

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 argument, reaffirming the old skepticism of legislatures but suggesting that transferring power from legislatures to chief executives offers a solution. 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 instead of hobbling it 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.

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The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. Keynes (1936: 384)

These are alarming times for democrats. The past two decades have seen falling public confidence in democracy across the developed world. Many 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 (Levitsky and Ziblatt 2018; Runciman 2018; Snyder 2018).

These political developments coincide with a new strand of academic argument advocating the transfer of power within democracies from legislatures to chief executives on the grounds that this will produce more rational—and more efficient—governance. This impetus toward executive concentration garners ideological ballast from an unexpected source: a public choice critique of legislative politics whose progenitors made quite different institutional prescriptions. Defenders of executive concentration such as Eric Posner and Adrian Vermeule

(2011), William Howell and Terry Moe (2016), and Francis Fukuyama (2014) are not themselves public choice theorists, but they invoke arguments about the sources of legislative dysfunction that are rooted in public choice theory. And like the classical public choice theorists, they associate the rationalization of government with pro-market policies. The institutional recommendations have changed but not the analysis of the legislative process that underpins them. That this analysis is largely erroneous has not stopped it from contributing to growing skepticism of democracy. This paper is an effort to push back.

We begin by revisiting the earlier public choice critiques of legislative politics. Then we turn to the new arguments, exhibiting their affinities with the classical arguments. Whereas the public choice theorists of the 1960s and '70s typically prescribed checks and balances, and particularly judicial review, as the best remedy for the irrationalities that allegedly plague democratic legislatures, the new authoritarians maintain that presidential leadership is better. Finally, we refute their arguments. We show that, like the classical public choice theorists, the new authoritarians mischaracterize the pathologies of legislatures while ignoring defects of the constraining institutions they advocate.

In their skepticism of democratic legislatures the new authoritarians are wrong for the same reasons that the classical public choice theorists were, but their credulous embrace of executive power is misguided for different reasons. 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—aggravating the legislative dysfunction to which the new authoritarians claim to be responding. However lacking in accountability legislatures might be, strong independent presidents are not the solution. Moreover, the

proponents of presidential control of the executive branch dramatically overstate the extent to which executives can be unitary and the extent to which presidential elections can function as robust mechanisms of political accountability.

The First Wave

The early social choice literature provided conceptual resources for libertarian attacks on big government. This is not to say that the likes of Kenneth Arrow (1951), Charles Plott (1976), and Allan Gibbard (1973) had ideological agendas; they did not. 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 democratic legislatures as much as possible. Public choice theory emerged out of social choice theory in the 1950s and '60s, championed by scholars who were suspicious of government in general and democracy in particular. Public choice theorists like James Buchanan, Gordon Tullock, William Riker, and Barry Weingast deployed the social choice critiques of majority rule to defend extensive constitutional restrictions on democracy. In the U.S., this 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 social choice literature, rooted in its—sometimes tacit—acceptance of Jean-Jacques Rousseau's construction of the challenge of democratic government: to discover a general will that embodies the "common interest." Rousseau ([1762], 72) 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." 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 an individual welfare function in economics, exhibiting standard features of

economic rationality: that 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.¹

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 ([c1680]) to the mature James Madison (1865: 332), Joseph Schumpeter (1942), and modern pluralists following Robert Dahl (2006) and Adam Przeworski (1999), for whom the value of majority rule has nothing to do with that definition of collective rationality. Indeed, writers in this tradition often see the possibility of Arrovian 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 (Lindblom 1965). Some defend it as more likely than the going alternatives to get the truth to influence decision-making in politics (Shapiro 2003: 192-207). 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 (Przeworski 1999). Sean Ingham (2019) argues that popular control is consistent with the findings of social choice theory, because governments can be accountable to multiple groups simultaneously. Nicholas Miller (1983) made the logic underlying many of these arguments explicit by pointing out that the Arrovian and pluralist conceptions of stability contradict one another. Those who deployed the early social 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.

¹ Riker's canonical interpretation of Arrow as demonstrating the incoherence of democracy due to cycling has been subject to empirical critiques (Green and Shapiro 1994, chapter 6; Mackie 2003).

Some public choice theorists extended their criticisms of democracy well beyond the alleged irrationalities of majority rule that social choice theorists had identified. They viewed the democratic process as a net drain on social welfare. Majority rule was identified as giving rise to rent-seeking, as majority coalitions seek private benefits at the expense of public good provision—not least the public good of a well-functioning market system (Buchanan and Tullock 1962). But the democratic process could not be relied upon even to yield effective majority rule, since officials often had stronger incentives to provide benefits to special interests at the expense of the majority (Stigler 1971).

Some significant work in public choice was addressed to the perceived problem of rampant bureaucracy, but this problem was secondary to legislative irresponsibility. Stigler's (1971) seminal analysis of regulatory capture focused not on bureaucracy but on the tradeoff that elected officials make between responsiveness to votes and to money. Others argued that electorally unaccountable bureaucrats might be even likelier than legislators to engage in rent-seeking behavior at the public expense by lobbying for bloated budgets (Tullock 1965; Niskanen 1971). But these problems were subsidiary to the fundamental problem: the incentive for legislators to abdicate responsible stewardship of the public fisc. Bureaucracy posed additional problems due to agency slack, but they were rooted, ultimately, in the dearth of legislators' incentives to engage in adequate monitoring.

The libertarian case eventually drew flak for leaning on misleading features of the social contract metaphor, in particular the idea that the alternative to collective political action is no collective political action. In fact, even 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 (Coleman and Ferejohn

1986). This characteristic libertarian blindness was dramatized in Nozick's (1974: 4) assertion that the fundamental question of political theory is "whether there should be any state at all." In the modern world this 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.

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 than political outcomes, 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 (cf. Dowding and Hindmoor 1997). Instead of inhabiting a few outposts like Washington University in St. Louis, George Mason, and Rochester, rational choice theory swept the mainstream of political science, but in a more domesticated—if not scholastic—form (Green and Shapiro 1994: 1-12).

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."² 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, fiscally strapped 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.

² Ronald Reagan, Inaugural Address, January 20, 1981, <https://www.presidency.ucsb.edu/node/246336> (accessed May 28, 2021).

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.”³ 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 (*Clinton v. City of New York*, 524 U.S. 417 [1998]). 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 \$1.9 trillion to the deficit—scarcely evidence of fiscal rectitude in the executive branch.

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. 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. The view that any more robust state would involve illicit legislative behavior loads the dice in favor of a government that does nothing more than monopolize the use of violence, protect private property, and enforce contracts—irrespective of whether a majority of the population, even a substantial one, would favor more expansive social policy. But this latent authoritarianism was obscured by social contract metaphors that take for

³ 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 May 28, 2021).

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.

The differences between democracy and dictatorship did not make it onto many early public choice research agendas,⁴ perhaps because of the libertarian suspicion that all governments are potential sources of expropriation. It is possible, however, to defend autocracy by appealing to classical public choice premises. For instance, Hoppe (2001: 17-33) maintains that autocracies (which he calls “monarchies”) will expropriate less than democracies on the grounds that democratic governments typically have shorter time horizons than autocrats. This is reminiscent of Olson’s (1993) claim that stationary bandits will engage in less expropriation than roving ones, with the twist that a democracy is portrayed as more like a roving bandit.⁵ Public choice theorists have also worried that democracy is distinctive in exacerbating the growth of bureaucracy. Tullock et. al (2002: 55) opine that “the bureaucratic problems of democracies would be much worse than those of a despotism” on the grounds that democracy exacerbates rent-seeking. There have been other libertarian attacks on democracy, but the distinctive public choice critique focused on its alleged tendency to produce deviations from efficiency. Restrictions on democracy were seen as appropriate not to protect individual rights from invasion (cf. Nozick 1973; Brennan 2016) but rather to prevent inefficiency. Yet the “rent-seeking” that they deplored was in effect, as Dowding and Hindmoor (1997: 456) observe, “another name for democratic politics.”

⁴ Mueller (2003) added a chapter on dictatorship to the third edition of *Public Choice* that had not featured in the prior 1989 edition, but it is notable that this chapter reviews almost exclusively literature from the intervening period.

⁵ We are grateful to an anonymous reviewer for this observation.

The New Authoritarianism

Like their classical predecessors, the new authoritarians 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 the chief executive—is the answer. Posner and Vermeule, Howell and Moe, and Fukuyama all argue for executive concentration by appealing to efficiency, if in different ways. Posner and Vermeule appeal to expediency, arguing that legislative processes take too long to respond to pressing issues—if they do at all. Howell and Moe invoke coherence, arguing that legislative outcomes are marred by inevitable compromises among 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” (Fukuyama 2014: 470).

The central thrust of this new scholarship is to view executives as able to avoid the collective action problems that plague legislators. Because legislatures are composed of many actors none of whom internalizes the benefits of optimal policymaking, they face efficiency-undermining collective action problems. Chief executives, by contrast, are unitary actors, from which it is alleged to follow that the prerogatives of the office are better aligned with the incentives of the officeholder. The primary focus of these scholars is not on relations within the executive (a subject we take up below), but their approach resembles recent arguments that have been developed by unitary executive theorists in the conservative legal movement. These scholars share the classical public choice concern with rent-seeking, but they view empowering chief executives as a way of disciplining both Congress and bureaucrats in the interest of efficiency. Federalist Society founder Steven Calabresi (1995) provides an elegant summary of this perspective, arguing that Congress faces a “redistributive collective action problem” to

which presidential leadership provides a solution. The usual pork-barrel incentives lead legislators to promote excessive public spending, but a single chief executive, representing a national constituency and motivated to govern effectively, will likely prioritize fiscal responsibility. In its essentials this is the same as Posner and Vermeule's claim that legislatures face distinctive collective action problems that are best obviated by a powerful chief executive (24). As a result, we should be neither surprised nor troubled 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 the other branches. And that, we are told, is good. The executive has consistently "proved capable of acting with dispatch and power, while Congress fretted, fumed, and delayed" (44).

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 consider, in formal terms, which distribution of power across branches will produce the socially optimal level of checking. One conjecture is that multiplying checks can reduce overall checking of the most powerful branch, which they take to be the executive, because weaker branches will free-ride on one another as checks against executive aggrandizement (21). 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 find it hard to coordinate so as to check the expansion of executive power (24).

Posner and Vermeule make two predictive arguments for executive concentration on the basis of expediency, one based on energy and the other on capacity. The executive will amass power over time first because it can respond rapidly to crises. The legislature will defer to executive action in times of crisis, ratifying constitutional excesses after the fact.⁶ 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 U.S. federal government employees work in the executive branch (Posner and Vermeule 2011: 6). Congress simply lacks sufficient capacity to resist executive encroachment.⁷

Posner and Vermeule's normative stance is often left implicit, embedded in their contentions that more authority should shift from the legislature to the executive and that the President should control the activities inside the executive branch without legislative oversight. They 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. As a result, "the plebiscitary presidency is constrained, not tyrannical" (Posner and Vermeule 2011: 205). Regular elections mean that presidents must remain responsive to public demands, even if they are no longer subject to effective legal constraints.

⁶ 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 during the 2008 financial crisis.

⁷ As we point out below, the atrophy of legislative capacity was a conscious political choice made by congressional leaders during the 1980s and '90s.

Posner and Vermeule maintain that presidents can be effective only when they have “credibility.” Because the President, unlike Congress, has strong incentives to govern effectively, this “forces the executive to adopt institutions and informal mechanisms of self-constraint that help enhance its credibility” (114). Their argument recalls North and Weingast’s (1989) argument that autocrats have incentives to create institutional constraints on their power in order to achieve their governance objectives, although Posner and Vermeule shift focus from constitutional constraints to the *de facto* constraints of political coalitions and public opinion.

Posner and Vermeule do offer telling criticisms of checks and balances, long a staple of public choice prescriptions. These constraints are sometimes defended as needed to protect minorities, but in reality they privilege the status quo and those who benefit from it (Barry 1965: 237-91; Tsebelis 2002). They can also produce “utility drift” (Rae 1975) or “policy drift” (Hacker and Pierson 2010), when changing circumstances erode the efficacy of once-effective policies. 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 (2012) were quick to point out, Posner and Vermeule’s positive case for increased executive power is notably more robust than their normative case. They frequently rely on the principle that “ought implies can:” if the executive is bound to encroach on legislative supremacy, then we might as well abandon the latter as a normative ideal (Posner and Vermeule 2011: 5). But if they literally believed executive concentration to be inevitable, then it is not clear why they would be so concerned to advance normative defenses 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 too complex for voters to understand and packed with special interest giveaways. The problem is not that Congress “cannot set the agenda” (Posner and Vermeule 2011: 206) but that it does. Howell and Moe’s proposed solution is a procedural reform “giving presidents broad and permanent agenda-setting power, and thereby moving Congress to the back seat of policymaking and presidents to the front” (xvii).

According to Howell and Moe (2016: 52, 57), legislators have incentives to be “parochial” and “myopic.” 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” (107). Presidents, accountable to national constituencies, also have better incentives to consider the national interest rather than the interest of particular constituencies. Howell and Moe’s argument that legislators are focused on parochial concerns recalls a recurring public choice trope: 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. 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, except when needed to correct market failures, is suspect. Part of their market-oriented bias results from the fact that public choice theorists often focus myopically on the ways in which government action might detract from efficiency, but as Carpenter and Moss (2013) point out, regulatory capture can occur by preventing prudential regulation as well as by securing regulatory policies that cater to industry interests. Howell and Moe speak the language of coherence and effectiveness, but their conclusions consistently lean toward less government—as they explicitly note (187).

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” (67). One consequence of adding institutional constraints on majority rule is increasing the number of pivotal players who are 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 in the longer run, because Senator Joseph Lieberman, heavily funded by Connecticut insurance interests, threatened to pull his support for the bill unless it was dropped (Rosenbluth and Shapiro 2018, 96). For reasons discussed below, any suggestion that the executive branch would have been less susceptible than Congress to industry lobbying on this legislation is implausible.

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 (Fukuyama 2014: 488). The decision to abandon the ACA provision—that candidate Barack Obama had run on in 2008 along with the public option—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 (Noah 2009; Suskind 2011: 292-6). Donald Trump ran on a similar promise to negotiate drug prices in 2016, but began backtracking during his first month in office and included big pharma benefits in his bill to replace NAFTA the following year. 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 2008 financial crisis (Carpenter and Moss 2013, chapter 4) to make it obvious that, whatever the problems created by lobbying Congress, immunizing administrative agencies from legislative oversight is not the solution.

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, public choice premises 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” (470). He endorses the “ossification” thesis, also advanced by Posner and

Vermeule, according to which excessive judicial review frustrates administrative efficacy. 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.⁸

As Elena Kagan (2001) observes, most legislative delegation to the executive until the 1980s had been from Congress to administrative agencies, not to the President. 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. But beginning with the Reagan Administration, presidents have moved aggressively to solidify control over the federal bureaucracy. This new presidential assertiveness coincided with Congress's increased willingness to transfer oversight functions to the Executive Office of the President.

Perhaps it is not coincidental that 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 new executive agency rule. 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. Kagan argues that presidential administration can be used for proregulatory as well as antiregulatory purposes, but there are structural limits to the efficacy of presidential control as a force for proregulatory ends.

⁸ Compare Yackee and Yackee (2009) and Pierce (2012).

Congress has the sole authority to appropriate money, and the OIRA review process can only delay or obstruct agency rulemaking, not initiate it.⁹

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" (Kagan 2001: 2332). 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. 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 (2017) have proposed institutional reforms to resist the encroachment of executive power on legislative prerogative.¹⁰ 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 (Katznelson 2014: 403-66). More recently, Congress has dismantled sources of expert counsel

⁹ Signals from OIRA about what regulations it will accept can, however, push agencies to regulate in particular ways, for instance based on certain approaches to cost-benefit analysis.

¹⁰ 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 of these would be desirable, but, as discussed below, salutary developments in separation of powers doctrine are unlikely to emanate from the courts in the near future.

like the Office of Technology Assessment, along with cuts to the Government Accountability Office and the Congressional Research Service on top of the pitiful funding allocated to congressional staffing.¹¹

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.¹² Moreover, when Congress has surrendered legislative capacity, 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. And even though Congress is typically more willing to defer when the presidency is occupied by a co-partisan (Levinson and Pildes 2006), the 116th Congress recognized the importance of strengthening congressional capacity, including by increasing funding allocated to staffing and expert counsel.¹³ 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

¹¹ 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 May 28, 2021).

¹² 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 May 28, 2021).

¹³ House Select Committee on the Modernization of Congress, “Final Report” (October 2020), <https://modernizecongress.house.gov/final-repdort-116th>.

concentration can restore accountability to a profligate, 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 increase corruption and clientelism while offering less democratic accountability.

Personalized Politics

Instead of a “constitutionalist fallacy” in public choice in favor of delegation to courts (Shapiro 1996: 30-42), 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 exacerbate clientelism due to the more streamlined distribution of pork. We might call this the pluralist case 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 (Robinson and Torvik 2016). 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 (1990).¹⁴

¹⁴ 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.

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 (Samuels and Shugart 2010). Personalization thrives on charismatic leadership, potentially exacerbating instability and facilitating authoritarianism. Dismayed by the election of President Trump (and by its grim implications for their theory), Howell and Moe (2018) have suggested that strengthening the presidency would help to combat the rise of populist politics. Recent political dynamics in Eastern Europe, Turkey, and Latin America suggest that this is wishful thinking.

Weak Political Parties

The drawbacks of presidentialism are compounded by weak parties, but presidentialism weakens them still more. 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, diminishing connections between 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 correspondingly diminished incentives 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 fostering 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 (1964: 2) characterizes the “loyal opposition” as valuable for accountability because it has a strong 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.” 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 to Presidential Control

The new authoritarians’ defense of executive power relies on criticizing legislatures, but it neglects the serious principal-agent problems that undermine effective presidential 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 gather necessary information and monitor subordinates effectively. 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 (2011) 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 (396). Larry Summers, based on his own political calculations, presented Obama with a stimulus plan that his economic advisers knew to be inadequate (153). Suskind concludes, "[w]hen 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" (377). 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 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 (Shapiro 2016: 91-93). Agencies rely on consultation in order to gather information, and well-heeled groups are well-placed 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 (Peltzman 1976; Coffee 2012). The obvious solution is better legislative oversight, for which presidential leadership is no 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; it might well 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 (West 2006), and there is some evidence that Congress is well equipped to perform this function by passing interagency coordination legislation (Shah 2019).

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 (2015) reveal that presidents have great latitude to mold public opinion through strategic agenda-setting and issue framing. 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 capacity to control political narratives and to set agendas. Moreover, legislators have greater proximity to their constituents and consequently greater capacity for responsiveness.

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 328 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” (Posner and Vermeule 2011: 208). But five years after the publication of *The Executive Unbound*, Posner seemed to have lost his nerve.¹⁵ 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.¹⁶ But Posner warned that Trump would, over time, have the ability to reshape the civil service (like the courts) in more congenial directions. Ultimately, Posner and Vermeule offer nothing but hope that public opinion will rein in rogue presidents, however fanciful that might be.

¹⁵ Eric Posner, “And if Elected: What President Trump Could or Couldn't Do,” *New York Times*, June 3, 2016.

¹⁶ 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 the unitary executive theory. Nevertheless, administrative resistance to Trump proved 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 May 28, 2021).

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 authoritarians, 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" (Fukuyama 2014: 471). But it is not majority rule that is to blame for congressional dysfunction. Rather, it is republican checks and balances and weak congressional parties (Rosenbluth and Shapiro 2018: 95-127).

Presidential Decision Processes

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 trade-off 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—think of Vietnam and Iraq—tend to be pitched with urgency.

Narrowing the range of interests consulted in the policymaking process is also often a disadvantage. Irving Janis's (1972) discussion of groupthink suggests that executive decision-making is more vulnerable to this pathology than what goes on in legislatures. Sunstein and Hastie (2014) 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. 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 critiquing only the American system as presently configured stacks the deck by focusing on one of the world's most poorly designed legislatures. The new authoritarians are right to draw attention to its pathologies, but their account misses the main sources of congressional dysfunction. Congress today functions poorly, but it does so for reasons having little to do with—old or new—public choice narratives. They would do better to focus on the causes and consequences of weak parties: the profusion of veto players within and between branches, partisan and misguided gerrymandering, malapportionment of Senate seats, and the role of money in the political system.

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!”)¹⁷ The addition of each veto player produces an additional 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 intermittently the Hastert Rule in the House.¹⁸

American parties lack the cohesion of their parliamentary counterparts. Party discipline, always weak, has been exacerbated by the increase in safe seats that empowers unrepresentative voters in low-turnout primaries. The mere possibility of primary challenges often prompts leaders to prevent votes on popular legislation and to hold them on bills that most voters oppose (Kustov et al. 2021). Despite these defects, historically in the U.S. parties have been the most important mechanism for making Congress function effectively (Aldrich 1995). Strengthening congressional parties would be a better response than the presidential leadership that Howell and Moe advocate, which, we have seen, is a remedy akin to bloodletting. Strengthening parties also helps lengthen legislative time horizons, mitigating concerns about short-termism (Simmons 2016: 52-7).

¹⁷ 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 (Bullitt 1946: 42-3).

¹⁸ 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, conceivably allowing 109 out of 435 House members to block legislation.

Howell and Moe, like Posner and Vermeule, 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 loss to John Quincy Adams in the House in the presidential election of 1824 despite beating him in the popular and Electoral College votes. Other plausible measures would be to curtail or eliminate the Senate filibuster and the Hastert rule in the House, support the moves in a number of states to relocate congressional redistricting from state legislatures to independent commissions, introduce minimum turnout requirements for primary results to be binding on parties, break up some of the largest states, and admit Puerto Rico and the District of Columbia to statehood. Such steps, none of which require constitutional amendment, would combat vetocracy and enhance congressional standing.

The Trump era in the United States saw a few tentative signs that Congress might be willing to start rolling back the imperial presidency. The 116th Congress defied President Trump on foreign policy repeatedly, albeit in largely symbolic ways, such as the House voice vote to repeal the AUMF and the Senate's 98-2 vote in favor of Russia sanctions. In 2019 both chambers

invoked the War Powers Resolution to end U.S. involvement in Yemen's civil war. But presidential administration continued unabated in many areas, sometimes taking new and disturbing forms.¹⁹ The Trump administration contemplated and indulged other questionable methods 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)²⁰ to ordering the construction of a wall on the southern border by declaring a national emergency.²¹ Congressional backlash to overreach by the Trump administration might turn out to have been 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 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 (Chernow 2017: 593-612). 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 (*Myers v. United States*, 272 U.S. 71 [1926]), Congress still

¹⁹ See, e.g., David Roberts, "Scott Pruitt Is Dismantling EPA in Secret for the Same Reason the GOP Health Care Bill was Secret," *Vox*, 14 August 2017. <https://www.vox.com/energy-and-environment/2017/8/14/16142150/scott-pruitt-epa-secrecy-republican> (accessed May 28, 2021).

²⁰ 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 May 28, 2021).

²¹ 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 May 28, 2021).

has the power to structure agencies with some independence from presidential control (*Humphrey's Executor v. United States*, 295 U.S. 602 [1935]). Equally important, Congress has powers of oversight and impeachment with which it can make life difficult for an errant President. Strengthening them would do more to make the U.S. operate like a parliamentary system than continuing to underwrite the growth and concentration of executive power.

The impetus for change is unlikely to come from the judiciary. Were the Supreme Court so inclined, it could do a lot to restrain the imperial presidency, but separation of powers jurisprudence has moved decisively in the direction of increasing presidential control over administration.²² Recent decisions, even during the Trump era, expressed great reluctance to check presidential discretion.²³ And in the wake of President Trump's judicial appointments, the Court's support for presidential unilateralism will likely increase.

It is particularly important in this situation to press the case for strengthening Congress as an institution and the parties within it. Like the classical public choice theorists, the authors discussed here have done considerable damage to democracy—however inadvertently. 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 authoritarians could seem to pose as neutral advocates for efficient public policy and the popular will against a sclerotic and captured legislature. Yet as we have shown here, emancipating chief executives undermines democratic accountability. For democracy to operate as well as possible in the United States,

²² 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.

²³ See, e.g., *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).

Congress must have the capacity and prestige to constrain the president—even if the American system prohibits its outright control.

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