Blank Checks, Insufficient Balances

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Does the President have too much power to act unilaterally, without any congressional authorization? If Presidents do have too much power, is there anything that We the People can do to redress the balance in favor of Congress? There is a growing trend in both political science and legal scholarship to answer both of these questions in the negative. As a normative matter, many scholars argue that, given the immensity of the problems facing the nation and the fragmentation of institutional power, the President ought to have broad powers to make policy even without Congress' guiding hand. As a positive matter, these scholars also argue that the congressional abdication of responsibility has gone so far that there is nothing much that can be done about Presidents' grabbing such power, so we might as well get used to the idea. (The latter positive claim, of course, reinforces the former normative claim to the extent that "ought" implies "can"). These two normative and positive claims make up the heart of Eric Posner's and Adrian Vermeule's recent book, *The Executive Unbound.* John Yoo and Steven Calabresi,—the latter co-authoring with Christopher Yoo and Saikrishna Prakash—have made similar normative claims on behalf of what we shall call the "unilateral executive," arguing that an independent presidential power to make policy without congressional leave is practically advantageous in foreign affairs and legally implied by this nation's constitutional history.[i]

On the side of positive political science, William Howell has re-stated (albeit in greater detail) Terry Moe's theory of unilateral presidential action from the 1980s that Presidents will aggressively aggrandize the power to act unilaterally and that there is nothing much that courts or Congress is likely to do about it. Recent studies of Presidents' use of signing statements and

executive order suggest that this presidential tendency to press against the limits of Article II to expand executive power transcends political party or historical epoch: Regardless of period or party, Presidents engage in what Ryan Barilleaux felicitously terms "venture constitutionalism," staking out aggressively broad readings of Article II powers and often prevailing in these assertions of constitutional prerogative. Popular journalists, writing in the wake of the Bush II Presidency, point to the resurgence of an imperial presidency, a claim that seems to be confirmed by President Obama's deploying broad executive powers to suppress leaks of government secrets by whistleblowers and maintain extra-territorial prisons—all assertions of power that Candidate Obama had promised to foreswear. If Moe and Howell are to be believed, President Obama's switch in position should not be surprising because, regardless of their intentions, the office of the President, in one way or another, forces its occupants to expansively construe the office's powers. Moe himself emphasized the electorally driven incentives that motivate the president to take broad responsibility for everything that happens in the economy, the society and outside world and to seek powers sufficient to satisfy that responsibility. Others have emphasized that no one other than the president has even fraction of the capacity to manage the large problems that the country faces.

Either way, it's a good thing that the president is driven to consolidate powers to the extent he is able, if one believes Posner, Vermeule, Calabresi, and a host of others: In particular, Posner and Vermeule argue that the old-fashioned checks and balances that once held the President at bay under the Madisonian constitution are obsolete in a modern administrative state with a powerful presence in the international order. Others have argued that checks and balances no longer work, having been circumvented by parties and partisanship; and that they never really

worked that well to begin with (Levinson and Pildes).[1] Not much would be lost if the whole "Madisonian" contraption was quietly dismantled and the government streamlined around a president able to redeem at least some of its promise.

These are powerful and troubling arguments and they force us to ask hard questions: what would be lost if president was to be "unbound"? Do we already live in such a world and lack only the courage to recognize it? Should more be done to speed things along? And, if the answers to these questions are "little" "mostly" and "yes" what kind of institutional structure should we aim at? Would it be enough to leave most of our constitutional institutions in place—perhaps as hollower shells than they are now—and endow the president with more powers to act unilaterally than he has now? Are electoral controls – and other plebiscitary controls—on the office really sufficient to assure that the president would remain accountable and responsive to our collective interests? Or does the four year term, and the relatively weak impeachment mechanism, make electoral "control" chimerical? If we are convinced that was is needed is a unitary executive led government, perhaps we ought to adopt something closer to a parliamentary system where the executive would need to maintain support in a sitting parliament in order to continue in her position.

Such arguments have been made before within the frame of a presidential government. Posner and Vermeule perceptively recognized that the Weimar experience, and particularly Carl Schmitt's reactions to it, offered an analogy to the American present. Weimar's liberal democratic constitution went through two crisis periods when its ordinary legislative processes seized up and were unable to function with the result that the government had to be conducted

[1] Unlike PV, however, Levinson and Pildes suggest ways that checks and balances might be made more effective during periods of unified party government when the Madisonian version is not likely to work very well.

under the emergency provision (Article 48) of the Weimar constitution. Schmitt had argued for the necessity of such provisions and they were successful in resolving the hyperinflation. And by the mid 1920s he seemed to have drawn the conclusion from this experience that liberal rule of law regimes are chronically susceptible to breakdown because of internal contractions in their makeup. And in circumstances of parliamentary gridlock, power will (and should) flow to the executive (in Weimar to the president). In effect, he argued that Weimar (or any parliamentary regime) would work better as a presidentialist regime, where the president was accountable directly to the people.

Schmitt's critique of liberal legalism was twofold: first he thought the attempt to employ to legal norms to control the "political" was unworkable. The body of legal norms is inherently incomplete and so cannot possibly control the "political" realm, wherein the sovereign's powers to act open-ended. Second, and more the point for us, Schmitt argued that the Weimar constitution, while seeking to institute a kind of democracy, placed the parliament in an impossible position. He thought that parliaments, in their nature, are really incapable of representing the people as a whole. Members of parliaments are obliged to advocate for their constituents and parliament as a whole therefore functioned mostly as a place for battles and compromises among competing interests and constituencies. A parliament is merely a place where liberal interests get aggregated into policies which have little connection to the interests of the "people" as a whole. On Schmitt's account the president is the only governmental person with the capacity and incentive to represent the whole people and, in that respect, pursue their common interest.

Central to Schmitt's view is his dismissive attitude toward the legislature is his conception of democracy and democratic legitimacy. Like other writers he thought that in a

democracy the people were sovereign in the sense of being the sole source of legitimate rule – even if they lacked the capacity to act directly. But he also believed that the people (of a genuine state) were relatively homogeneous – that they were bound together, as "friends" by thick common interests and so they could be "represented" by an institutional actor.[2] Members of the legislature were however advocates for partial interests, constituencies, and he thought it was obvious that they would be unable, collectively, to put these partial interests aside to pursue public purposes. Parliament is, in modern terms, a "they" not an "it" and so it could not institutionally function as a representative of the people as a whole. He did not consider the possibility that the very diversity of parliamentary representation might bring multiple viewpoints and competences into collision in a way that might be fruitful, even if painful to combine.

Schmitt was able to draw on the relatively successful use of Article 48 emergency powers to put down insurrections from both the right and left and to overcome hyperinflation in the early 1920s. Presidentially sanctioned emergency powers permitted the government to circumvent parliamentary processes, and establish a new currency that effected a massive redistribution from creditors to savers and ended the inflation. From Schmitt's viewpoint, the existence of emergency powers in the Weimar constitution was fortuitous in that Aritcle 48 provided a way to accomplish the necessary actions legally without engaging in parliamentary bickering. But even if the emergency provision had not existed Schmitt thought that the President would have been well situated to deal legitimately (if not legally) with the crisis. Indeed, he argued for an

[2] This is the opposite of Hobbes' view of representation. For Hobbes, the representative gave unity to the people – without a representative they are a mere cacophonous multitude. So, in principle, any group of strangers could (and might rationally) set up a sovereign above them to maintain peace. For Schmitt, a people's prior homogeneity is what makes representation possible. A cacophonous multitude cannot be represented at all.

expansive reading of Article 48 – essentially eliminating its enumerated limitations – if such powers were needed to regulate the emergency.

Schmitt believed that crisis – what he called the exception – was omnipresent in the modern state and was led, in this way, to the idea that a stable democratic government depends on an executive, capable of representing the people, who has broad authority make policies in the public interest in periods of crisis. He thought neither parliament nor courts could play this role in the modern state nor could they really check presidential authority during or even after the crisis (nor could they determine when the crisis was finished). In effect, therefore, Schmitt advocated a kind of quasi-direct democratic rule that we might call electoral presidentialism. The president in this view is not a perfect representative of the people but is as close as one can find within the legal structure of government, and is the only official capable of having real democratic legitimacy.[3]

The general point that can be learned from Weimar is this: even if, as Schmitt claimed, rule by presidential decree is more efficient in dealing with crisis, and even if it is more

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[3] The writings we drew on in the previous paragraphs were written the 1920s, before the "final" Weimar crisis (and are summarized in Constitutional Theory which was published in 1928), and so Schmitt can be faulted (at that point) mostly for failing to imagine how badly an unconstrained president could botch things up. Later on, during the early stages of the last crisis, Schmitt argued that the President, in addition to his normal role, ought to be regarded as the guardian of the constitution. See Carl Schmitt, Legality and Legitimacy, Durham: Duke University Press, 2004, which was first published in 1932. This argument was directed against Hans Kelsen who thought that the Constitutional Court was best placed to play that role – partly because he regarded it as neutral between the two chief potential disturbers of the constitutional order (the legislature and the executive), and partly because he thought it would govern itself according to legal norms (which he thought were self contained and complete), even in times of crisis. Still, at that point Schmitt was not sullied with an affiliation with or apparent affection for the Nazis and had urged prophylactic policies against their entry into government. That connection came later.

legitimate from a democratic viewpoint, there are still serious flaws and risks to running an unchecked presidential government. Schmitt did not really examine the actual competences of an executive to act intelligently to take account of social and political diversity and the complexity of economic and strategic considerations. While he was able to point to the successful example of the use of emergency powers to deal with the hyperinflation, he presented no theoretical reason to think that a president-led hierarchy would be able to manage other kinds of crisis. Or that it would necessarily function better than a parliamentary system in normal times. Maybe it is better to sacrifice a bit of efficiency and a bit of democratic legitimacy in order to manage the risk of an unchecked executive. Moreover, it is by no means clear that either of Schmitt's claims ought to be accepted, at least not without qualification. And it is not clear that even if both were accepted, that there may not be strong reasons to build in some residual checks on presidential actions either by time limiting them severely or by demanding public justifications in some forum with the competence to cancel his legislative acts (decrees) or even to remove the president after a fairly short period.

How far down the Schmittian road do PV go? As we read them, pretty far. We think that PV hold a similarly sour view of the capacities of the legislature either to represent the people or to produce adeaquate law to manage the modern state. And, for different reasons, they doubt the capability of the courts to manage the modern state or to make new rules in "the exception." And, like Schmitt, they think the president is likely to be fairly efficient in directing government during emergencies and will, in normal times, tend to produce better and more coherent policies than the disjointed mechanisms associated with liberal legalism (ie. courts and congress engaging in piecemeal activities). And so they recommend removing or minimizing the congressional and judicial checks on the president and executive branch. They may not go as far

as him in recommending to the president that he evade legal or congressional checks; but then the US Constitutions lacks explicit emergency provisions that would make such evasions plausibly legal. In any case they think the President's democratic credentials are adequate: he is largely controllable, at least in nonemergency periods, by elections and other modes of accountability to the public. In view of these similarities it seems fair to characterize their views as Schmittian in defending presidential plebiscitarianism.

We take issue with both the normative and (albeit to a lesser extent) the positive claims of these Presidential unilateralists. On the normative side we reject the idea that removing checks on presidential powers is always a good thing. Instead, we argue that a suitably updated version of Madisonian checks and balances will likely improve the President's democratic accountability with little loss of governmental efficiency. We accept many of their empirical observations and theoretical architecture offered by the unilateralists, but remain skeptical that a president would be adequately checked electorally. Electoral accountability is too crude and too infrequent to perform the day to day role that Congress, courts, and, indeed, executive branch officials play in disciplining presidential adventurism.

We also challenge the presidential unilateralists' claim that Presidential self-aggrandizement is inevitable: We argue that Congress has ample powers to check the President if only it could be induced to exercise those powers. This is not so easy. We suggest that, with some constitutionally modest institutional changes, the institution of the Congress could become more assertive on behalf of We the People. We think there is some prospect of vindicating its constitutional prerogatives despite the ample incentives of its members, who are elected from subnational electoral districts, to shirk in their duty to protect constitutional prerogatives. In other words, we think there is more to be said in favor of Madisonianism, even now, after all

these years. We do not try, here, to reconstruct the thought of Madison or any other of the Philadelphia framers or their contemporaries but attempt, in the spirit of the presidential unilateralists book, to sketch a model and justification of a Madisonian model (not necessarily Madison's own model). Quibbling is in order of course: This is academia so there is no stopping that.

Aside from these two normative and positive claims, we also will draw some lessons from the constitution of the Roman Republic, which was a critical influence on Madison and other framers of the U.S. Constitution and that may have been an influence on the presidential unilateralists – notably Eric Posner.[ii] Eric Posner has argued that the elaborate system of Roman checks on (especially) the exercise of executive powers was causally related to the collapse of the Republic because these checks were either unworkable or counterproductive once Rome had expanded in scale to encompass a huge empire (by the second century B.C.E.). He draws from the Roman experience the lesson that elaborate checks on the executive are practically infeasible in a large and diverse state: Either the checks or the state will collapse, because checks prevent the executive from addressing with dispatch the military and diplomatic crises that require a quick, unified, and, therefore, non-legislative response.

We think Posner's conclusions about why the roman republic collapsed may be plausible but we doubt the lessons for Americans. Posner argues that the fate of the Republic was essentially determined by material issues (the size, scope and diversity of Roman imperial conquests), together with inflexible political structures (the extensive veto system embodied in Rome's constitution) and he discounts contingent or conjunctural factors (personalities, rivalries,

misunderstandings, chance, etc).[4] The Republic collapsed after a long period of civil wars and it is not clear to us what role the heavily checked constitutional structure played in the collapse. As far as we can see, the Romans had found ways to bribe, bully or bargain around many potential vetos when someone really needed to get something done, making the constitution more flexible than it may have appeared to a foreigner (like Polybius). Posner could be right that the extensive vetoes embedded in the constitution played a decisive role at some stages but the vetoes had been in the constitutional structure for centuries before the singular Julius Caesar's constitutional coup. There is no lack of other explanations and the jury remains out as to which is the best account. In any case, to use a contestable theory of the collapse of the Republic as a basis for a normative argument for how well a checked constitution could work in the United States seems dubious.[5]

Moreover, whether he is right about the collapse of the Republic it is not clear that there is a message for the US constitutional order since it contains nothing like the extensive system of vetoes that Roman system had. Roman institutions were much more checked than American institutions: multiple magistrates had absolute veto powers over both executive and legislative actions. For that reason it was imperative from the beginnings of the Republican to license a special emergency regime that could act when ordinary state officials could not. By contrast the American framers, who knew well the Roman constitution, saw no need to institute special

[4] It is important to note that vetoes embedded in the constitution of the Republic were not "designed" in the way that checks and balances are in the US constitutional scheme. They arose as successive compromises or settlements over a long period of often violent class struggles – often called by historians the "Struggle of the Orders," which spanned nearly three hundred years of the early republic. For a description of the evolution of the republican constitution see John Ferejohn, "Two views of the City" forthcoming in a volume on republicanism to be published by Cambridge Press.

[5] Moreover, American political scientists have often argued that the US Constitution is far more flexible than it may appear to those who read it in narrowly legal terms. The dean of presidential studies, Richard Neustadt built an impressive career out of this observation. See the many editions of his classic: Presidential Power which first appeared as in 1960 a reflection on John F. Kennedy's predecessors in office with lessons for how he might conduct his own presidency.

emergency powers in the Constitution or to empower a constitutional officer to take actions outside of the normal legal system. The institutional competences embedded in the Articles were judged to be sufficient to handle anything that might come. While we agree that the growth in the size and diversity of the United States makes it necessary to update institutions to relate to new realities, we doubt that instituting presidentialism is the best or only way to do this.[6]

For Madison, a critical issue of constitutional architecture was to allocate powers among the various institutions to preserve or stabilize the separation of powers: which he argued "...consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." (Federalist 51) If the distribution of powers in the first three articles of the Constitution provides the means by which each department could defend itself, he relied on the psychology of self interest to supply to the members of each department the motivation to act to protect the powers of their department: "... the interest of the man must be connected with the constitutional rights of the place...[so] that the private interest of every individual may be a sentinel over the public rights." (Federalist 51) With the benefit of hindsight we must say this plan did not work out very well. However, the failure was not complete: checks on Congress – its division into two competing bodies, and parceling out its legislative powers to other branches, etc – have actually turned out to be quite

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[6] From the early days of the Republic, the office of Dictator was devised when crisis (and invasion or rebellion) needed a rapid and decisive response that could not be produced in the ordinary Roman political process. The Dictatorship was invoked procedurally (the Senate asked the consuls to appoint a dictator and submit to his authority), and terminated after no more than six months. This institution was invoked over 90 times in the first three hundred years or the Republic, until the end of the war with Hannibal. After the Dictatorship fell into disuse, the Senate in response to new social disorders, created a special senatorial decree (the Senatus consultum ultimum) which instructed the consuls themselves to take care than no harm came to the Republic (i.e., to do what was "necessary" – which could include measures as drastic as summary executions of prominent political figures). This Senate directed remedy may have been less regulated than the Dictatorship had been, and it may have been used more frequently as an instrument in class warfare. In any case the two institutions worked successfully to preserve the Republic for more than 400 years.

effective in restraining that branch from encroaching on the executive or the courts.[7] Indeed these checks have grown more powerful and less restrained over time.

Moreover collective problems severely attenuated the motivations of individual congressmen to protect congressional powers. No individual congressperson, elected from a small subpart of a large nation-state, has adequate electoral incentives to risk their political career in protecting abstract national values of legality in the face of a presidential assertion of a national emergency requiring the waiver of law. But, not only were the executive and the courts were much less checked than Congress in the original scheme, they were much less plagued by internal collective action problems. As a result the long term institutional power dynamic has been away from Congress to the other branches. This may be a good thing or a necessary one. But it is not clear that it could not be arrested or shaped by a revised theory of checks and balances.

In a sense the unevenness of constitutional checks is not really surprising. Madison and the other framers did not see the president or courts as real threats to the separation of powers compared to Congress. Indeed he wrote that "... the weakness of the executive may require that it be fortified..." (Federalist 51). And we see Hamilton's description of the judiciary as the least dangerous branch as something Madison would have agreed with (in 1787; perhaps not in 1820, following McCulloch v Maryland). Moreover, because collective action problems do not plague either of these institutions to the degree that they do the Congress, the Madisonian motivational

[7] We agree with Levinson and Pildes that constitutional restraints tend to work better in some political configurations than others – especially in periods of divided government. But we think that even with unified government, there are times when the political incentives of members of the majority party can produce some use of constitutional checks – especially when the president is perceived to be weak or incompetent or when his term is ending. There is a further issue implied by the Separation of Parties Perspective. If one thinks of checks as having a constitutional purpose – to keep other institutions inside their lawful bounds – is there reason to think that checks will be used for such purposes and no others? Checks might well be used to extort concessions not because they represent valid constitutional objections but because they are valuable bargaining tools. No student of American politics will find such a possibility at all farfetched.

principle worked to motivate the President and the Supreme Court to aggrandize and manage their institutional powers in a way that Congress rarely could.[8] As a result we would say that Madisonian checks actually worked pretty well where they were well and truly intended to and put firmly in place (against the Congress) and not so well where they were not.

It's pretty clear that the framers underestimated the powers of the executive and, ultimately, those of the judiciary as well. Madison saw almost immediately that Presidential powers were much more dangerous than he had thought when Washington unilaterally announced the Neutrality Proclamation. And certainly by the time of the Jay Treaty was ratified in secret session by the Senate he could see that the Constitution he defended in the Federalist was quite different from the Constitution in operation.[9] But the constitutional damage had been done. If the balanced constitution which was ratified in 1787-8 represented a desirable governmental arrangement it was instantly undermined by the fact that president's authority was not really checked in the way the Framers thought.[10]

If this is a problem with the constitutional scheme in operation, the solution is not necessarily to abolish even those flimsy controls on the executive that remain in place and trust to the speculative workings of plebiscite to control presidential actions. The populace faces collective action problems of its own that make plebiscitary democracy an equally inadequate

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[8] Moreover, as Levinson and Pildes note, the rise of political parties dampens congressional incentives when the congressional majority is of the same party as the president. This dampening is more pronounced of course when the parties are relatively homogeneous and polarized as they happen to be currently.

[9] John Ferejohn, "Madisonian Separation of Powers," James Madison: The Theory and Practice of Republican Government, Stanford University Press, 2003. Pp. 126-155.

[10] Some have argued that until Andrew Jackson took office American national government was congressionally dominated. We agree that after the repudiation of the Federalists in1800, the leading proponents of an executive led national government when into eclipse. Even so, as the leaders of the Jeffersonian Republicans assumed the presidency one saw them readily adopting Federalist positions on presidential powers allowing the purchase of the Louisiana Territory as well as the establishment of the Second Bank of the United States. In any case most of the period from 1800 to 1824 was unusual in that there was no real partisan contestation One could argue that already, in most infertile ground, the seeds of presidential power accumulation were taking root.

check on executive power. Instead, if we think that something like the Madison separation is desirable we should seek institutional reforms that may either stiffen Congress' spine in facing down the President, or create new allies for the defense of the legislative powers which are the most in jeopardy in the constitutional system. The point is to require, institutionally as well as intellectually, a more robust public and deliberate justification of the extension of executive powers in both emergency and nonemergency settings. With suitable adjustments, the neo-Madisonian model may be capable of exhibiting the "balanced" virtues for which Madison strived – energy, deliberation, and assent. But maybe the separation of powers itself is no longer normatively desirable (if it ever was).

It is premature therefore to launch a reform program of the kind that may be necessary without a brief excursion into constitutional and political theory. We do this to present a reinterpretation of the Madisonian project a statement of what he was trying to achieve and why it is valuable. To do this we need to present or excavate what we might think of as a madisonian normative theory which would justify separating powers in the way he recommended, and madisonian positive theory that would justify the checks he defended in his Federalist writings. We recognize the potential pitfalls of such an enterprise; it is inevitably speculative and to some extent anachronistic. We cannot attribute our constructions to Madison himself: that would be the project of an extremely ambitious historian. We are more interested in providing an historically grounded interpretation that makes sense of Madison's project and why, in a narrow sense, it failed. But, it also allows us to see the ways that it, or something as like it, succeeded in some part. We defend the idea that there remains, in fact, some separation of powers in the American governmental structure, if not precisely the separation that Madison himself proposed. We also think that part of the best explanation of the actual separation of powers is located in the

distribution of checking powers to institutions and institutional occupants. Again, Madison's specific claims about how these checks would work did not turn out to be true. But it seems to us that extensive checking has generally been the common element of the American governmental system except for rare and short historical moments.

The roadmap for what follows begins, in part 1, with an argument for a balanced constitution that combines an energetic and decisive executive with a deliberative legislature and independent judiciary and which requires that government maintain the assent of the people and show how that conception traced to republican ideas drawn directly or indirectly from Roman constitutional structures and thought, and to the liberal ideas of Montesquiue. The constitution sought to maintain "balanced" policymaking reflecting public consensus by means of distributing procedural "checks" to various officials in ways that would obligate government to consider all sectors of society. In equilibrium, the checks would rarely be exercised, as decisionmakers would anticipate their use and therefore avoid "unbalanced" decisions. In Part 2, we describe Madison's belief that the threat to "balance" in the American republic was an overweening legislature; hence, Madisonian checks tended to run against the Congress out of a fear that the House of Representatives, because of its closeness to the people, was the most dangerous branch. As we argue in parts 3 and 4, this fear turned out to be misplaced; Congress from the beginning had too much trouble getting its act together to be a real source of constitutional instability. The Supreme Court and especially the President proved much more subversive to the Madisonian design. Madison's retreat from his suspicion of legislatures and trust in executive power is described in part 3; in part 4, we set forth the familiar reasons for why Madisonian checks have steadily eroded, as Presidents have enlarged their power with "one-way ratchets," responding to emergencies with broad constructions of executive power that

remain even after the emergency recedes. In part 5, we argue that it is very unlikely that the President can replicate inside the executive branch (or inside the office of the president) the virtues of a balanced constitutional design. We argue, based on both theoretical and empirical research, that it is very unlikely that the president would be effectively checked by the prospect of elections either. In section 6 we present an historical account to the effect that Madisonian constitutional checks can be best understood as mechanisms for overcoming collective action problems of those opposed to presidential usurpation by giving those opponents institutional platforms and resources with which to resist Presidential claims. Finally, in section 7, we provide some suggested reforms by which the legislative check could be strengthened, aimed at insuring a more balanced and deliberate move towards executive discretion when times require it, with a retrenchment with the emergency passes.

1. Balances and Checks: Liberal v Republican theory

When the Americans began their experiments with republican government during and after the revolution, many of them turned to the example of the Roman republic for ideas as to how such governments might be built. Rome's republican constitution embodied the principles of mixed government, balancing democratic, aristocratic and monarchical elements. Resort to the Roman model was already a venerable tactic for those seeking to resist monarchy, having been practiced in Poland, Venice and many other northern Italian cities for more than half a millennium. The English resistance to the Stuarts and later to the Whig Oligarchy, and the novel Dutch republic had also, in various ways, emulated the roman example. Where else should one have looked for a model? The alternative form of popular government, the Athenian democracy,

was widely thought to have been disastrous both for individual liberty and prudential statecraft. The Roman republic had at least endured for 500 years (Venice had for much longer) and had to a great extent preserved liberty and state power.

But the Framers were actually proposing a novel form of mixed government that rested on liberal as well as republican normative foundations. The liberal component, drawn partly from Montesquieu's famous description of the English Constitution, emphasized personal liberties which he argued could be preserved only by separating the judicial from the executive and legislative powers. His idea presupposed a more or less modern notion of a functional separation of powers rather than the older notion, found in medieval constitutions, of allocating distinct governmental powers to the various estates or social orders. Perhaps because he was not faced with the practical task of constructing an operating government, Montesquieu gave little thought to how power separation of this kind might be maintained. Perhaps he thought it sufficient to show that the English had in fact maintained such a governmental system. English government at that time was based on the representation of distinct social orders within the institutions of government (the landed aristocracy in the House of Lords; the commercial elite and gentry in the Commons) and perhaps that provided sufficient stability by protecting judges from complete dependence on the king and making legislation an agreement among the different parts of the "city".

Madison and his compatriots could not draw on any such "natural" social classes to stabilize governmental functions. The new constitution proposed instead to insulate the judiciary from interference by guarantees of salary and life tenure and by limiting the capacity of each branch to appoint judges unilaterally (and especially preventing the House of Representatives from any role in judicial appointment). The Constitution checked dangerous legislative powers

artificially by restricting, for example, limiting their scope, dividing them bicamerally and giving the executive a say in their exercise. But however much emphasis the new constitution placed on using checks to keep the departments in their proper bounds and particularly in following Montesquieu's advice to segregate judicial from lawmaking functions -- both which were aimed at preventing harms such as tyranny and abuses of liberty -- the liberal tradition had rather less to say about a positive role for separating powers. And here, it seems to us, the framers could have drawn on republican notions of *balancing* the distinctive virtues of the different branches.

The great contemporaneous analysts of Rome – Polybius and Cicero – both thought that the power of Roman institutions was based on the capacity of its mixed constitution to harness and coordinate conflicting social classes in the peaceful pursuit of common interests. Both identified the *res publica* with the traditional institutions that had permitted Rome to dominate the Mediterranean world (Polybius) while retaining the distinctive values of Roman life. These institutions and practices permitted an **energetic** executive to be normatively restrained by a **deliberative** (aristocratic) Senate, as well as by **democratic** assemblies and their representatives (especially the tribunate) jealous to preserve popular liberties. Obviously there were many checks within the Roman constitution but more important in our eyes is the underlying objective of preserving the constitutional balance among three basic values: energy, deliberation, and assent.

Cicero exposited and defended this conception of a balanced constitution in various places: in his public speeches and legal defenses but also, more systematically, in his later writings. In De Republica Scipio (speaking for Cicero) argued that the best pure constitution is a monarchy but the trouble with monarchy is that if the king were to change his character it would

immediately become a tyranny, which is the worst form of government.[11] In this sense kingship while attractive in many ways, was intrinsically unstable. For that reason Scipio preferred a mixed government in which the executive was limited to enforcing laws that had been agreed to by the people, and acting with the advice of a body of experienced and wise men regularly assembled to discuss issues and events.[12] The Roman constitution, on this account, would normally generate deliberatively shaped policies that would effectively respond to the problems facing the state while, at the same time, maintaining the assent of the plebes. Moreover, Scipio implied, this balance would tend to remain stable in the face of disturbing circumstances. It was, in other words, robust or resilient in ways that kingship and other pure forms of government were not.

Cicero did not, however, think that maintaining the constitutional balance would be painless. He defended the extensive allocation of vetoes within the Roman structure and rejected the idea of giving the Senate a direct role in making laws, preferring instead to leave that power to tribunal legislation agreed to in the popular assemblies. He knew, from (often very bitter) experience that these powers could be abused and that correcting abuses would be dangerous and not always successful. Roman history, in his telling, was a record of constitutional conflict, often violent. But despite his Aristocratic views, he thought it better to incorporate the lower orders inside the constitution.

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[11] "But a regal form of government is particularly and most certainly exposed to change. When a king begins to be unjust, that form of government perishes at once. The tyrant is, at the same time, the worst of all conditions of government, and the nearest to the best." Book I, ch 42.

[12] "... one which shall be well tempered and balanced out of all those three kinds of government, is better than that ; yet there should be always something royal and pre-eminent in a government, at the same time that some power should be placed in the hands of the better class, and other things reserved for the judgment and will of the multitude." Book I, 45.

By the time that Cicero wrote, however, the republican constitution had failed and by his account the explanation for this failure was that the division of powers embodied in the "ancestral" mixed constitution had fallen apart. Specifically he thought that the proper role of the Senate had been eclipsed by the recurrence of populist forms of direct rule through the assemblies. Others have given different diagnoses of the collapse, tracing it to the greed of landowners or the growth of large absentee armies more loyal to their generals than to the Republic. But every account we know of comes down to the assertion that somehow the stabilizing or checking forces that had permitted Rome hundreds of years of stability had been insufficient to hold things together in context of the extended empire that Rome had built by Cicero's time.

After their brief and unhappy experience with a unitary legislative government under the Articles of Confederation, many American leaders sought to try to establish a balanced or mixed constitution that would assure good government and preserve personal liberties of the kind they had grown accustomed to in colonial times. Many of them agreed with Montesquieu that the English mixed constitution had been effective at preserving the liberties of Englishmen (especially since the start of the 18th C.) and that, suitably reframed, it might be a useful template for the Americans. But, through the widely circulated *Cato's Letters,* they were also well aware of critiques of the Whig oligarchy which, republicans thought, had corrupted that constitution and begun to undermine the liberties it was supposed to support. Those who came to Philadelphia evidently thought that a balanced constitution could be created by instituting functionally separated departments roughly along the lines that Montesquieu had recommended. But to preserve and stabilize this liberal constitution they adopted the Roman idea of distributing checking powers among the departments by which they could defend their roles in the new

constitutional order. We think that the best way to understand the Madisonian constitution is this. It was an institutional arrangement that sought to maintain liberty by constructing a balanced republican constitution that was stabilized by checks more or less in the way that Cicero and later republicans envisioned.

It is common parlance to refer to "checks and balances" in a single phrase, as if the two nouns referred to a single undifferentiated system for slowing down government. We believe that it is more faithful to both the Roman and Augustan roots of the ideal to treat "checks" (a barrier to unilateral official action) as a means for producing "balance" (a desirable end-state that well-designed "checks" will produce). "Balance" as a Ciceronian ideal is a mixture of governmental virtues that different social classes or idealized types of officials were said to possess. The unitary monarch possessed energy; the aristocratic Senate (or House of Lords or Article III judicial branch), deliberation and fidelity to established customs; and the plebian popular assembly (or House of Commons or House of Representatives), the current consensus of the community. If each class or official had a "check," and was able to make adequate use of it then – so the theory went – the result would be "balanced" government characterized by energy, deliberation, and assent. That is, decisions would be deliberately entered into but then energetically pursued, and both the decision and execution would have buy-in from the people at large.

The important thing to emphasize in our emphasis on checks as a means to maintain balance is that, if the checks are credible, then balance would normally be maintained without the need for any active checking at all. Of course there can be mistakes and miscalculations and so one would expect occasionally breakdowns of balance and the resulting resort to overt checks to punish the undeterred offender. This is not to say that one can infer from the absence of

checking that there is balance; it is the other way around; balance produces no checking. The reason that checks would rarely be observed is that in equilibrium all the players expect a costly reaction to any effort to infringe on the prerogatives of the other branches. In Rome, when things worked well (in much of the second Century for example until the time of the Gracchi) the tribunes would rarely block senatorial or consular actions because, presumably, popular demands had been sufficiently satisfied. Later on, according to Cicero, the system became unbalanced so that the Tribunes had to be bought off or intimidated to withhold their checks.

We should lay our cards on the table. We think that there is a lot to be said for balanced government (combining energy, deliberation and assent) not only in order protect conditions of liberty, but also pursue public purposes intelligently and with some degree of popular support. And we doubt that these values, liberal as well as republican, would be well protected inside a hierarchical executive. Hierarchy often blocks the upwards flow of information leading to institutional stupidity of the kind observed in Stalinist and Mao-ist regimes. And absolute leaders cannot convince others that they will not renege on their debts if that is the rational thing to do at some point and so few would willingly provide them credit. Even if those at the top want to keep open informational channels, normal human temptations often prevent them from being able to. The hierarchical nature of an energetic executive makes it easy enough to smooth over or avoid political conflicts, to filter out unpleasant facts, and to put off fights to another day. Mixed or limited governments, it seems to us, have a better chance to make and keep promises precisely because interbranch conflict may give some part of the government an interest in keeping commitments even if other parts disagree. But can appropriate balance actually be maintained? That is the question that Madison thought the Constitution answered (in Federalist 51).

2. Madisonian Checks and Balances

Madison, no less than the other framers and their opponents, was aware both of the republican achievement in Rome, and of its ultimate failure. The new nation was already geographically extensive and expected to grow rapidly; it was also divided economically and culturally, and surrounded by hostile powers. And, as in Rome, there were important class divisions in the new nation even if they did not trace to ancestral social classes but to more recent cleavages arising out of the economy and the society. In these respects the new nation resembled Rome at the dawn of her imperial expansion and Rome's example represented a reminder that republican institutions needed to be carefully contrived and balanced if they were to survive the pressures of growth and expansion.[iii]

Madison himself entertained various theories of republican failure in his pre-constitutional writings, agreeing with Cicero and modern republicans of his own time, that the greatest danger to the republic would come from its democratic component and, in the American case, from the lower chamber of the legislature (as well as the state legislatures). The executive power in a republic was weak in his view and needed beefing up to resist legislative encroachments. And, in case the executive power turned out to be stronger than anticipated, one could rely on the principles of electoral selection in a large district to ensure that only good men (alas) were elected president.

In Federalist 51, Madison asked how the carefully (but incompletely) separated powers embodied in the proposed constitution could be maintained. His famous solution was a system of checks producing balance: "the only answer that can be give is...the defect must be supplied, by

so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." These checks were a product of collective institutions' producing individual incentives: "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." As expressed in Madison's peroration, "ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place." There is no doubt that Madison thought that institutional checking of the kind he described is only a kind of second best support for maintaining a republican government: "A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Having laid out the need for checks, Madison then surveyed the republican landscape of the new constitution, noting that "it is not possible to give each department an equal power of self defense. In republican government the legislative authority necessarily predominates." The critical checking, therefore, would be the checking of this most powerful branch by breaking it into two separate pieces and by giving the veto to the executive.[iv] Madison did not, in these pages, say anything of the judiciary; perhaps this is surprising given the debt of the American framers to Montesquieu who worried about the fragility of an independent judiciary. As will be seen (or argued at any rate), this omission has not turned out to be important as the judiciary has normally been able to defend its own powers pretty well.

But things have not gone so well for Congress. It needs to be said that Madison regarded the American constitutional project as an experiment in the sense that he thought – as one may presume many of the framers did – that the workings of the new constitution's institutions was

ultimately an empirical issue to be proven by subsequent experience. He recognized the experience of the Classical republics and the short histories of the American state governments could not possibly provide sufficient information suitably to guide the formation of new institutions to be introduced in what he called the compound republic. There would be a need to learn from experience. This is not to say that he urged Americans to be quick in revising the new constitution. Quite the opposite. [v] But experimentalists are the first to insist that one needs to run an experiment for a long time under controlled conditions to learn anything from it.

Another way of putting the matter is this: the checks included in the proposed Constitution were put in place to prevent problems the framers could anticipate and such anticipations depend on a model of how republican government would work. But unlike the ancient republics (such Athens, Sparta and Rome) in which popular assemblies could legislate directly, the American governments were wholly made up of representatives.[vi] He acknowledged that representation was not truly unknown in the classical cities, the Romans elected tribunes of the people annually and the Athenians elected their generals, but still, by allowing a popular role in day to day government, the principle was applied incompletely.[vii] In the American governments the people only retain the power to vote. Indeed, Madison argues, from the examples of the tribunes, that even this power, economically reserved to the people, can lead to trouble if it is exercised too often.[viii]

It is clear enough from these snippets that, reasoning from the incomplete examples of the Classical Republics, Madison thought that the powers of the constitutional departments in the American republic fundamentally depended on their closeness to the people: The House of Representatives because it was elected in relatively small districts, in biannual elections, was the

most powerful and most dangerous department, followed by the Senate and President and then, distantly, by the judiciary. And, on his account, the state and local governments, especially their legislatures, were even more dangerous to the republic. From this viewpoint appropriate checks ought to be designed to limit or regulate the powers of the more dangerous departments and so to help guide against the most likely dangers.

What would likely go wrong in the new republic? Earlier republican models (Rome, Athens, Sparta, the new state governments, etc) were few and sufficiently dissimilar to the new Constitution as to be less than fully informative, but they all suggested that the presidency would probably be weak compared to Congress and that its powers should be buttressed and, when the Constitution got going, given a generous construction. Indeed, in the first Congress, Madison expounded views that are similar to those now advanced by unified executive theorists. He argued in support of the president's power to remove executive branch officials, even those who may have been appointed with Senatorial confirmation, which he regarded as intrinsic to the executive power. He gave both textual and functional arguments for this proposition: First, he pointed out that Article II vested the executive power in the President subject to certain qualifications which, he argued ought to be construed narrowly so as not to impair the (weak) executive power. He argued that if senatorial concurrence were required for removal, those officials will not be responsible to the "elected" president but to a two-headed monster and so will have, in effect, two bosses (and in effect, none at all). We do not claim that he would have repudiated this view based on the experience of subsequent events. Rather, this argument was confined to powers like removal of executive officers, powers that arguably were core to the executive power and where the proposed Senatorial role of confirmation was ancillary to congressional "legislative" powers. Evidently more needed to be said in case interbranch

conflicts are of a different nature -- if for example the conflict occurred between core executive and core legislative (or core judicial) functions. Here, the textual arguments cannot convince, so that there is no substitute for a functional and normative understanding of how the Constitution is supposed to work. We develop such ideas further below.

3. Madison's Mistakes

Whatever he thought prior to the Constitution going into effect, it seems clear enough that by the middle of the 1790s Madison rapidly became convinced that he had underestimated the institutional powers that the new Constitution had conferred on the President, as compared with Congress.[ix] He was shocked by the Neutrality Proclamation, in which President Washington unilaterally abrogated the mutual assistance treaty with France. He was even more outraged by the secret negotiation and ratification of the London Treaty, which made enormous and unpopular concessions to British interests and was sprung, as a *fait accompli*, on the American public. On the domestic front, he was appalled by Washington's support for Hamilton's very broad reading of Article I, section 8 powers and he fought unsuccessfully against the Washington administration's efforts to establish the US Bank and to nationalize the war debt. By the early 1790s, he had recognized that the President had the power to control the national agenda in both foreign and domestic affairs and that the Administration could not only easily evade any responsibility to seek council or advice from the Senate, but that it could manipulate partisan and nationalist sentiments to get the lower chamber to follow along meekly. And this realization was brought about by a President whom Madison revered and trusted. Things got much worse under John Adams whom Madison had long suspected of having monarchical sympathies.

One could make a similar claim (as Brutus, the shrewdest of the Anti-Fderalists did) that Madison and the other framers failed to anticipate the powers of the Supreme Court (and Madison would probably have agreed, after the Federalist Judiciary's eager prosecution of the Sedition Act and the *Marbury* and *McCulloch* decisions). To his surprise Congress, and especially the House of Representatives, turned out to be much weaker and less effectual than he thought it would be. Given the crucial role he attributed to institutional checks to preserve the republican allocation of powers, Madison would likely have been willing to entertain ideas – and eventually even constitutional revisions -- as to how the self-protection powers of weaker republican institutions could be buttressed.

We think the evidence presented by the presidential unilateralists shows just how serious the underestimation of the president's authority was and how persistent these advantages have been. Madison also overestimated congressional powers of institutional self-defense to a similar extent, most obviously by failing to see the corrosive effects of collective action problems. Challenging the President's assertion of power produces both costs and benefits, but the costs are focused entirely on the challengers, while the benefits are enjoyed by any member of the legislature who thereby retains law-making power, even a member who shirks from the interbranch fray. Small wonder, then, that individual members hold back from defying Presidents for fear of earning the opprobrium of constituents waiting to see if the President will ultimately prevail with public opinion. But, such holding out may imply that no showdown between the President and Congress ever takes place.

The problem is deeper and more extensive in that Congress is afflicted by mismatch of individual and collective incentives based on the character of their electoral districts. Individual congresspersons are elected from districts comprising but a small portion of the nation. Their re-

election turns on their capacity to take credit for both the state of the nation and the state of their particular district. But it is much easier to take credit for the latter with district-specific benefits, giving each member of Congress an incentive to focus on ribbon-cutting at federally financed pork projects and constituent casework rather than on diffuse national goods like (for instance) a robust theory of separation of powers). David Mayhew and Morris Fiorina have documented electorally driven incentives of individual congressmen which exacerbate collective action problems by reducing their incentives to provide public goods either for the nation (in the form of good policies) or the institution (by working to maintain its constitutional position).[x] Moreover, the characteristic congressional "solutions" to collective action – the formation of committees, congressional parties and party organizations – introduce severe agency problems themselves.[xi] Worse than that, the fact that congress is internally heterogeneous makes the agency problems extremely difficult to police. The congressional tools for controlling agency problems are very low powered, to use Oliver Williamson's phrase. And to cap matters, electoral turnover in congress implies that internal and external agency problems cannot be policed by the delegating congress but must be enforced by later congresses which may have very different preferences.

In some ways all of these issues appeared pretty quickly once the government was up and running. And they occurred not only within Congress as it tried various organizational solutions to the problems of collective action, They also plagued the state legislatures as well. Indeed Madison's own reaction to the failure of the Virginia and Kentucky Resolutions reads as a kind of extended complaint about the intractability of organizing a response to constitutional abuses. But collective action problems, as serious and persistent as these are, were only part of the problem.

The inadequacy of constitutional checks was partly due to the failure of the framers to understand the role that "the people" could play in constitutional politics. Madison thought that because they were elected in relatively small constituencies in frequent elections, members of the lower chamber would be the closest to the people and most trusted by them in any power struggle. He did not understand that representatives in small elections are often pretty much invisible to constituents – especially if their elections are not strongly contested – and that people more easily identify and feel close to a president or presidential candidate. It is not so much that he was wrong to think that closeness to the people was important; it is just that his idea of closeness was mechanical rather than psychological. Had he been able to imagine Nancy Pelosi, Harry Reid, John Boehner or even Tip O'Neill in their struggles against presidents, he might have seen how powerful a single nationally endorsed leader could be. Had he thought more deeply about Rome, and especially about Caesar and the other *populares* politicians, he might have seen that the most threatening political force to any constitution combines psychological closeness or identification with energy and decisiveness.[xii]

In fact, at the end of that first republican decade we believe that Madison began to see just how important the people could be in a constitutional struggle. This was partly a revelation born of desperation. When the Federalist congress enacted the Alien and Sedition Acts, he and Thomas Jefferson embarked on a futile constitutional campaign to persuade the state legislatures to protect political liberties. When that effort failed, the Republican leaders were forced to do something that he had not previously envisioned (and indeed had largely rejected in Federalist 49 and 5) -- to take the appeal directly to the people in the context of the 1800 presidential campaign. This election -- the "Revolution of 1800" -- not only turned the Federalists out of national office but destroyed their party as a political force, leaving behind only a few federal

judges (some famous; some infamous). But it probably would not have been won had Jefferson not established himself in the popular imagination as a paragon of the people and their liberties.

4. Eroding Constitutional Balance: one-way ratchets

Madison's epiphany about presidential powers is old news and might have been seen by him and others as requiring a modest one-time adjustment in the constitutional means of keeping executive authority within reasonable bounds. But what those reasonable bounds would be was controversial. In opposing President Washington's neutrality policy (which abrogated a mutual defense treaty with France), he argued for a narrow definition of Article II powers in Helvidius (#1), saying that "...the two powers, to declare war and make treaties... can never fall within the proper definition of executive powers." (Writings, 540). In light of the eclipse of treaties in American foreign policy making the example seems perhaps arcane and irrelevant. Indeed we cite it only to show Madison's belated response to the recognition of the dangers of the presidency, even when controlled by the venerated President Washington. We could go on throughout the 1790s to show how complete his conversion was in respect to the abstract constitutional restraints on the president found in Article II. Perhaps he thought that this matter could be fixed by giving correct interpretations to its various cryptic clauses. He was wrong about that too. The political dynamics favoring the accretion of presidential powers were too profound, evidently, to be controlled by giving a better gloss on the text. Such efforts produce even less restraints than the "parchment barriers" he derided elsewhere in the Federalist.

As presidential unilateralists recognize, these presidency-favoring forces work both gradually though the accretion of congressionally delegated powers, punctuated occasionally by

unilateral assertions of new powers during "emergencies" of various kinds that occur in any nation's history. Political scientists have produced two broad lines of argument describing the gradual accretion of presidential powers. The first is centered on the growing pressures for regulation that arise outside government (from economic dislocations or increasing diversity for example). Work by Steven Skowronek, Daniel Carpenter, and Theda Skocpol among others characterize the uneven political response to such largely external events, arguing that they resulted in an accretion of new state capacities (mostly delegated) exercised by relatively powerful and autonomous bureaucracies. Their stories concern the president in important ways but, for the most part, they argue that new state capacities were demanded by changes in the society, were directed by new ideologies, advanced by increasingly independent bureaucracies, and were to some extent inexorably autonomous of the wants of particular presidents.

The second line of argument, traceable mostly to Terry Moe and his former students, emphasizes the role of the president whose political/constitutional position induces in any occupant of that office characteristic motives and incentives. This line sees gradual power accretion as endogenous to the constitutional organization of political power rather than as a result of exogenous pressures. Briefly, Moe's central insight was that the President's status as a single, highly visible officer elected from a nation-wide constituency gives him distinctive incentives to expand the limits of his power in order to satisfy constituent demands which are driven by the salience of the office within the constitutional system. Regardless of whether the law formally assigns a power to the President, constituents expect him to take actions to solve problems perceived as national, ranging from Hurricane Katrina to the collapse of the banking system. Unlike individual members of Congress, Presidents internalize the successes of such ventures, and they take the blame for inaction. Thus, Presidents, unlike members of Congress,

inexorably seek to expand the reach of their constitutional powers, simply by force of the office that they occupy and the incentives that the office creates.

There is no point in arbitrating among these views in this context: both point to important features of the dynamics of American government and both agree on the basic factual claim: that there has been a long and more or less univocal (if uneven) drift of effective powers to the executive branch. They may disagree a bit about the powers of various executive actors and notably about the powers of the president to actually control the bureaucracy very effectively, emphasizing agency problems within the executive branch. But both agree that the congressional capacity to direct the exercise of delegated powers has declined over time.[xiii]

Both the gradual and sudden stories describe, and partly explain, what we could call the one way ratchet of presidential power. We could, if we wanted at this point, tell a similar story about federal courts. It seems to us that in this case as well, when a power drifts into the ambit either of the executive or of the courts from Congress, it tends not to come back. And we could characterize this phenomenon as having both gradual and sudden features though the story is a bit different and more complicated. The reason for bringing it up here is that, in our view, the basic mechanism is the same for courts and executive agencies, and has to do with an asymmetry in congressional delegation of authority.

The key idea is that both courts and executive agencies are fairly decisive compared with Congress and have the capacity to shift policies (which constitute a new "status quo" for congressional action) fairly quickly in response to contextual changes – included those generated by elections. And this capacity can be used to anticipate and head off any congressional efforts to recall delegated powers, by shifting policy to a point where the pivotal member of one of the

chambers is indifferent between reversing the delegation of authority or leaving things as they are.[13] The capacity to shift the status quo is not unlimited so we don't think that courts or agencies are completely free to change policies on a dime.[14] Courts need to await cases ripe for decision and the executive agencies may (but may not) need to go through cumbersome rule making processes. If agencies and courts could move fast enough, the one way ratchet would work perfectly in the sense that there would never be a reversion to Congress of previously delegated power. This would, of course, raise lots of questions including that of why Congress would not anticipate this and be pretty stingy with such delegations, limiting them by sunset provisions or refusing altogether to make them. But even if the power to adjust the status quo is only partial it still provides a way for courts and agencies to preserve their powers when political times are tough, waiting until better days to exercise them fully.[xiv]

The reasons for the one-way ratchet are fairly simple. Both the executive and courts are, to some significant, extent structured hierarchically with a decisive peak decision maker (either it is a single person or a committee governed by simple majority rule) who cannot be internally blocked from making a policy decision. By contrast, the Constitution fragments congressional powers both internally (bicamerality plus archaic supermajority Senate rules) and externally, sharing legislative powers with other branches which can veto decisions either ex ante or ex post. Congress's basic decision structure is not at all decisive in light of these multiple internal and external vetoes: it faces hard collective action problems that the other branches do not – or at least, not nearly to such a degree. Because of their decisiveness and hierarchical structures, the

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[13] The logic of the one way ratchet is presented in Ferejohn, John, and Charles Shipan. 1990. "Congressional Influence on the Bureaucracy" Journal of Law, Economics, & Organization, 6(Sp), 1-20. See also Gely, Rafael, and Pablo Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases," Journal of Law, Economics, & Organization, 6, 263-300.

[14] For an application of this idea to courts and a discussion of these issues see William Eskridge and John Ferejohn. 1992. "Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State," Journal of Law, Economics, & Organization, 8, 165-89.

President and the Supreme Court are pretty well positioned to take care of their institutional interests in preserving and enlarging their constitutional powers: the personal interest of the incumbents tend to line up with the institutional interest of the "place".

But for Congress things are much more difficult. There is really no one, aside perhaps from the chronically weak leaders of the majority parties, to speak for the institutional interests of Congress; and those leaders, because they are party leaders, have only a weak motivation to do this. So, in effect, when the President or the Court makes a unilateral move to assert a new power, they are often pushing on an open door.[xv] That things are arranged this way is, as we have argued, due to the framer's failure to anticipate how the various constitutional institutions would actually work. Ironically the elaborate checks on congressional power have turned out to be extremely effective in preventing congressional reactions to presidential or judicial unilateralism. Moreover they failed, to anticipate the potential far reaching consequences of congressional delegations of authority, and to forsee which institutions see that if they wanted to preserve a balanced and mixed constitution, it would be necessary to place more effective checks on the other constitutional branches – especially the executive branch.

The existence of the one way ratchet suggests caution when making assertions about congressional acquiescence to Presidential claims of power (or to congressional acquiescence to court decisions). Presumably, when Congress delegates a new power to an agency or the President (or both), it has to be that the current majority counts the delegation as a good deal in expectation. That might mean no more than that the current majority believes the immediate benefits of the delegation are large enough to offset any long run costs. Those members will have effectively applied a double discount to future benefits – their "rate of time" discount multiplied by their likelihood of keeping their seats. If the ratchet logic works smoothly, any future

Congress will face an agency/court-created status quo sufficient to make sure that there is no majority to overturn the delegation. "Acquiescence" in this circumstance just means that the agency has done its homework well and has adjusted its policy to current political conditions sufficient to maintain its powers.[xvi] One of us has argued long that once account is taken of the one way ratchet, there are reasons to seek or preserve ways to limit the constitutional damage incident to congressional delegations of authority by seeking to maintain something resembling the original "balance" of influence embodied in the Constitution.[15] It was argued there that this consideration provided grounds to criticize the overly deferential *Chevron* Doctrine and the formulaic decision in *Chadha* to eliminate the legislative veto. Our suggestions were not heeded, possibly because they were based on an unargued originalist assumption that restoring the original balance of powers was always desireable. We did not, in that paper, try to argue for why the original constitutional balance – the separation of powers and the allocation of checking powers -- was worth restoring. We took the framers' word for it. One could argue, as Posner and Vermeule have, that conditions have changed and the Constitutional structures have to adapt to the new world. In this paper, therefore, we have tried to supply some additional arguments for balance that would be valid in modern conditions, whatever the original design of the Constitution.

The point of these arguments is this: big constitutional changes in the balance of powers ought to be considered publically and explicitly and not settle by drift or unilateral assertion. One can imagine someone in Philadelphia in 1987 suggesting an amendment to the proposed constitution that would give the president not only qualified veto power but also the power to set the status quo in advance of any legislation. In other words, the president would set policy by

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[15] William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992). Article I, Section 7

decree, subject to legislative correction and if none was forthcoming, the President would get the final say as to policy. Our guess is that such a proposal to give such extensive decree powers to the executive would have been hooted down and not only by those who sympathized with the state governments. But this is exactly the power that agencies have when they exercise their delegated authority. Not surprisingly therefore, when Congress delegates powers, it normally tries to limit this constitutional damage by slowing the agency policy making process and retaining various controls over agency budgets and personnel. But, as the presidential unilateralists note, these defenses are not really adequate to control agencies; and certainly not to prevent the president (who controls higher powered incentives) to push the agency where he wants it to go. But does this mean that the best thing to do is to give up?

In sum, we accept much of the presidential unilateralists' account of the President's advantages in asserting unilateral power over a fragmented Congress. For the most part, the presidential unilateralists couch this account purely in positive terms and do not use the fact of the President's creeping accretion of power as any reason to endorse such an accretion. The President acts unilaterally much more frequently today than fifty, a hundred, or two hundred years ago, and structural factors make this trend difficult for Congress to resist.

But we ought to recognize that the Supreme Court has often gone along with presidential assertions of authority and that we need to ask if such a compliant posture is a good idea. Sometimes, as in genuine emergencies we would concede a strong case can be made for giving the president ample room to maneuver, at least in the short term. But in other circumstances where long term constitutional consequences are in the offing (ie in the cases of *Chadha* or *Chevron* and in other cases as well), the normative argument for deferring to the executive is not

so strong. To say that somehow democracy pushes the Court in this direction is a kind of amazing intellectual claim – one that the Court lacks the credibility to make in our view.

5. Problems with Presidentialism

Is the trend toward a more president-centered government a bad thing? Sometimes the presidential unilateralists suggest that the very fact of the trend suggests that political elites have consciously endorsed it.[xvii] As we argued above, arguments in favor of de facto acquiescence are unconvincing. For the most part, however, the presidential unilateralists suggest only that the demise of Madisonian checks and balances should not be resisted for two reasons. First, they suggest that the change is inevitable and resistance is pointless. Second, they argue that presidents can be trusted with unilateral authority even in normal times, because they are adeqauately constrained by their electoral connection with their "principal" (variously defined as "the public," "certain segments of the public," or"the agglomerations of interests produced by the interactions of individuals, institutions, and groups of various sorts such as unions and businesses"[xviii]). Moreover, unilateralists think that the president has a strong motivation to build structures into the executive branch or, more narrowly, the presidency that guarantee him adequate deliberative advice and evidence of general assent to his policies.

We take issue with the first claim of inevitability below, where we suggest various mechanisms by which Madisonian checks and balances might be re-engineered by tweaking congressional or judicial organization and incentives. In this section, we take issue with the presidential unilateralists's argument that unilateral presidentialism can be adequately constrained by the president's electoral motivations. The modern literature on electoral

accountability – which is closely connected to our notion of "assent" -- doesn't really give much reason to think that the kind of intermittent and distracted attention that voters give to governmental performance or candidate promises provides much reason for optimism either. The problem is easy enough to state: how much control can a heterogeneous collective principal (the electorate), which is uninformed relative to a reelection seeking agent (the president) exert over the agent's behavior, using only votes as the instrument of control? The literature has two main strands, one of which suggests the limits of accountability due to the bluntness of the vote as an instrument of control, the heterogeneity of the principal, the information asymmetry between the principal and agent, and the relative infrequency of elections.[16] Because of these factors – which are intrinsic to the delegation of policy making authority to elected officials -- any elected official has a great deal of agency "slack" within which he can exercise in an (electorally) uncontrollable discretion. This could be good – if the official is motivated and able to pursue common interests – or bad if her motivations are bad or she is incompetent or lazy or has goals very different from her constituents.

[16] The theoretical literature distinguishes between two ways that electoral control might work. Moral hazard models emphasize incentivizing the elected official – getting her to take actions that are best for constituents. The classical papers on this include Robert Barro, "The Control of Politicians: an Economic Model", Public Choice 14 (1973): 19-42. John Ferejohn, "Incumbent Performance and Electoral Control," Pubic Choice 50 (1986): 2-26. These papers both show that if the voter are sufficiently heterogeneous that their interests can be represented by the median voter, some electoral control is possible but that there is a great margin for incumbent shirking due to the information asymmetry, infrequency of elections, and bluntness of the vote instrument. Ferejohn's paper additionally shows that if there is enough heterogeneity that the median voter is not well defined, no electoral control is possible. Further work along this line includes Torsten Persson and Guido Tabellini, Political Economics: Explaining Economic Policy, Cambridge: Cambridge University Press, 2000. Adverse Selection models are based on the idea that the electorate can screen candidates, reelecting only those that are "good" in the sense that they are motivated to pursue public interests (without being rewarded or punished for doing so). A good example is James Fearon, "Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance," In Bernard Manin, Adam Przeworski, and Susan Stokes, eds., Democracy, Accountability, and Representation. Cambridge: Cambridge University Press, 1999. Whether selection models lead to high levels of electoral control depends on whether there are "good" politicians in this sense and how hard it is to tell good from bad candidates (evidently, bad candidates will try to imitate good ones). Moreover, in a heterogeneous electorate there notion of a "good" politician may not be well defined.

The other strand of the literature emphasizes policy distortions that are traceable due to elections such as electoral cycle effects which may be due to fixed terms lengths or to defects of voter rationality such as myopia. These distortions arise from the fact that an official who wants to be reelected has incentives to find ways to get electoral approval. But since voters find it impossible to monitor most of what the official does, this incentive will be exercised in doing things the voters can observe. And if voters are, in addition cognitively defective in some way – for example if they are myopic, or have short memories, or are vulnerable to other cognitive limits (as psychologists say that everyone is), candidates will have reason to play to those distorting features as well. The basic message of the two lines of research are that elected officials, including a president, are not very controllable by the electorate and that such control or influence that the electorate has gives any president perverse policy incentives of various kinds. In effect any president has electoral incentives to pander to voter beliefs, to produce superficially attractive outcomes (if she can), and perhaps postponing those choices to the period immediately prior to elections, etc.[17] As long as she does these things she is mostly free to pursue her own preferred policies under the veil of voter ignorance.

It's not a pretty picture. And there is a good deal of empirical evidence in support of these claims. This is not to say that the political science literature is univocal on this matter but the theory and empirical work to date are not very encouraging.[18] Unmediated elections are

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[17] For a model in which politicians "pander" to voters (in the sense of taking actions which are not best but are popular) see Eric Maskin and Jean Tirole, "The Politician and the Judge: Accountability in Government," American Economic Review, 94 (2004): 1034-1054. Or, see Canes-Wrone, Brandice, Michael C. Herron, and Kenneth W. Shotts. 2001. "Leadership and Pandering: A Theory of Executive Policymaking." American Journal of Political Science 45(July):532-550.

[18] There is a lot of evidence indicating that, when voting for a president running for reelection, individual voters take account of prior performance in office. See Fiorina, Morris P. 1981. Retrospective Voting in American National Elections. New Haven: Yale University Press. But the statistical effects reported there and elsewhere are fairly weak and in any case party loyalty, which may conflict with retrospective motives, is always the larger effect. Moreover, there is plenty of evidence that incumbents who want to be reelected shape their policies in ways that

simply not very promising as ways by which presidents (or any elected official) can be induced to pursue publically oriented objectives.[19] It is important to see that the argument that presidents have reason to incorporate deliberative capacities inside their administration does not help alleviate this problem at all. Indeed, it only makes the informational asymmetry between president and voters more severe, permitting even more exploitation of voter ignorance. At least this would be true if presidents were to appoint those loyal to his interests.

For that reason, it is far more promising, it seems to us, to have multiple and overlapping mechanisms of accountability which are built up, essentially, of people and institutions whose interests are different from the president. Because of the enormous informational and strategic advantages of the president relative to voters, it is necessary to have independent means to monitor the activities of presidents and their agents. And these monitors must the means to get information from agencies and from other sources as to the effects of policies, and to have the means and motivation to analyze and publicize what they find and, ideally, to reward or punish presidents who step too far out of line. In other words, checking institutions need to be independent of the president, capable of fine grained monitoring, powerful, and competitive with him to some extent. They need not be opponents (though opponents may be very valuable in enhancing democratic control) but to be useful in providing information to voters or other

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they think may enhance their chances. But as the previous note suggests, putting these two tendencies together does not imply real electoral control. Voters have too little information and what information they have is largely irrelevant to incumbent actions for such control.

[19] One line of response to this dismal picture is ***to*** model elections as ways in which voters can select among candidates of different qualities. The results here are not much more encouraging. Low quality candidates will be motivated to imitate higher quality, while high quality candidates will try to signal that they are good by taking actions that are costly to imitate for low quality types. But in plausible models voters will often be unable to tell one kind from another, at least until after a term in office.

interests it is important that monitors have distinct interests from the president. These may be private interests or public ones (allegiance to law or the constitution for example.

Many of these institutions are traditional and familiar. The press and broadcast media generally have ample professional motivation to find and reveal information about government activity whether or not the president or his partisans wants it to be published. And, more recently, the development modern highly decentralized social media gives those skeptical of the incumbents lots of motivation and opportunity to spy and gossip and question official actions. The more traditional powers of legislatures can also force the administration to reveal information that the president may not want to share. Congressional control of revenues and appropriations – based on the notion that the legislature has a special claim over the power of the purse -- provides a relatively fine grained instrument of control, at least when Congress is not led by the president's own copartisans. Even if congressmen do not have exactly the same preferences as their constituents they are likely to be somewhat skeptical of presidential programs. Of course, the most important presidential monitors are probably those who want the job themselves: members of the other party and aspirants for the high office itself.

The point is that various elites inside of government and out are continuously present and able to monitor what the president and the agencies are doing. Besides, the various political elites (congressmen, judges, lobbyists, potential opponents, members of other political parties etc) do not suffer the same degree of information asymmetry that voters do. These elites do have heterogeneous policy preferences – indeed probably more strongly felt ones than the general public – and so a president can try to play off one against the other. We do not argue that plural mechanisms of accountability will by themselves "solve" the agency problem or, more broadly, implement the notion of balance. And we don't argue that these complex mechanisms of

accountability may not introduce distortions of their own. We think that such distortions may however tend to be self correcting to some extent since there is ample competition among monitors. The focus on these mediating monitoring institutions is to highlight the importance for democratic accountability of nurturing the complex system of political monitoring.

6. Reconstructing a case for constitutional checks

Our theoretical argument is consistent with the approach that Madison and other 18th century political theorists tried to address by designing constitutional checks – namely, the problem that "the public" could not organize itself into an alert and public-spirited body absent institutions that would assist them in overcoming their collective action problems. Federalism and checks and balances were precisely those institutions that facilitated popular organization, in effect *creating* the very public on which the presidential unilateralists rely to monitor and constrain the President. By assuming the existence of a politically active and representative citizenry, the presidential unilateralists assume away the very problem that Madison was trying to solve with institutions like checks and balances. More precisely, the presidential unilateralists assume that the existence of a politically active public is exogenous to the constitutional institutions that they claim are dispensable: Legal limits on the President in statutes play no role in their account in mobilizing the public to resist the President when he or she asserts power that the public believes to be unwarranted. But this assumption is exactly the point that Madison and other opponents of unilateral presidential power contested.

Our objection to the presidential unilateralists defense of unilateral presidentialism reconstructs the 18th century notion of "balance" by reconstructing two strains of argument

against executive power. First, we resurrect the old Country Party idea that executive power can be used to create interest groups that could be used to create artificial electoral support for the executive's programs. Second, we revive the Madisonian idea that institutions can assist the public in overcoming collective action problems that would otherwise bedevil efforts by the disorganized public to overcome these executive-created interests. Both concepts need a bit of translation from their 18th century context to fit our contemporary world and political science. But, with a bit of tweaking, both notions comfortably fit into a theory that the presidential unilateralists must address before we can wholeheartedly sign on to their assurance that Presidents' electoral incentives insure that they are trustworthy agents of We the People.

a. Country Party Ideology and We the Semi-Sovereign People

Take, first, the Country Party notion that the executive, using its control of public funds, can create artificial constituencies that could not only induce government to pursue private goals inimical to the public interest but also corrupt the electoral process itself with governmental patronage. On this theory, elections alone cannot constrain the executive absent some sort of counterbalance to executive power over the resources of the state. The basic Country Party ideology was most famously purveyed in twelve dozen essays written by John Trenchard and Thomas Gordon between 1720 and 1723 that focused on how promoters of the South Sea Company had corrupted members of Parliament and thereby created a financially disastrous stock bubble.[xix] But the general Country Party rhetoric had been deployed as early as the 1690s, when William II used the Whig junto of powerful aristocrats to manage Parliament and fund his wars with France.

Country Party writers and politicians were so-called because they opposed the "Crown" by championing the interests of the "Country" (i.e., constituencies outside London) against what they took to be corrupting influences within the executive. Chief among these, in Country Party rhetoric was the "paper aristocracy" of "fundlords" -- that is, holders of public debt – who constituted a loyal cadre of support for the Crown, because they depended on the solvency of the government to re-pay their bonds. The Crown could insure re-payment by using bond proceeds to bribe members of Parliament with lucrative executive "places" or offices in return for votes for taxes or monopolies profitable to bondholders. But the corruption went deeper than mere bribes to prominent politicians: The public itself could be induced to support the "paper aristocracy's" program of expanded governmental borrowing and debt through the spreading of the paper wealth among ordinary citizens. "How easily the People are bubbled by Deceivers," warned Cato's Letter #6, because they could be seduced by a program of public spending with visions of striking it big with rapidly appreciating government bonds.

Viewed as actual descriptions of finance and state-building in 18th century England, these moralistic denunciations of "stock-jobbing" were "remarkably uniform, indeed, monotonous in tone, and uninformative about how the market actually worked."[xx] Viewed more abstractly, this Country Party rhetoric set forth a specific application of a more general story of high agency costs familiar from Mancur Olson, in which the public of latent interests are never organized because no political entrepreneur can bear the high costs of monitoring officials, publicizing malfeasance, and getting constituents to the polls. By contrast, incumbents can create an artificial constituency – for Country Party rhetoricians, of bondholders – based on the use of government power itself. The common theme not only of *Cato's Letters* but a myriad of similar tracts was that a complex financial state deprived the people of the capacity for

independence and self-government, simply because that state was too difficult to monitor when officials could use governmental resources to maintain their own power.[xxi]

Prominent presidential unilateralists acknowledge that institutions affect voters' capacity to monitor politics. Posner and Vermeule note, for instance, that "[v]oters have trouble keeping informed on the issues and have incentives to free ride on each other, in which case their ability to discipline wayward politicians is correspondingly limited."[xxii] But they remain confident that private citizens funded by voluntary contributions will suffice to provide the political competition necessary to keep the incumbent executive official honest. "Because the executive obtains substantial rents, there is terrific competition for the office" such that "[p]eople who seek the office have strong incentives to discover and disclose negative information about those in office."[xxiii] The presidential unilateralists's confidence about the voters' capacity is bolstered by the existence of "powerful institutions that are not part of the constitutional structure – most prominently, the media and political parties."[xxiv] Who needs a legislature, when any private entrepreneur, interested in cashing in on the fruits of executive power, can simply run for office backed by a non-incumbent political party funding a robust media campaign?

The problem with this simple electoral model is that it assumes that media and parties are somehow exogenous to the constitutionally created institutions of government. But the essence of Country Party rhetoric is that incumbent officials can create their own media and party using the very rents that competitors seek to secure. (For instance, Robert Walpole, the English Prime Minister against whom Country Party writers inveighed, was able to rid himself of the pesky Thomas Gordon by giving Gordon a comfortable government job as the First Commissioner of Wine Licenses[xxv]). Controlling the levers of government, the incumbent executive can overcome the free-rider problem that might otherwise plague efforts to organize a political party. How can

non-incumbent politicians secure comparable media and patronage opportunities with which to fuel a political campaign? The presidential unilateralists never really discuss the question of how challengers to incumbent executives organize effective opposition, overcoming free-rider problems and matching the powers of the incumbent to subsidize publicity and patronage with governmental funds. But this problem was a central obsession of 18th century Country Party ideologues who regarded the power of the executive to buy off opposition with "place" as a central obstacle to political competition. It is no coincidence that the Anti-Federalist pamphleteer who most passionately inveighed against the power of the executive under the proposed Constitution gave himself the pseudonym of "Cato," tapping the Americans' wide familiarity with "Cato's Letters" as a source of resistance to "the Court."[xxvi]

b. The Madisonian Answer: "Constitutional Rights of the Place" as a Source of Political Competition for incumbent executives.

Separation of powers provides one answer to this question: By multiplying independent legislative offices with the power to veto executive proposals, the principle of checks and balances that can be used to finance and publicize candidates who seek to launch challenges to incumbent executives. Armed with the power to block legislation, legislators can extract contributions from constituents who might otherwise free ride off of the political entrepreneurs' efforts to organize an opposition party. Legislators can also arm themselves with the franking privilege and the power to subpoena executive officials, thereby providing themselves with the information and spotlight necessary to gain recognition as potential challengers to executive officials. The legislature, in short, can be a source of credible candidates capable of challenging incumbent executives.

The colonists, of course, were intimately familiar with the role of legislatures in providing a platform against which to challenge incumbent executives. The American Revolution was critically dependent on the mobilizing efforts of colonial assemblies, town meetings, and committes of correspondence: Institutions channeled the complex collective actions such as boycotts, stock-piling of weapons, and agenda-setting that otherwise might have failed for the usual hold-out problems afflicting a disorganized public. Madison tapped into this experience when he argued in Federalist #46 that state legislatures could provide an institutional basis for opposition to the unconstitutional encroachments of the central government in *Federalist #46*:

> Into the administration of these [states] a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

Put in terms of modern public choice, officials with the taxing power can overcome free-rider problems that might otherwise plague efforts to organize a political party. "Offices and emoluments" are patronage opportunities with which state governments create those "party attachments" essential for competing against federal politicians. Madison was referring, of course, to *state* governments rather than Congress. But the same argument, however, applies *mutatis mutandis* to the legislative branch of the federal government: Politicians in Congress can

fund staffers, command patronage, hold hearings, subpoena witnesses, send out franked mail, and otherwise use governmental funds to publicize their opposition to the executive. Because they can block executive proposals, they can extract funds necessary for these activities. In this way, legislators can provide the public good of political competition that might otherwise be under-funded for the usual reasons of free riders and small individual stakes.

The presidential unilateralists seem remarkably sanguine about the power of plebiscites – basically, presidential elections – to cabin presidential power even as they express skepticism about the values of legislative checks in fostering political competition. Posner and Vermeule, for instance, argue that the ways in which legislative power fosters political competition to executives are difficult to model formally.[xxvii] True enough – but the presidential unilateralists provide no formal model whatsoever for private citizens' funding credible political campaigns against incumbent executives against the obstacles of overcoming free rider problems, citizens' rational ignorance, and the resources available to an incumbent executive. Yet the presidential unilateralists's principal-agent model rests entirely on the incentives created by political competition from these candidates waiting in the wings to challenge the President's missteps and force him to demonstrate credibility through various signals. The Madisonian intuition that rival institutions fuel political competition is at least as plausible as the presidential unilateralists's intuition that competition can be assumed – and the Madisonian problem thereby assumed away.

The presidential unilateralists might acknowledge the obvious – that Congress provides a training ground for potential candidates against incumbent presidents – and yet maintain that the unilateral executive poses no obstacle to this training ground. On this theory, the President might rule by unilateral decree and yet members of Congress could still deploy their franking privileges, their hearings, C-SPAN, etc, to build up their reputations as credible challengers to

presidential incumbents. The balance of power between these congressional challengers and presidential incumbents would be a function of politics rather than legal boundaries.

The difficulty with this theory, once more, is that it assumes that the efficacy of congresspersons' political candidacies for the Presidency are somehow exogenous to legal limits on executive power. On this account, the credibility of members of Congress as potential challengers to presidential incumbents would be unaffected by whether the president could simply rule by decree, sidestepping entirely the need for statutory authorization. Admittedly, a world in which presidents would enjoy this species of unilateral power in the United States is far-fetched: It is commonplace for Congress to prevail over presidents who seek (or appear to seek) such a power of unilateral legislation.[xxviii] There have, however, been constitutional regimes such as the Weimar Republic in which the president obtained something close to such a power to rule by unilateral decree.[xxix] Moreover, to the extent that the presidential unilateralists find the Schmittian concept of unbounded executive power normatively attractive, then they ought to applaud such a regime.[xxx]

It seems likely, however, that such a presidential power to engage in unilateral legislation would erode the credibility of Congress as a source for powerful presidential candidates. There are toothless legislative bodies in other democracies – for instance, the United Kingdom's House of Lords, the Canadian Senate, or the European Union's Parliament – and none are serious incubators of important political talent or rungs on the ladder to higher office. Were Congress reduced to an optional route to legislation, it is plausible to believe that Congress, too, would be reduced to a contemptible talking shop rather than a source of serious challenges to the President.

The presidential unilateralists could respond that presidential assertions of unilateral power would never reach such a point, because such assertions are constrained by "constitutional showdowns" in which "public constitutional sentiment" limits any branch's assertion of unilateral authority.[xxxi] But this positive claim is undermined by the presidential unilateralists's institutional analysis of Congress' weaknesses as a defender of its own prerogatives. If the presidential unilateralists's positive account of Congress' incentives is accurate, then there is no reason to believe that Congress' defense of its own prerogatives will result in the optimal distribution of power between the branches. This is not to say that we foresee a time in which Congress is reduced to the same imbecility as, say, the House of Lords in the United Kingdom. Instead, we suggest only that, to the extent that the incentives of Congress lead it to relinquish power to the President, these incentives will also undermine Congress as a credible source of political challengers to presidential incumbents. Given that the presidential unilateralists agree on the critical function of such challengers in constraining presidential power, we believe that the presidential unilateralists's own theory suggests the importance of setting limits on presidential power.

Legislatures do not only provide resources and visibility for challengers to incumbent executives. They also provide the coordinating device of law itself. Legal rules set forth baselines around which coalitions can coalesce: they are, in Barry Weingast's phrase, "focal points" for collective action. Any anti-presidential coalition will be hampered by the need to unite around a common platform. If such a coalition can muster only policy-based objections to a President's decisions, then the coalition members' commitment to a unified course of opposition might be difficult to engineer, as the President could divide the coalition with strategic concessions designed to foster mutual mistrust among coalition members. By contrast,

a single, unified ("principled") position based on the President's duty to adhere to statutory limits can provide a bright-line platform by which to mobilize an otherwise disunited opposition. Take, for example, the Democrats' opposition to the Reagan Administration's aid to the "Contra" rebels opposing the Sandinista government of Nicaragua. The Democrats in the 99th Congress were divided among "Hawks" like Sam Nunn and "Doves" like Ronald Dellums: If the President had the legal power to issue an executive order authorizing aid to the "Contras" without (or even against) congressional authority, then the members of this disparate coalition would have to campaign against the President on whether the President's aid package was a good idea, and the President could split off wavering members with offers of unrelated benefits. By contrast, if the President is under a duty to make policy consistent with federal statutes, then the Democrats could unite around the principle of legality: Compliance with the Boland Amendment was a presidential duty regardless of its policy merits. The duty to comply with a specific law is, in short, a more salient organizational principle for a presidential campaign than the duty to pursue good policies. In this sense, law is not separate from, but integral to, politics, because it provides the focal points around otherwise squabbling coalitions can achieve stability.

7. How to resist acquiring Carl Schmitt's Constitution in a fit of absent-mindedness

Even if one agrees that it would be good thing to have a robust legislative check to balance the executive, there remains the question of whether such checks are possible. The presidential unilateralists remind us that "should" implies "could": If unilateral presidentialism is inevitable, then there is little point to criticizing it for being undesirable. As we noted above, we agree with the presidential unilateralists that there are institutional forces at work in

undermining congressional resistance to executive power. But this does not mean that such forces cannot be resisted. The most important point is that the choice between a Madisonian or Schmittian constitution ought to be made deliberately rather than through the tyranny of small institutionally driven accretions of presidential power.

In particular, we emphasize that an institutional weakness suggests that there may be an institutional fix: There are a few cheap and easy ways in which the congressional slide into passivity might be arrested. But it must be said that these easy ways have long been available an not really used. So we must also explore a few not-so-cheap-and-easy proposals. Acquiring a Schmittian constitution through a fit of absent-minded acquiescence, however, is not somehow dictated by the plural structure of Congress or the generalist character of judges: It is, in large part, the result of deliberate doctrinal choices rather than driven by a misplaced desire to preserve a presidency from non-existent legislative threats.

a. Where there's a congressional will, there's a way: Congress <u>could</u> resist the President if it tries – and sometimes it does.

Before one explores ways to strengthen Congress, it is important to acknowledge Congress' existing strengths. The presidential unilateralists downplay – in our view, excessively – the elaborate system of "fire alarms" and internal delegations that allow Congress to play a much larger role in policing the "gray holes" of judicial review that the presidential unilateralists rightly note are the hallmark of the modern administrative state. We do not dispute that lawmakers "delegate broadly" to "leave the executive and the judges and themselves ample wiggle room for unforeseen circumstances."[xxxii] Indeed, this characterization of administrative

discretion has been familiar at least since Theodore Lowi inveighed against it thirty-two years ago.[xxxiii]

"Hard look" review pursuant to the APA, however, might alternatively be seen as a procedural mechanism by which Congress delegates to interest groups the task of monitoring agency decisions and setting off fire alarms when the decisions go astray.[xxxiv] Of course, as the presidential unilateralists note, the "substantive" constraints of review under APA section 706(2)(A) are minimal: courts do not frequently kick decisions back to the agency for exceeding their statutory authority. The publicizing effect of the APA processes, however, might be much more robust: They delay and publicize agency decisions for a sufficiently lengthy period that affected interests can bring the issue to the current Congress' attention so that the relevant congressional committee can bring its pressure to bear. Agencies, knowing that they risk the wrath of a subcommittee chair if they depart too far from the preferences of the median member of Congress, stay within predictable bounds when exercising what looks (from the face of the statute and deferential character of judicial review) like "unfettered" discretion. The result is that the agency is always upheld by courts but always nevertheless constrained by the agency's own desire to stay on the good side of the relevant congressional committee. Where the legislature fears that this system of *ex ante* agency self-constraint will break down because of ideological conflict, then they write much more detailed *ex ante* restrictions into their statutes.[xxxv]

Some presidential unilateralists say almost nothing about this familiar system of congressional oversight. Yet this system of effective congressional power might provide a much better explanation for some of the events that they attribute to administrative discretion free from congressional controls. Take, for instance, the Secretary of the Treasury's use of TARP funds to aid auto companies. Posner and Vermeule treat this episode as an example of an executive

actor's ignoring statutory constraints through an expansive interpretation of the term "financial institution" contained in Section 101(a)(1) of the ESSA.[xxxvi] After all, Congress had failed to pass a specific bill authorizing aid to automakers only months earlier.[xxxvii]

Far from being a "Schmittian" moment, however, the executive decision to aid the auto companies with TARP funds looks much more like a "McNollGastian" moment of congressional supremacy. During the debate on the TARP program, two barons of the House of Representatives made it perfectly clear that they wanted TARP monies to be made available to automakers. Representative John Dingell, Democrat of Detroit and long-time chair of the Commerce Committee rose to ask his "good friend" Representative Barney Frank, chair of the Banking Committee, whether TARP money could be used to aid distressed automakers, and Frank replied that TARP monies could and should be so used.[xxxviii] Secretary Hank Paulson – a former Wall Street leader who was no fan of Keynesian extravagance -- had earlier resisted such a use of TARP funds.[xxxix] But he changed his mind in December, under considerable pressure from congressional Democrats, who took a different view of his authority. On the McNollGastian account, this hardly looks like an act of an "unbounded executive's" overweening discretion: It looks, to the contrary, instead, like the executive was cowed by the barons of the House, bucking to their view of what the relevant statute meant.

We emphasize Posner's and Vermeule's apparent misreading of the TARP automaker episode, because it is their only example of *presidentially* controlled executive's bending a statute's limits during an economic emergency. They also highlight Fed Chair Ben Bernanke's decision to aid AIG pursuant to section 13(3) of the Federal Reserve Act. On their account, this aid stretched the statute to the limit, given that the Fed effectively purchased an insurance company using its power to discount the notes of "any individual, partnership, or corporation" in

"unusual or exigent circumstances."[xl] Chairman Bernanke's decision, however, is hardly a good illustration of the discretion enjoyed by a Schmittian "unitary executive": As posner and Vermeule concede, the Fed is the consummate independent agency the discretion of which is an indication that "the president can exert control in certain areas," because "the sheer complexity of the government response limits the impact of a single person."[xli] It may be, as Posner and Vermeule assert, that the power of the autonomous bureaucratic expert is also not any part of Madison's theory of checks and balances. In a larger sense, however, one can regard the independence of the bureaucratic expert as an instance of checks and balances that is closer to the spirit of James Madison than Carl Schmitt. In any case, the scorecard from the Posner's and Vermeule's narrative of the 2008 crisis is Congressional Barons: 1; Bureaucratic Expert: 1; Schmittian Executive: 0. This is hardly a track record suggesting that Schmittian unbounded executives rule the roost.

b. Doctrinal remedies to strengthen Congress

Congress, in short, has the institutional capacity to set limits on executive power. The real question is whether they will use it. As we noted above, we agree with the presidential unilateralists that legislators' large numbers and small constituencies greatly diminish the incentives of individual congressmen to take stands on questions of congressional power. Each will want to protect her own turf and make hay at the expense of the administration from time to time. Moreover as Levinson and Pildes emphasize party loyalty is often a stronger motivation than institutional allegiance; the president's copartisans have little incentive to police his powers. Likewise, we agree that generalist judges will be reluctant to face down an agency responding to a perceived crisis. These fundamental institutional constraints, however, can be countered with institutional responses. Some of the weaknesses of the Congress and courts are not inherent in

their structure but imposed by bad legal doctrine. To paraphrase a line from an Elizabethan play about the need to constrain executive power, the fault lies not in our institutional stars but in our doctrinal selves. That doctrine could be reversed without requiring judges to transform themselves into judicial Hercules.

For instance, Congress' incentives for controlling the executive depends critically on each chamber's capacity to transform itself into a hierarchically controlled body where the national benefits from aggressive policing of constitutional and statutory lines can be internalized by the party in control of that chamber. The Speaker and majority leader of the two chambers, after all, are major political figures who stand to benefit from legal victories preserving congressional powers against presidents from the opposite party. Henry Clay's campaign against Andrew Jackson – including the Whig censure of Jackson's alleged violation of statutory authority by withdrawing funds from the Bank of the United States – was fueled by Clay's ambitions for the Presidency and the Whig's partisan self-interest in painting Jackson as "King Andrew the First." Large numbers, therefore, need not prevent Congress from pursuing diffuse goods like a limited Presidency, if party allows individual members to internalize those benefits. But of course Jackson was a Whig and, in the end, his challenge did not stop Jackson from killing the Bank.

Legal doctrine, however, can prevent party leaders in Congress from having a full array of tools by which to fine-tune the interpretation of statutes. For instance, one of us has argued that the Court's decision in *Chadha* critically weakened the Congress in relationship to agencies by reducing its capacity to regulate agency decisions that shift the status quo to a point immune from bicameral revision. *Chadha* was not a product of judicial modesty resulting from judges' self-awareness of their limits as generalists: It was the result of judicial philosophy – an ill-

advised foray of judges into the thicket of separation of powers. *Chadha* could be reversed or shrunk.

Other doctrines that give Congress more flexibility to adopt internal rules of procedure facilitating quick action and powerful legislative leadership – for instance, the "enrolled bill" rule – can be construed more broadly. The Court could give more deference to committee reports and the right sort of floor colloquies in statutory interpretation: The judicial turn against legislative history disempowers committee chairs and other key members of Congress, depriving them of a tool by which to fine-tune statutes in accordance with the wishes of the majority party that controls the committees.[xlii] Judicial decisions like *Franklin v. Massachusetts* that exempt the President from transparency-enhancing statutes like the APA or the FOIA or the FACA could be reversed or narrowed. Again, a judge does not need to be Hercules and make difficult factual determinations to allow private parties or members of Congress to enforce these statutes broadly. The decision to carve the Presidency out of the APA's definition of "agency" was driven by an ideology of separation of powers favoring presidential power, not any practical assessment of judicial capacity.

And so forth: there are a myriad of doctrinal choices made by courts construing law or adopting methods of statutory interpretation that are the result of what we argue is a misplaced judicial effort to bolster presidential power in an effort to be faithful to constitutional design. But we suggest that true fidelity to that design requires honoring the constitution's Madisonian spirit rather than some ostensible letter of Article II.

c. More ambitious institutional remedies to strengthen Congress

We acknowledge that the doctrinal tweaks suggested above would play a modest role in bolstering Congress as a referee of the system of checks designed to produce balance, mostly by making it more difficult for the President unilaterally to shift the status quo without Congressional authorization. But what about Presidential refusal to enforce federal statutes at all? Deliberate presidential non-acquiescence in enforcing statutes, expressed in the form of signing statements rose to an all-time high under the Administration of Bush II.[xliii] Judicial refusal to defer to agency decisions will do nothing to remedy executive *inaction*, for there will be no decision to which to defer.

More generally, one might want some mechanism by which Congress' institutional interests could be defended outside of court. We agree with the presidential unilateralists that somehow Congress, as an institution, has failed to preserve its constitutional powers both against the president and against congressmen and parties. The stream of transactions that led to this state of affairs were all voluntary actions taken by consenting adults. But there is a third party whose interests were affected by these exchanges – the republic itself, "We the People", etc – and who had an interest in blocking or at least regulating them, with the purpose of maintaining a balanced government.

We offer, therefore, some more speculative proposals for ensuring that this public interest in balanced policy-making is at least articulated when such deals are being considered. Consider, for instance, the possibility of Congress' creating a Constitutional Assessment Office ("CAO") akin to the CBO or the GAO (both more or less either nonpartisan or bipartisan) whose role it would be to represent the congressional interest in both legal and political fora. The office could be staffed by retired federal judges or others with eminence sufficient to insure that the Office's voice would be taken serious by the public. Being legislative officers appointed by the

leadership of Congress, the CAO would have no authority to define private rights or relationships or otherwise exercise executive functions. Instead, its function would simply be to issue "constitutional impact statements" assessing claims of presidential authority in signing statements, veto messages, OLC opinions, or other executive declarations upon the petition of interested parties. Being a unified body with a duty to issue opinions, the CAO would not be suffer from the tendency to duck constitutional challenges to congressional authority that afflicts individual members of Congress. Being a non-judicial body, the CAO would not be limited by principles of ripeness, mootness, standing, or justiciability that allow federal courts to avoid ruling on presidential claims of authority. The CAO's sole duty would be to articulate and defend Congress's institutional interests in the Madisonian scheme.

If one sought to make the CAO a more "high-powered" agency for forcing congressional action, then one might give the CAO the power automatically to places issues on the agenda of each House by amending the Houses' rules. In any case where the CAO deemed that either presidential action or inaction constituted an unconstitutional encroachment on the Congress' legislative prerogative, the CAO's opinion could automatically become a privileged matter to be debated on the floor in the form of a resolution. Any member could raise a point of order, under this proposal, to object to further debate on any other scheduled matter until the Congress took a vote on the CAO's report. In effect, such a rules change would transform the CAO into a congressional committee the reports of which (like Rules Committee resolutions) enjoy automatic privilege.

The CAO's powers might be further enhanced by guaranteeing a privilege to any officer or employee in the executive branch to report alleged illegality by executive actors, either in the non-enforcement of statutes or the performance of actions forbidden by law. The CAO could

either issue an opinion on such allegations or simply publicize them without comment. In cases where the allegations involved classified information, the Congress would have to empower executive officers to report classified information to the CAO free from sanction and also provide adequate training and security to manage leaks from the CAO itself.

We acknowledge that the influence of the CAO's opinions is wholly speculative, depending on the prestige of the office which, in turn, might depend on the degree to which it could be designed as a wholly non-partisan legislative agency. We further concede that similar efforts to bolster Congress' constitutional "voice" have been attempted in the past—notably, the Office of the Senate Counsel – without much effect. Our own sketchy proposal is intended to strengthen these devices by freeing the defense of Congress' institutional interests from the shackles of party loyalties that might otherwise hamper the articulation of that interest whenever the same party simultaneously occupies Capitol Hill and the White House. The prospects for such a non-partisan office are not hopeless: The Office of the Parliamentarians in House and Senate are famously non-partisan even though the Parliamentarians serve at the pleasure of the House leadership.[xliv] The question of whether the CAO could achieve similar detachment form party interests might depend on careful grandfathering to insure that the CAO did not rule on any pending controversies of interest to the current congressional leadership.

The executive and federal courts, being fundamentally hierarchical organizations, have no need of such a kluge. They have proved more than able to defend their institutional turf without outside help. But Congress, if it has proved nothing else in two centuries, has proved to be (in Ken Sheplse's words) a "they" rather than "it" when it comes to constitutional issues

8. Conclusion

At the end of their book Posner and Vermeule say that it not clear that the "Madisonian" system has actually worked better to protect liberties than the unitary UK constitution where, presumably cabinet directs agencies without parliamentary interference. Maybe so. Maybe not. This is too hard a question to confront in this essay and, anyway, the comparison implicitly holds things constant between the two nations that cannot be constants. But we accept at least that there is a lot to be said for the British constitution and maybe it is better all things considered. But even so that doesn't mean that eliminating or reducing the effects of checks and balances would be an improvement in the American system. Leaving aside the caveat about comparisons, second best considerations block that facile inference. Indeed, the screamingly obvious "other" fact that would need to be considered is that in the US, the president does not have to maintain a working majority to keep his office. The British government can be immediately called to electoral account if it insists on pursuing a sufficiently unpopular policy. So there is a sense that in the UK the reliance on political checks is clear and univocal. If you want to remove checks in the US we think that the notion of fixed presidential terms probably ought to be put on the table as well, so that the president would take the risk of being forced to go to the electorate if he wants to advance a policy that he cannot persuade congress to support.

Moreover, while we agree that as a matter of fact presidents have asserted and had a freer hand in emergencies than at other times, it is important to remember that modern government leaders (presidents or prime ministers) rarely claim to rule on based on either on explicit emergency provisions in their constitutions (such as Article 16 of the Constitution of the Fifth Republic) or implied or constructed emergency powers (as in the US) but usually ask, and receive, explicit legislative support. Such cases are not instances of emergency rule at all but

seem to be a special intermediate version of ordinary rule. In such cases legality is not suspended and courts can intervene if (and as long as) they choose and the legislature can, at any time, decide to stop cooperating. This intermediate regime is more flexible – indeed it seems to to vary in the extent of powers permitted to the executive as the "emergency" wanes – and it is not clear that it poses the tragic choice between legality and legitimacy that Carl Schmitt emphasized. We have not really seen the kind of emergency where a president would have to act only on his own authority, building an emergency regime out of constitutional bits and pieces (mostly Article II powers we guess) and running a legitimate if not fully legal government. We hope we never do. But if we were to witness such a moment and live through it, we would be inclined to agree with Justice Jackson's Korematsu dissent when he said that a Court ought to refuse to confer legality on presidential actions, however necessary they may have been to save the republic, taken in such a setting.

As the presidential unilateralists persuasively argue, the system has drifted away from its Madisonian roots through both institutional incentives of the actors and presidentialist legal decisions. Reversing the latter can strengthen the former in the direction of consciously engaging with the question of whether we really want a Schmittian constitution. Maybe Madison was wrong and Schmitt, correct. But we make the choice in a self-conscious way, by bolstering Congress' capacity to engage the general question of limits on Presidential power.

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[i] Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive During the First Half-Century, 47 Case W. L. Rev. 1451 (1997); Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541 (1994); Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 Nw. U. L. Rev. 1377 (1994); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153 (1992).Rev. 1451 (1997); Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541 (1994); Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 Nw. U. L. Rev. 1377 (1994); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153 (1992).

[ii] Eric Posner, "The Constitution of the Roman Republic: A Political Economy Perspective", working paper University of Chicago Law School, November 2010.

[iii] The framers were also cognizant of the British example and probably most of them thought of it as a generally successful mixed government which normally protected traditional liberties. Indeed, until quite late in the pre-revolutionary period most of those complaining about British rule in the colonies argued that the colonists did not enjoy security in their rights as loyal subjects of the Crown. To take a Montesquieuian example, colonial judges did not have lifetime tenure as British judges did were, in that respect, more like colonial administrator than 'real' judges. In any case, the framers probably thought that British separation of powers was adequately protected by the traditional mode of appointments to various constitutional departments: heredity for the Crown and Lords, and election for the House of Commons, and by the constitutional guarantees of bicamerality and royal veto as well as life tenure for judges.

[iv] "As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified."

[v] : (see Federalist 49 and 50 for his arguments against the Jeffersonian notion of continual constitutional revision).

[vi]"The difference most relied on, between the American and other republics, consists in the principle of representation; which is the pivot on which the former move, and which is supposed to have been unknown to the latter, or at least to the ancient part of them...." (Federalist 63)

[vii]"... it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American governments, lies IN THE TOTAL EXCLUSION OF THE PEOPLE, IN THEIR COLLECTIVE CAPACITY, from any share in the LATTER, and not in the TOTAL EXCLUSION OF THE REPRESENTATIVES OF THE PEOPLE from the administration of the FORMER." Federalist 63).

[viii] "The [annually elected] Tribunes of Rome, who were the representatives of the people, prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it.... It proves the irresistible force possessed by that branch of a free government, which has the people on its side." (Federalist 63). This argument favored giving the Senate at least some democratic credentials in order to offset the more formidable powers of the lower chamber, which was closer to the people and therefore more dangerous to the republic. These democratic credentials were, of course, indirect in that they ran through the state legislatures. But that made them perhaps more reliable. We should point out that the framers' endorsement of representation – or indirect rule – was typical of many 18th C. writers such as Kant in **Perpetual Peace**, and De Lolme and indeed Montesquieu. Even Rousseau, often claimed as a proponent of direct democracy advanced a more complicated notion. Direct democracy only applied to legislation and not at all to acts of government (magistracy). He insisted that reserving legislation to the whole citizenry was compatible with any arrangement of magisterial powers, including monarchy as well as any kind of aristocracy. The key is to recognize that lawmaking for was considered to be a fairly rare activity as most laws that would be needed would have been supplied long ago. And in any case, the power to propose or amend legislation would be restricted to magistrates or representatives in any case as at Rome.

[ix] John Ferejohn, "Madisonian Separation of Powers," Chapter 6 in *The Theory and Practice of Republican Government*, Sam Kernell (ed.), Stanford University Press, 2003. Madison's recognition that he had underestimated the powers of the president are hard to date – but certainly by the time of the Jay treaty, he recognized deficiencies in his earlier understanding and began looking around for ways to ameliorate them, sometimes by proposing new glosses on the text and sometimes by proposing more profound adjustments in the political underpinning of the American federal experiment.

[x] Mayhew argued that these incentives are so strong and omnipresent as to distract members of congress from taking very seriously their role in lawmaking. He argued that this led Congress to develop internal institutions that would create internal incentives for lawmaking that might partly the electoral temptations. Fiorina's focus is more on the distortions in legislation that arise from the imbalance of incentives.

[xi] There is much dispute about what these problems are exactly though few doubt their severity. Krehbiel for example argues that the median congressperson can control committee preferences to assure manage the agency issue. Epstein and O'Halloran's theory concurs in large part. But Cox and McCubbins argue that the median member of the majority party is a better candidate for the principal and that she would try to manipulate committee compositions to solve "her" agency problem. But in no case is the agency problem eliminated. A slightly dissenting vote might be found in Weingast and Marshall's notion of the industrial organization of congress which could be read to say that congressional institutions are arranged to minimize agency problems...but they do not address how far that minimization may go. And in any case none of these authors takes seriously the issue of multiple principals by effectively modeling the issue in a single policy dimension.

[xii] The Roman experience did not warn against the threats coming from constitutional executives but from those "private" individuals or military leaders (Pompey, Caesar, Crassus) who commanded popular identification, or money, and inspired fierce loyalty. Such figures could relatively easily control the elected magistrates either by seeing to their election or bribing or threatening them. Elective office was usually for just a year and collegial so it would not have generated many resources for political struggle. More valuable was the control of a province – but that came after the mandate was finished.

[xiii] We should point out the Terry Moe has another line of research that emphasizes how agencies are often designed to fail. The president and or congressional actors in seeking advantage might concede to the agency authority to do something but at the price of special procedures permitting congressional or judicial interference. While he gives it a very itnterpretation, he seems to be considering phenomena that McNollGast write about where, as part of delegating authority to an agency, the interests that the congressional majority favors in a delegation are given a procedural seat at the table (with sharp knives and pointy forks).

[xiv] In the case where courts or agency can adjust the status quo completely and where there information is complete see John Ferejohn and Charles Shipan, "Congressional Influence on the Bureaucracy," **Journal of Law, Economics and Organization**, vol 6(1990). An application of the model is found in William N. Eskridge, Jr. & John Ferejohn, "Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State" 8 *Journal of Law, Economics & Organization* 165 (1992) With incomplete information and weaker powers to adjust, the ratchet would be less complete but would still exist.

[xv] This is a bit of an overstatement to be sure. We will qualify it later. The point is that Congress itself is unable or unwilling to resist presidential assertions. This is not to say the same thing about individual congressmen or parties.

[xvi] The logic is the same for courts interpreting statutes and, in that case, it can be said illustrate a tension between what legality requires in a particular case and maintaining judicial powers in an area.

[xvii] For instance, PV "speculate that this trend [away from Madisonian checks and balances]" is due, in part, "to a general sense among the political elites that the erosion of separation of powers has not been a bad thing." (120)

[xviii] PV at 114.

[xix] The essence of the scandal was the joint-stock company's alleged bribing of government ministers and members of Parliament with stock in return for assistance in inflating the stocks' trading value. The company's value was based exclusively in the re-financing of public debt, as the Company re-financed ^10 million of short-term public debt by securing a 6% annuity on this sum from the government and by persuading the private holders of the debt to exchange their government bonds for Company shares. The Company thereupon attempted with initial success to inflate the value of its stock through bribery of governmental officials and general spreading of rumors of secret governmental support.

[xx] P.G.M. Dickson, *The Financial Revolution in England* at 33 (1967).

[xxi] For examples of this rhetoric, see Jonathan Swift, *History of the last Four years* (1713)("monied interest" opposed to "gentry of the kingdom"); Bolingbroke, *Reflections on the Present State of the Nation* (1749) ("Method of funding and trade of stock-jobbing" created "great companies" that were "the pretended servants, but in many respects the real masters of every administration"); etc, etc, etc, ad nauseam.

[xxii] PV at 115.

[xxiii] *Id.* at 119.

[xxiv] *Id.* at 120.

[xxv]Alexander Chalmers, 16 The General Biographical Dictionary: Containing An Historical And Critical Account Of The Lives And Writings Of The Most Eminent Persons In Every Nation, Particularly The British And Irish, at 106 (1812).

[xxvi] *See, e.g.,* Cato, Letter #5, The New-York Journal, November 22, 1787 ("the president possessed of the power, given him by this frame of government differs but very immaterially from the establishment of monarchy in Great Britain").

[xxvii] PV at 119.

[xxviii] As an example, consider the Democrats' struggle with Nixon over the latter's impoundment of funds, which resulted in the victory for the latter in the Congressional Control & Budget Impoundment Act of 1974, Pub. L. No. 93-344, 1974 U.S.C.C.A.N. (88 Stat.) 297 (codified as amended at 2 U.S.C.A. §§ 681-688). Ralph S. Abascal & John R. Kramer, Presidential Impoundment Part II: Judicial and Legislative Responses, 63 Geo. L.J. 149 (1975). Likewise, consider the Democrats' attack on Anne Gorsuch's interpretation of her authority under CERCLA, resulting in her resignation after a bipartisan investigation in the House of Representatives. Bruce A. Williams &

Albert R. Matheny, Democracy, Dialogue, and Environmental Disputes: The Contested Languages of Social Regulation 104-06 (1998).

[xxix] Notably, Article 48 of the Weimar Republic's constitution gave the President wide-ranging powers to rule by decree whenever the public order and security ("die öffentliche Sicherheit und Ordnung") was disturbed.

[xxx] Schmitt was a champion of a broad reading of Article 48 and counsel to the Reich when it asserted the Article 48 power against the Prussian government in the case of *Prussia v. Reich*, a decision that paved the way for a Nazi takeover of the Prussian government. *See* Peter C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism 106-116 (1997).

[xxxi] PV at 79-81.

[xxxii] PV at 110.

[xxxiii] Theodore Lowi, *The End of Liberalism* (1979).

[xxxiv] McNollGast, *Administrative Controls as Instruments of Political Control*, 3 JLEO 243 (1987).

[xxxv] John D. Huber & Charles R. Shipan, Deliberate Discretion: The Institutional Foundations of Bureaucratic Autonomy (2002).

[xxxvi] "The Secretary is authorized to establish the Troubled Asset Relief Program (or ''TARP'') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary."

[xxxvii] Auto Industry Financing and Restructuring Act, H.R. 7321, 110th Cong. § 10 (2008).

[xxxviii] Dingell: "[T]he automobile manufacturers face the most difficult conditions they've faced in decades. We need to do something to help unfreeze the credit markets that are hurting our industry. As I read the legislation, the Secretary has the authority to purchase from a motor vehicle finance company traditional car loans and mortgage-related paper, such as a home equity loan used to purchase cars or trucks. Is my interpretation correct?
Frank: I thank the gentleman, who comes to us with great authority here because of having chaired the committee for years and had some of this jurisdiction, and having been right when other people were resistant, he speaks with a great deal of credibility. And the answer to his question is, yes, it does require that there be consultation with the Chairman of the Federal Reserve, but the Treasury Secretary is empowered to do exactly that.
154 CONG. REC. H10374 (daily ed. Sept. 29, 2008) .

[xxxix] See Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and of Government Lending and Infrastructure Facilities, before the H. Comm. on Fin. Servs., 110th Cong. (2008) (statement of Sec. Paulson)(" The TARP was aimed at the financial system ... I believe that the auto companies fall outside of that purpose").

[xl] 12 USC 343. As added by act of July 21, 1932 (47 Stat. 715); and amended by acts of Aug. 23, 1935 (49 Stat. 714) and Dec. 19, 1991 (105 Stat. 2386): In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System, by the affirmative vote of not less than five members, may authorize any Federal reserve bank, during such periods as the said board may determine, at rates established in accordance with the provisions of section 14, subdivision (d), of this Act, to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange when such notes, drafts, and bills of exchange are indorsed or otherwise secured to the satisfaction of the Federal Reserve bank."

[xli] PV at 59.

[xlii] This assertion, of course, assumes that the majority party, not the median member, controls committees and floor colloquies. This contention is the topic of a lively debate among political scientists that we will not attempt to summarize here.

[xliii] *See* Christopher S. Kelley & Bryan W. Marshall, *Going it Alone: The Politics of Signing Statements from Reagan to Bush II*, 91 Soc. Sci. Q. 168 (2010).

[xliv] David King, *Turf Wars: How Congressional Committees Claim Jurisdiction* at pp 28-29.