the probability of being held accountable for delegated policies. The conventional public choice assumption is that legislators should prefer to increase their power in order to increase their attractiveness to donors. But delegation need not in itself decrease congressional power, since Congress retains its oversight power. The question remains not why so much delegation but rather why so little oversight?

Kagan suggests that the rise of presidential administration is primarily due to presidents' ability to serve as more efficient and accountable intermediaries between agencies and the public. She argues that "the President has natural and growing advantages over any institution in competition with him to control the bureaucracy. The Presidency's unitary power structure, its visibility, and its 'personality' all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate."<sup>53</sup> Presidential control, on this view, ought to increase the accountability of the regulatory process by making agency decisions more transparent and clarifying relationships of responsibility. Though not herself a public choice theorist, Kagan's analysis dovetails with Posner and Vermeule's suggestion that there is a natural tendency for power to gravitate over time from the legislative to the executive branch.

Alarmed at the celebration of these developments by the likes of Posner and Vermeule, John Ferejohn and Roderick Hills have proposed institutional reforms to resist the encroachment of executive power on legislative prerogative.<sup>54</sup> They are right to be concerned, even if the accumulation of executive power is not as unidirectional or relentless as the literature we have reviewed here suggests. It is true that Congress has often ceded its own capacity voluntarily. During the Truman Administration, Congress gave up substantial budgetary and oversight



capacity on national security to the executive without so much as a whimper.<sup>55</sup> More recently, Congress has dismantled sources of expert counsel like the Office of Technology Assessment, along with cuts to the Government Accountability Office and the Congressional Research Service, and the pitiful funding allocated to congressional staffing.<sup>56</sup>

But it is not all a one-way street. In battles over Russian sanctions after 2016, Congress forced the Trump administration to adopt measures it opposed and that the President decried as unconstitutional.<sup>57</sup> Moreover, when Congress has surrendered legislative capacity to the executive, this is not always due to institutional incentives. Sometimes it is a consequence of political ideology, as conservative activists have found it easier to reshape the legislative branch than administrative agencies.<sup>58</sup> There is also evidence that Congress might be more willing to defer when the presidency is occupied by a co-partisan.<sup>59</sup> While the institutional incentives are powerful, there is more room for agency and choice than the new authoritarians suggest. For those of us who are unpersuaded by their normative claims, that is good news.

### **AGAINST EXECUTIVE CONCENTRATION**

The normative case that the new authoritarians make for enhanced executive power is even weaker than their mechanical analyses of institutional incentives. They argue that executive concentration can restore accountability to a sclerotic and captured government, but the opposite is more likely true. Just as parliamentary systems facilitate better accountability than presidential systems, so executive aggrandizement within presidential systems is likely to produce a government that is more corrupt and clientelist, while offering less democratic accountability.

It is banal to observe that dictatorship (i.e. making a single agent decisive) solves the rationality problems detailed in Arrow's theorem, since it was Arrow's own conclusion that dictatorship is the only decision rule that consistently overcomes all of the other flaws that he identified. A conventional response was to explore institutional constraints on agenda-setting as

a solution.<sup>60</sup> But what of the new authoritarians' arguments for the superiority of presidential power to promote economic efficiency, in ways that are responsive to public opinion while avoiding the perils of legislative capture?

### **Personalized Politics**

Instead of a “constitutionalist fallacy” in public choice in favor of delegation to courts,<sup>61</sup> the new authoritarians embrace a presidentialist one. They imagine that the unitary executive can somehow pursue the public interest impartially, that presidents are more likely than legislatures to prioritize spending on public goods over targeted transfers to favored interests. In fact, presidents can and do give away rents too—as we noted with respect to healthcare legislation. The main difference is that the rents will be less widely distributed, going to the president's cronies rather than allies of more diffuse groups of legislators. Indeed, executive aggrandizement should be expected to result in an exacerbation of clientelism due to the more streamlined distribution of pork.

We might call this the pluralist case here for preferring legislative supremacy as a lesser evil. If politics is going to be concerned with the allocation of private goods to constituencies, then it is better to allocate them more widely, rather than to fewer beneficiaries. Presidentialism reduces turnover in coalition membership.<sup>62</sup> This will likely result in less rotation in the interests patronized under presidentialist politics and fewer cross-cutting cleavages. This might be one contributor to the greater instability of presidential systems than parliamentary ones, identified long ago by Juan Linz.<sup>63</sup>

One consequence of making a single office the focal point of political competition is to magnify the importance of personality in political competition, but personalized politics frustrates accountability. Political competition under presidentialism tends to be less partisan and hence less programmatic, with a corresponding increase in clientelism.<sup>64</sup> Personalization thrives

on charismatic leadership, potentially exacerbating instability and facilitating authoritarianism.

### **Weak Political Parties**

The drawbacks of presidentialism are compounded by weak parties, but presidentialism weakens them further. One mechanism is through personalization, which detracts from party branding and discipline. Another is that strengthening presidents shifts the center of political gravity away from the legislature, weakening the connection between the voters and parties. Powerful presidents' usurping legislative agendas also exacerbates the diffusion of responsibility, permitting legislators to dodge accountability. When their political fortunes depend less on party loyalty, they have less of an incentive to conform to party discipline. Party leaders in the legislature will also evade accountability, as when Nancy Pelosi's leadership position remained secure despite leading Democrats to four successive defeats from 2010 to 2016. That would be much less likely in a parliamentary system. In short, weakening parties erodes their political accountability without a concomitant increase in presidential accountability.

Legislatures also perform better on the dimension of accountability because they institutionalize a role for the opposition, something conspicuously lacking in the executive branch. Legislatures provide forums for minority parties, offering them both institutional resources and public platforms. Archibald Foord characterizes the "loyal opposition" as valuable for accountability because it has a powerful incentive to scrutinize the government: "The immediate purpose of Opposition criticism is to check, prevent, and rectify and abuses of which government may be guilty."<sup>65</sup> Voters benefit from this scrutiny. The opposition's hope to become a future government aligns with the voters' desire to gain information about government malfeasance. Legislatures have opposition leaders and ranking or shadow members, but there is no shadow president. Once the campaign is over, the loser loses her public platform—another reason that enhancing presidential power diminishes accountability to voters.

## Limits of Bureaucratic Accountability

The new authoritarians' defense of executive power relies on criticizing legislatures, but it neglects the serious principal-agent problems that undermine effective executive governance. For one thing, principal-agent dynamics within the executive erect obstacles to the development of good policy. In a complex bureaucratic system like the federal government, it is hard for a leader to monitor subordinates effectively and to gather necessary information. Legislative power offers resources that can enhance accountability and the quality of policymaking.

The new authoritarians largely ignore the glaring challenge that executives cannot in fact be unitary. They are complex organizations composed of many actors with differing motives and visibility. Ironically, this is a standard insight from public choice, which has seen much ink spilled over the problems of principal-agent relationships. Agents tend to be imperfectly responsive to the demands of their principals. Ron Suskind gives several examples from the Obama administration. Tim Geithner repeatedly deferred action on President Obama's order to research how to break up the big banks until Obama finally gave up asking. Larry Summers, based on his own political calculations, presented Obama with a stimulus plan that his economic advisers knew to be inadequate. Suskind concludes, "When a staff of thousands is designated to express the will of a single man, bad process can spell disaster, no matter the clarity of best intentions."<sup>66</sup> The Obama administration was far from unique in this respect. Oliver North's overzealous interpretation of Reagan's instructions resulted in his Iran-Contra debacle. It will likely be decades, if ever, before we learn what rogue exploits have occurred in the Trump White House. Weberian bureaucracies are supposed to operate efficiently due to smooth transition of commands downward and information upward, but as these examples suggest, principal-agent dynamics within the executive thrive on serious information asymmetries. So much for the efficiency of "unitary executives."

There are also more basic problems with information gathering in bureaucratic systems, analogous to the failures of command economies to pool information efficiently. Even the best-intentioned agents face daunting challenges in gathering accurate information. Moreover, bureaucratic processes may be vulnerable to cooptation by special interests, as the example of the Dodd-Frank rulemaking process attests.<sup>67</sup> Agencies rely on consultation in order to gather information, and well-heeled groups are simply better able to influence this process. By contrast, legislators have at least intermittent incentives to be responsive to the majority of their constituents in the face of interest group pressure.<sup>68</sup> The most obvious solution is better legislative oversight, for which presidential leadership cannot substitute.

Posner and Vermeule might respond that the problem is that currently the executive is not as unitary as it ought to be. But it is hard to see why a more unified executive would avoid the principal-agent challenges we have identified; if anything it might make them worse. In any case, our discussion of the infirmities of presidential supervision of agencies mirrors their ought-implies-can challenge to legislative oversight. If an argument from feasibility does not suffice in the one case, neither can it in the other. Moreover, their prescription may be contraindicated. Presidents are often less effective coordinators of agencies than they imagine, and there is some evidence that Congress is better equipped to perform this function.<sup>69</sup>

### **Limits of Presidential Responsiveness**

Relations between voters and the president are also beset by principal-agent problems. Presidential elections are practically useless as accountability mechanisms, partly because of formidable information asymmetries and partly because voters face massive coordination problems. Posner and Vermeule rely on responsiveness to public opinion as the main check on the executive, but they overlook the capacity of leaders to manipulate the public to advance their own agendas. Druckman and Jacobs reveal that presidents have great latitude to mold public

opinion through strategic agenda-setting and issue framing.<sup>70</sup> Presidents use polling to frame issues such that they can claim the mantle of public support, while at the same time they focus on policy concessions to their favored policy-demanders. In this respect, executive power is surely more concerning than legislative power, since legislators have less ability to control political narratives and to set agendas. Moreover, legislators have greater proximity to their constituents and consequently greater capacity for responsiveness.

This is why Robert Dahl argued that executive aggrandizement, already apparent in the U.S. by 1990, had “come to endanger the operation of democratic processes.”<sup>71</sup> He characterized the advent of belief in presidential representation as a “pseudodemocratization of the presidency,” because presidents are much less accountable through elections than legislators. An increase in apparent popular control went hand in hand with a shift in the center of gravity within government that has diminished the power of those officials who are most popularly accountable.

Voters also face daunting coordination challenges in attempting to defeat presidential incumbents. Even if they can obtain accurate information about poor performance, they must coordinate not only to remove the incumbent but also to select a successor. The sheer size of the presidential electorate makes this a difficult undertaking. We should certainly expect this problem to be more severe for a population of 300 million than for 435 members of Congress (or for 650 Members of Parliament, perhaps a more apt comparison). Posner and Vermeule do acknowledge the electorate’s agency problem, but they fail to see that the answer is to look for reforms that would make the American system function more like a parliamentary one—not less.

Posner and Vermeule argue that the main check on executive power is public opinion. They claim that, in contrast to the moribund state of constitutional law, “electoral democracy is alive and well.”<sup>72</sup> But five years after the publication of *The Executive Unbound*, Posner seemed to have lost his nerve.<sup>73</sup> As the prospect of a Trump presidency loomed, Posner began waxing

nostalgic for the separation of powers (even as he warned that it would provide little respite). He focused on the possibility of administrative resistance to presidential power, considering the ability of civil servants to resist Trump's orders.<sup>74</sup> But Posner warned that Trump would, over time, have the ability to reshape the civil service (like the courts) in a more congenial direction. Ultimately, Posner and Vermeule have no recourse but hope in the capacity of public opinion to check the president, however fanciful that might be.

Empowering chief executives is not likely to foster responsiveness to the preferences of the median voter. That desideratum would be better satisfied under legislative primacy and majority rule. Of the new public choice theorists, Fukuyama is the most perceptive (or the most frank) about presidential power's dearth of democratic credentials. He associates legislative power with democracy and executive power with state capacity, arguing that the United States suffers from "too much 'democracy' relative to American state capacity."<sup>75</sup> But it is not majority rule that is to blame for congressional dysfunction. Rather, it is republican checks and balances and weak congressional parties.<sup>76</sup>

### **Authoritarian Decision Process**

It is fortunate that executives cannot be unitary, because they would be pretty terrifying if they could. Hierarchical decision processes are ill-suited to yield well-reasoned results, because deliberation in hierarchical settings tends to consist of kissing up and kicking down. There is always a tradeoff in decision-making between the costs and benefits of acquiring information. Expediting decision-making comes at an informational cost. There can therefore be value in slowing down the pace of policymaking. The legislative process takes time, but if time devoted to information-gathering helps to ensure a fuller airing of the testimony of affected interests then it might be time well spent. The supposed virtue of executive "energy" is often a vice. The most disastrous military misadventures—as with Vietnam and Iraq—tend to be pitched with urgency.

Moreover, narrowing the range of interests consulted in the policymaking process is a disadvantage.<sup>77</sup> Irving Janis's discussion of groupthink suggests that executive decision-making is more vulnerable to this pathology than what goes on in legislatures.<sup>78</sup> Sunstein and Hastie identify another mechanism: deliberating groups that are overly homogeneous—as when all of the members are selected by one leader—tend to make poor decisions.<sup>79</sup> Congress should be expected to have better information than the president partly because it solicits testimony from more diverse arrays of stakeholders.

### **MISDIAGNOSIS AND PRESCRIPTION**

Unlike Posner and Vermeule and Fukuyama, Howell and Moe would not displace the action from legislative politics to bureaucratic processes. They regard increasing the role of presidential leadership in the legislative process as the only feasible solution to congressional pathologies. They are right that legislative fragmentation in the American system undermines accountability. Checks and balances worsen these problems as we have seen. Presidents and Congress claim credit for legislative successes and blame one another for failures. Against endemic finger-pointing and sclerosis, the impulse to bet on a strong president is understandable. But the solution is not further to undermine Congress; it would be better to strengthen it.

The new authoritarians' argument for executive concentration rests on an indictment of legislatures, but it is unfortunate that their complaints draw exclusively on the pathologies of the U.S. Congress. In their haste to attack legislatures, the new authoritarians have a worrying tendency to neglect the flaws of executive governance, as we have seen. Taking the defects of the American system as a rationale for executive aggrandizement stacks the deck by focusing on one of the world's most poorly designed legislatures. The new authoritarians are right to draw attention to congressional pathologies, but their account misses the main sources of congressional dysfunction. To be sure, Congress today functions poorly, but it does so for



reasons having little to do with the new public choice theorists' narrative, reasons which include gerrymandering, campaign finance, weak parties, and a profusion of veto players.

To their credit, these authors recognize that checks and balances pose serious obstacles to legislative performance, but it is worth emphasizing that the American system institutionalizes veto players to a greater degree than any other democracy—save only the “unit veto” that prevailed in the Polish-Lithuanian Commonwealth from the mid sixteenth to the late eighteenth century, where any member of the Sejm could nullify all legislation passed in the current session by yelling “Nie pozwalam!” (literally: “I do not allow!”).<sup>80</sup> The addition of each veto player produces a further departure from majority rule, thereby increasing the likelihood of gridlock. The American system today includes three formal veto points—the Senate, the presidential veto, and judicial review—as well as additional veto points embodied in Congress's own rules: most notably the Senate filibuster and more recently the Hastert Rule in the House.<sup>81</sup>

The American system also differs from many parliamentary democracies in the weakness of its political parties. Lack of party discipline reduces the competitiveness of the system. American parties tend to lack the cohesion of their parliamentary counterparts, and American party discipline historically tended to be even weaker before polarization had advanced to its current levels, where threats of primary challenges often prompt leaders to prevent votes on popular legislation and to hold them on bills that majorities of voters oppose. Despite these defects, historically in the U.S. parties have been the most important mechanism for making Congress function effectively.<sup>82</sup> Strengthening party cohesion within Congress would obviate any need for presidential leadership of the kind that Howell and Moe advocate.

Other sources of U.S. legislative dysfunction are malapportionment and gerrymandering. The Senate embodies particularly egregious malapportionment, giving citizens of the smallest state, Wyoming, 66 times as much representation in the Senate as citizens of the largest state,

California.<sup>83</sup> Gerrymandering might not contribute much to the structural bias of the House of Representatives toward Republican Party control, but the proliferation of safe House districts does enable extremism. In safe districts, the most credible challenger to an incumbent is an opponent closer to the base of the dominant party, rather than a challenger from the opposing party, fostering a tendency toward increasing extremism. Not only is this worrying from the perspective of the responsiveness of the system to the preferences of the median voter, but it also contributes to legislative gridlock by empowering the veto players on the fringes of the parties.

These sources of dysfunction in the American system will be difficult to reform, and the impulse of the new authoritarians is understandable in a period of such intense congressional gridlock. But whatever the defects of collective action through legislatures, the proponents of executive concentration dramatically understate the flaws of executive power. Executive concentration exacerbates systemic tendencies toward the manipulation and capture of policy outcomes, while fostering worrying tendencies toward authoritarianism.

Howell and Moe, like Posner and Vermeule, all register admiration for the Westminster model, but their insinuation that their proposals would harness its benefits within the institutional constraints of the American system is stillborn. The central problem with Howell and Moe's proposal—giving the president the power to require an up-or-down vote on any legislation—is that they want to give the president all the legislative power of a prime minister without any of the checks on executive power that accompany it in a parliamentary system. As we have noted, in parliamentary systems, backbenchers can and do remove leaders whose performance falls short, and electoral incentives correspond well to legislative performance. Better reforms to the U.S. system would be to get rid of the presidential veto, the opposite of what Howell and Moe propose, and to give congressional parties more say in the selection of their presidential candidates—as they had before Andrew Jackson led the first populist assault on America's

fledgling party system following his failure to defeat John Quincy Adams for the nomination in 1824. Other feasible near-term measures would be to curtail or eliminate the Senate filibuster and the Hastert rule in the House, neither of which would require constitutional amendment. These incremental steps would combat vetocracy in ways that would enhance congressional standing.

In the United States, there are a few tentative signs that Congress might be willing to start rolling back the imperial presidency. The 116<sup>th</sup> Congress defied President Trump on foreign policy repeatedly, albeit in largely symbolic ways, such as the House voice vote on the AUMF and the Senate's 98-2 vote in favor of Russia sanctions. Both the House and Senate recently invoked the War Powers Resolution to end US involvement in the ongoing war in Yemen. But presidential administration continues unabated, including in new and disturbing ways.<sup>84</sup> The Trump administration has also frequently, and publicly, contemplated methods of questionable constitutional validity to circumvent Congress, from cutting the capital gains tax through the administrative process (encroaching on one of the few powers still generally regarded as exclusive to Congress)<sup>85</sup> to ordering the construction of a wall on the southern border by declaring a national emergency.<sup>86</sup> Congressional backlash to overreach by the Trump administration might turn out to be the beginning of real constraints on the imperial presidency, but achieving that would take more defiance than Congress historically has demonstrated.

Posner and Vermeule are mistaken, however, to claim that congressional acquiescence must be a one-way ratchet. The post-Vietnam reforms of the 1970s, which included the War Powers Resolution, are not even the most dramatic example. After Republican victories in the 1866 elections, Congress set out to reclaim a great deal of power from Andrew Johnson. It did so not just with bills facilitating facilitating military Reconstruction, passed over his veto, but also by insulating the military command in the South from presidential control, and by passing the

Tenure of Office Act to prevent the President from firing executive officers without congressional approval.<sup>87</sup> Despite subsequent constitutional doctrine restricting congressional power over appointments and removals, including the Court's judgment in 1926 that the Tenure of Office Act was unconstitutional,<sup>88</sup> Congress still has the power to structure agencies with some independence from presidential control. Equally important, Congress has powers of oversight and impeachment, with which it can make life difficult for an errant President.

What is most clear is that change is not likely to come from the Supreme Court. Were the Court so inclined, it could do a lot to restrain the imperial presidency, including through a revival of the nondelegation doctrine. But separation of powers jurisprudence has moved decisively in the direction of increasing presidential control of administration.<sup>89</sup> Recent decisions, even in the Trump era, have expressed great reluctance to check presidential discretion.<sup>90</sup> And in the wake of President Trump's judicial appointments, the Court's support for presidential unilateralism will likely increase.<sup>91</sup>

In this context, it is particularly important to put a thumb on the scale for strengthening Congress as an institution and the parties within it. Like Arrow and Olson several generations before, Posner and Vermeule might inadvertently have done considerable damage to democracy. The delegitimation of legislative politics—indeed of democracy—wrought by that earlier generation of public choice theorists helped to foster conditions in which the new authoritarianism could become plausible, in which its proponents could plausibly claim to be the advocates of popular will against a sclerotic and captured legislature. Yet as we have shown, emancipating chief executives tends to undermine democratic accountability. For there to be effective democracy, the legislature must have the capacity and prestige to constrain the president—even if the American system prohibits its outright control.

## Notes

<sup>1</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishing, 2018); David Runciman, *How Democracy Ends* (New York: Basic Books, 2018); Timothy Snyder, *The Road to Unfreedom: Russia, Europe, America* (New York: Duggan Books, 2018).

<sup>2</sup> Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2011); William G. Howell and Terry M. Moe, *Relic: How Our Constitution Undermines Effective Government and Why We Need a More Powerful President* (New York: Basic Books, 2016); Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014).

<sup>3</sup> Kenneth Arrow, *Social Choice and Individual Values* (New York: Wiley & Sons, 1951), Charles R. Plott, "Recent Results in the Theory of Voting," in Michael D. Intriligator, ed., *Frontiers of Quantitative Economics* (Amsterdam: North-Holland Publishing Company, 1971); 109-127, Charles R. Plott, "Axiomatic Social Choice Theory: An Overview and Interpretation," *American Journal of Political Science* 20, no. 3 (1976): 511-596; Allan Gibbard, "Manipulation of Voting Schemes: A General Result," *Econometrica* 41, no. 4 (1973): 587-601.

<sup>4</sup> James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962); William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (Long Grove, IL: Waveland Press, 1982); William H. Riker and Barry R. Weingast, "Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures," *Virginia Law Review* 74, no. 2 (1988): 373-401.

<sup>5</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 25-7.

<sup>6</sup> Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (Baltimore, MD: Penguin Books, 1968 [1762]), 72.

<sup>7</sup> Riker's canonical interpretation of Arrow as demonstrating the incoherence of democracy due to cycling has also been subject to trenchant empirical critiques. Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory* (New Haven: Yale University Press, 1994), chapter 6; Gerry Mackie, *Democracy Defended* (Cambridge: Cambridge University Press, 2003).

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- <sup>8</sup> John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven: Yale University Press, 2003 [c1680]); James Madison, "Majority government," *Letters and Other Writings of James Madison*, Vol. IV (Philadelphia: J.P. Lippincott, 1865), 332; Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Brothers, 1942); Robert A. Dahl, *A Preface to Democratic Theory*, Expanded Edition (Chicago: University of Chicago Press, 2006); Adam Przeworski, "Minimalist Conception of Democracy: A Defense," in Ian Shapiro and Casiano Hacker-Cordón, eds., *Democracy's Value* (Cambridge: Cambridge University Press, 1999), 23-55.
- <sup>9</sup> Charles E. Lindblom, *The Intelligence of Democracy* (New York: Free Press, 1965).
- <sup>10</sup> Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003), 192-207.
- <sup>11</sup> Przeworski, "Minimalist democracy."
- <sup>12</sup> Nicholas R. Miller, "Pluralism and Social Choice," *American Political Science Review* 77, no. 3 (1983): 734-747. Ingham advances another pluralist account: popular control is consistent with the findings of social choice theory, because the government can be simultaneously accountable to multiple groups. Sean Ingham, "Social Choice and Popular Control," *Journal of Theoretical Politics* 28, no. 2 (2016): 331-349. Still others, following Sen, treat Arrow's result as revealing constraints within which any social choice mechanism must be designed. Amartya Sen, "A Possibility Theorem on Majority Decisions," *Econometrica* 34, no. 2 (1966): 491-499. Deliberative democrats claim that deliberation can mitigate instability in voting. John Dryzek and Christian List, "Social Choice Theory and Deliberative Democracy: A Reconciliation," *British Journal of Political Science* 33, no. 1 (2003): 1-28.
- <sup>13</sup> Jules L. Coleman and John Ferejohn, "Democracy and Social Choice," *Ethics* 97, no. 1 (1986): 6-25.
- <sup>14</sup> Nozick, *Anarchy, State, and Utopia*, 4.
- <sup>15</sup> Ian Shapiro, *Politics Against Domination* (Cambridge, MA: Harvard University Press, 2016), 90-93.
- <sup>16</sup> Green and Shapiro, *Pathologies*, 1-12.
- <sup>17</sup> Ronald Reagan, Inaugural Address, January 20, 1981, <https://www.presidency.ucsb.edu/node/246336> (accessed February 4, 2019).
- <sup>18</sup> Ronald Reagan, Address Before a Joint Session of Congress on the State of the Union, February 4, 1986, <https://www.presidency.ucsb.edu/node/254269> (accessed February 4, 2019).
- <sup>19</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998).

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<sup>20</sup> By late 2016 the Afghan and Iraq wars had cost almost \$5 trillion. Leo Shan III, “Report: Wars in Iraq, Afghanistan cost almost \$5 trillion so far,” *Military Times*, September 12, 2016, <https://www.militarytimes.com/news/your-military/2016/09/12/report-wars-in-iraq-afghanistan-cost-almost-5-trillion-so-far/> (accessed February 4, 2019). Medicare Part D, enacted in 2003 to go into effect in 2006, gives free prescription drugs to seniors. The cost rose from \$49 billion in 2007 to \$100 billion in 2017. Juliette Cobanski and Tricia Neuman, “The Facts on Medicare Spending and Financing,” Kaiser Family Foundation, June 22, 2018, <https://www.kff.org/medicare/issue-brief/the-facts-on-medicare-spending-and-financing/> (accessed February 4, 2019). Stephen Dinan, “Trump goes silent on national debt while racking up \$1 trillion in 14 months,” *The Washington Times*, March 15, 2018, <https://www.washingtontimes.com/news/2018/mar/15/donald-trump-adds-1-trillion-national-debt-14-month/> (accessed February 4, 2019).

<sup>21</sup> Noah Feldman, *The Three Lives of James Madison* (New York: Random House, 2017).

<sup>22</sup> See David McCullough, *John Adams* (New York: Simon & Schuster, 2001); Ron Chernow, *Alexander Hamilton* (New York: Penguin Books, 2004).

<sup>23</sup> Nancy MacLean, *Democracy in Chains* (New York: Viking Press, 2017), 74-100, 154-68.

<sup>24</sup> Fukuyama, *Political Order and Political Decay*, 470.

<sup>25</sup> The chief examples cited are the Bush administration’s enormous expansion of the national security apparatus in the wake of September 11, 2001 and the administration’s implementation of the Troubled Asset Relief Program in response to the 2008 financial crisis.

<sup>26</sup> Posner and Vermeule, *Executive Unbound*, 6.

<sup>27</sup> Although, as we point out below, the atrophying of legislative capacity was a conscious political choice made by congressional leaders during the 1980s and ’90s.

<sup>28</sup> Posner and Vermeule, *Executive Unbound*, 25.

<sup>29</sup> For some of the classic public choice arguments for checks and balances, see Torsten Persson, Gerard Roland, and Guido Tabellini, “Separation of Powers and Political Accountability,” *Quarterly Journal of Economics* 112, no. 4 (1997), pp. 1163-1202; William H. Riker, “The Justification of Bicameralism,” *International Political Science Review* 13, no. 1 (1992), pp. 101-116.

<sup>30</sup> George Tsebelis, *Veto Players* (Princeton: Princeton University Press, 2002).

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- <sup>31</sup> Jacob Hacker and Paul Pierson, *Winner-Take-All Politics* (New York: Simon & Schuster, 2010).
- <sup>32</sup> Graham G. Dodds, “The Executive Unbound: After the Madisonian Republic,” *Law and Politics Book Review* 22, no. 2 (2012), 75-79.
- <sup>33</sup> Posner and Vermeule, *Executive Unbound*, 5.
- <sup>34</sup> Howell and Moe, *Relic*, 52, 57.
- <sup>35</sup> Howell and Moe, *Relic*, 107. Even if one were to grant that legacy concerns are a predominant influence on presidential behavior, this would not establish that this generates good presidential policymaking, since it is far from obvious that wanting to look good in the eyes of history has a different effect than wanting to look good to constituents. In fairness, the view that presidents are particularly motivated by legacy concerns is commonly held (see, e.g., Posner and Vermeule, *Executive Unbound*, 131).
- <sup>36</sup> Dearborn outlines the theory of “presidential representation,” conceiving of the president as “the nation’s chief representative.” John A. Dearborn, “The ‘Proper Organs’ for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921,” *Journal of Policy History* 31, no. 1 (2019), 1-41. This view sees the presidency as the true representative of the whole of the nation, in contrast to the fragmented legislature.
- <sup>37</sup> Daniel Carpenter and David Moss, eds., *Preventing Regulatory Capture* (Cambridge: Cambridge University Press, 2013).
- <sup>38</sup> Howell and Moe, *Relic*, 187.
- <sup>39</sup> Peter C. Ordeshook, “Political Disequilibrium and Scientific Inquiry: A Comment on William Riker’s ‘Implications from the Disequilibrium of Majority Rule for the Study of Institutions,’” *American Political Science Review* 74, no. 2 (1980), 449.
- <sup>40</sup> From 2000 to 2010, the share of individuals from the top three income deciles who said that it would be “good” or “very good” to have a “strong leader” who does not have to “bother with parliaments and elections” rose from 23% to 34%. Roberto Foa and Yascha Mounk, “The Democratic Disconnect,” *Journal of Democracy* 27, no. 3 (2016), p. 14. As Foa and Mounk note, this is, in a way, merely a return to the historical norm: “with the exception of a brief period in the late twentieth century, democracy has usually been associated with redistributive demands by the poor and therefore regarded with skepticism by elites.”
- <sup>41</sup> Howell and Moe, *Relic*.



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<sup>42</sup> Frances Rosenbluth and Ian Shapiro, *Responsible Parties: Saving Democracy from Itself* (New Haven: Yale University Press, 2018), 96.

<sup>43</sup> Fukuyama, *Political Order and Political Decay*, 488.

<sup>44</sup> Rosenbluth and Shapiro, *Responsible Parties*, 104-9.

<sup>45</sup> At Trump's first meeting with drug industry executives in January 2017, he endorsed their dubious claim that it costs \$2.5 billion to bring a drug to market. Michael Hiltzik, "The \$2.5 billion mistake: A gullible Trump bought into big pharma's inflated claim about drug R&D costs," *Los Angeles Times*, January 31, 2017 <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-trump-pharma-20170131-story.html> (accessed February 10, 2019). Trump did not subsequently propose legislation to negotiate drug prices, and his bill to replace NAFTA would increase protections of biologic drugs from competition from generics in Canada and Mexico from five to ten years. Caitlin Owens, "Trump's trade deal includes major win for pharma," *Axios*, October 2, 2018. <https://www.axios.com/trump-trade-deal-nafta-drug-prices-pharma-d9f76a89-8572-44d0-9784-963eca85b1c8.html> (accessed February 10, 2019).

<sup>46</sup> Ian Shapiro, "Democracy between Elections," in Adam Przeworski, ed., *Democracy in a Russian Mirror* (Cambridge: Cambridge University Press 2015), 179-80.

<sup>47</sup> Fukuyama, *Political Order and Political Decay*, 470.

<sup>48</sup> Compare Jason Webb Yackee and Susan Webb Yackee, "Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making 'Ossified'?" *Journal of Public Administration Research and Theory*, Vol. 20, no. 2 (2009), pp. 261-282; Richard J. Pierce, Jr., "Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis." *George Washington Law Review* Vol. 80 (2012), 1493-1503.

<sup>49</sup> Elena Kagan, "Presidential Administration." *Harvard Law Review* Vol. 114, no. 8 (2001), 2245-2385.

<sup>50</sup> A congressional deregulatory agenda abetted the rise of "presidential administration." Congress found it easier to pursue deregulation through expanded presidential control than through the legislative process. Empowerment of the Office of Information and Regulatory Affairs (OIRA), established by Congress as part of the Paperwork Reduction Act of 1980, mandated pre-publication review of any executive agency decision. This process, controlled by the White House, has been one of the most effective routes (perhaps second only to appointments) for presidents to stymie the regulatory process.

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<sup>51</sup> McCubbins and Schwartz famously argued that much congressional oversight is overlooked because it takes place through privatized “fire alarms” rather than formal “police patrols,” Matthew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” *American Journal of Political Science* 28, no. 1 (1984): 165-179, but this assumes that the two modes of oversight are substantial substitutes.

<sup>52</sup> Morris P. Fiorina, “Group Concentration and the Delegation of Legislative Authority,” in Roger G. Noll, ed., *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985), 175-196.

<sup>53</sup> Kagan, “Presidential administration,” 2332.

<sup>54</sup> John Ferejohn and Roderick Hills, “Blank Checks, Insufficient Balances.” Unpublished manuscript, 2017. Ferejohn and Hills focus on possible changes in legal doctrine, such as reversing *INS v. Chadha* (eliminating legislative vetoes of administrative decisions), placing more stress on legislative history in statutory interpretation, and reversing *Franklin v. Massachusetts* (exempting the President from the Administrative Procedure Act). All would be salutary, but, as discussed below, salutary developments in separation of powers are unlikely to come from the courts, anytime in the near future.

<sup>55</sup> Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright, 2014), 403-66.

<sup>56</sup> Lee Drutman and Steven Teles, “A New Agenda for Political Reform,” *Washington Monthly*, 2015, <https://washingtonmonthly.com/magazine/maraprmay-2015/a-new-agenda-for-political-reform/> (accessed February 4, 2019).

<sup>57</sup> Matthew Nussbaum and Elana Schor, “Trump signs Russia sanctions bill but blasts Congress,” *Politico*, August 2, 2017. <https://www.politico.com/story/2017/08/02/trump-signs-bipartisan-russia-sanctions-bill-241242> (accessed February 10, 2019).

<sup>58</sup> Drutman and Teles note that “the decades-long diminishment of nonpartisan expertise in Congress has gone hand in hand with the rise of conservative power. Ideologically or lobbyist-driven legislation moves faster through the process when there are fewer knowledgeable, nonpartisan staffers asking inconvenient questions.” Lee Drutman and Steven Teles, “Why Congress Relies on Lobbyists Instead of Thinking for Itself.” *The Atlantic*, March 10, 2015, <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/> (accessed February 4, 2019).

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- <sup>59</sup> Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review*, Vol. 119, no. 8 (2006), 2311-2386.
- <sup>60</sup> Richard D. McKelvey, "Intransitives in Multidimensional Voting Models and Some Implications for Agenda Control." *Journal of Economic Theory* 12 (1976), pp. 472-482; Kenneth Shepsle, "Institutional Equilibrium and Equilibrium Institutions," in Herbert F. Weisberg, ed., *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 51-81.
- <sup>61</sup> Ian Shapiro, *Democracy's Place* (Ithaca: Cornell University Press, 1996), 30-42.
- <sup>62</sup> James A. Robinson and Ragnar Torvik, "Endogenous Presidentialism," *Journal of the European Economic Association* 14, no. 4 (2016), 907-942.
- <sup>63</sup> Linz offers other reasons why presidentialist systems tend to be more unstable than parliamentary democracies: presidentialism divides power between the independent mandates of the president and the legislature, setting the system up for crises of authority. Juan J. Linz, "The Perils of Presidentialism," *Journal of Democracy* 1, no. 1 (1990), 51-69.
- <sup>64</sup> David J. Samuels and Matthew W. Shugart, *Presidents, Parties, and Prime Ministers: How the Separation of Powers Affects Party Organization and Behavior* (Cambridge: Cambridge University Press, 2010).
- <sup>65</sup> Archibald S. Foord, *His Majesty's Opposition, 1714-1830* (Oxford: Clarendon Press 1964), 2.
- <sup>66</sup> Ron Suskind, *Confidence Men: Wall Street, Washington, and the Education of a President* (New York: HarperCollins 2011), 396, 153, 377.
- <sup>67</sup> See Shapiro, *Politics Against Domination*, 58, 91-93.
- <sup>68</sup> Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics* 19, no. 2 (1976): 211-240, John Coffee, "The political economy of Dodd-Frank," *Cornell Law Review*, Vol. 97, No. 5 (July 2012), 1020-82.
- <sup>69</sup> William F. West, "Presidential Leadership and Administrative Coordination: Examining the Theory of the Unitary Executive," *Presidential Studies Quarterly* 36, no. 3 (2006), 433-456; Bijal Shah, "Congress's Agency Coordination." *Minnesota Law Review* (forthcoming, 2019).
- <sup>70</sup> James N. Druckman and Lawrence R. Jacobs, *Who Governs? Presidents, Public Opinion, and Manipulation* (Chicago: University of Chicago Press, 2015).
- <sup>71</sup> Robert A. Dahl, "Myth of the Presidential Mandate," *Political Science Quarterly* 105, no. 3 (1990), p. 370.

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<sup>72</sup> Posner and Vermeule, *Executive Unbound*, 208.

<sup>73</sup> Eric Posner, “And if Elected: What President Trump Could or Couldn’t Do,” *New York Times*, June 3, 2016.

<sup>74</sup> It is ironic that Posner’s most plausible hope for preventing Trump’s damage, that he might not be able to exercise effective control over the federal bureaucracy, also undermines Posner and Vermeule’s theory of the unitary executive. Nevertheless, administrative resistance has proven to be effective in some cases. See, e.g., Christopher Flavelle and Benjamin Bain, “Washington Bureaucrats Are Chipping Away at Trump’s Agenda,” *Bloomberg*, December 18, 2017. <https://www.bloomberg.com/news/features/2017-12-18/washington-bureaucrats-are-chipping-away-at-trump-s-agenda> (accessed February 4, 2019).

<sup>75</sup> Fukuyama, *Political Order and Political Decay*, 471.

<sup>76</sup> Rosenbluth and Shapiro, *Responsible Parties*, 95-127.

<sup>77</sup> The frenzied and furtive passage of the 2017 Tax Cuts and Jobs Act is another good example. By failing to condition corporate tax cuts on hiring U.S. workers, Congress and President Trump passed a bill that instead created incentives to increase dividends to shareholders and continue offshoring jobs. Hunter Blair, “Heading into the midterms, there’s still no evidence that the TCJA is working as promised,” Economic Policy Institute, November 5, 2018. <https://www.epi.org/blog/heading-into-the-midterms-theres-still-no-evidence-that-the-tcja-is-working-as-promised/> (accessed February 10, 2019).

<sup>78</sup> Irving L. Janis, *Victims of Groupthink* (Boston: Houghton Mifflin, 1972).

<sup>79</sup> Cass R. Sunstein and Reid Hastie, *Wiser: Getting Beyond Groupthink to Make Groups Smarter* (Cambridge: Harvard Business Review Press, 2014).

<sup>80</sup> Conceived as a way to limit royal power, the unit veto rendered the Sejm hostage to conservative opponents of change who were often bribed to cast vetoes by foreign powers. William Bullitt, *The Great Globe Itself* (New York: Charles Scribner’s & Sons, 1946), 42-3; George W. Carey, *The Political Writings of John Adams* (Washington, D.C: Regnery Publishing Company, 2000), 242. The unit or liberum veto was gradually abandoned and eventually replaced by majority rule in the 1791 constitution.

<sup>81</sup> The Hastert rule—an informal rule during Republican control—requires that legislation introduced in the House have the support of a majority of the members of the majority party in order to receive a vote,

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conceivably allowing 109 out of 435 House members to block legislation. In the 115th Congress, 119 members were required (27%).

<sup>82</sup> John Aldrich, *Why Parties?* (Chicago: University of Chicago Press, 1995).

<sup>83</sup> According to the 2013 U.S. Census data, the population of Wyoming was 582,658, while the population of California was 38,332,521.

<sup>84</sup> See, e.g., David Roberts, “Scott Pruitt Is Dismantling EPA in Secret for the Same Reason the GOP Health Care Bill was Secret,” *Vox*, August 14, 2017. <https://www.vox.com/energy-and-environment/2017/8/14/16142150/scott-pruitt-epa-secrecy-republican> (accessed February 4, 2019).

<sup>85</sup> Damien Paletta, “Trump Administration Considers Tax Cut for the Country’s Super-Rich,” *Independent*, 31 July 2018, <https://www.independent.co.uk/news/world/americas/trump-tax-cut-superrich-billions-us-president-wealthy-washington-a8470736.html> (accessed February 4, 2019). Presidential unilateralism tends to increase under unified government, because the president has less fear that her actions will be challenged by the other branches. But the scope of this contemplated assertion of power would be unusual.

<sup>86</sup> Bruce Ackerman, “No, Trump Cannot Declare an ‘Emergency’ to Build His Wall,” *New York Times*, 5 January 2019, <https://www.nytimes.com/2019/01/05/opinion/no-trump-cannot-declare-an-emergency-to-build-his-wall.html> (accessed February 4, 2019).

<sup>87</sup> Ron Chernow, *Grant* (New York: Penguin Press, 2017), 593-612.

<sup>88</sup> *Myers v. United States*, 272 U.S. 71 (1926).

<sup>89</sup> The Court’s recent separation of powers jurisprudence has endorsed, at least partially, the unitary executive theory. In *Free Enterprise Fund*, 561 U.S. 477 (2010), the Court held that the existence of multiple layers of tenure protection in an agency leadership structure violates separation of powers, because it dilutes too much the President’s power to control executive officers. Recent decisions have tended to promote administrative centralization, as in *Lucia v. SEC*, 585 U.S. \_\_\_\_ (2018), holding that administrative law judges are “inferior Officers of the United States” who can only be hired by the President or by an agency head.

<sup>90</sup> See, e.g., *Trump v. Hawaii*, 585 U.S. \_\_\_\_ (2018).

<sup>91</sup> “Kavanaugh believes that the president doesn’t have to follow the law if he ‘deems the law unconstitutional’; that ‘criminal investigations and prosecutions of the President’ should be deferred while he is in office; and that ‘the President must be able to appoint and remove at will the independent counsel.’” Nan

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Aron, "No One On Trump's Short List Is Fit to Replace Kennedy," *The Hill*, June 27, 2018, <http://thehill.com/opinion/judiciary/394503-no-one-on-trumps-short-list-is-fit-to-replace-kennedy> (accessed February 4, 2019).