

ARTICLES

The Unbundled Executive*Christopher R. Berry*[†] & *Jacob E. Gersen*^{††}

INTRODUCTION

That the US Constitution establishes a single executive is incontrovertible as a historical matter;¹ a plural executive was debated and rejected.² As a matter of constitutional theory and institutional design, however, this conclusion is far from inevitable and likely incorrect. The convention era debates about single versus plural executives exhibited fundamental confusion about the relationship between numerosity in the executive, the structure of executive authority, and core democratic values like accountability, coordination, and uniformity. This confusion is understandable given the extraordinary pedigree of single executives in constitutional theory, including but not limited to Locke,³ Blackstone,⁴

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¹ US Const Art II, § 1 (“The executive Power shall be vested in a President of the United States of America.”) (emphasis added).

² For example, Eldridge Gerry favored annexing a council to the executive. In general, participants in the Federal Convention were concerned that a single executive would trend towards monarchy but that a plural executive would lack sufficient energy and authority. See *Records of the Federal Convention*, in Philip B. Kurland and Ralph Lerner, eds, 3 *The Founders' Constitution* 491–95 (Chicago 1987).

³ See John Locke, *Second Treatise of Civil Government* § 144 at 72 (Blackwell 1946) (J.W. Gough, ed). See also Oliver Ellsworth, *The Landholder*, VI, in Paul Leicester Ford, ed, *Essays on the Constitution* 161, 163 (Historical Printing 1892) (“[T]he supreme executive should be one person, and unfettered otherwise than by the laws he is to execute.”).

⁴ See William Blackstone, 1 *Commentaries on the Laws of England* *242–43 (Chicago 1979).

Hamilton,⁵ and Montesquieu,⁶ and the historical fact that most plural executive regimes were ineffectual councils. But the conventional justifications for rejecting plural executives are powerful weapons against only some very specific forms of plural executive regimes. Unfortunately, this early confusion has been replicated over and over in more recent debates about the unitary executive and the scope of executive authority.

This Article articulates and analyzes the possibility of what we call the *unbundled executive*. The unbundled executive is a plural executive regime in which discrete authority is taken from the president and given exclusively to a directly elected executive official. Imagine a directly elected war executive, education executive, or agriculture executive. We show that a partially unbundled executive is likely to perform better than the completely bundled executive structure attendant in the single executive regime. By better, we mean that the standard arguments used to justify a single strong unitary executive in the United States—accountability, energy, uniformity, coordination, and so on—actually justify a specific type of plural executive, not the single executive structure favored in Article II. Our thesis then is both unusual and controversial in that there has been virtually no serious theoretical challenge to the single executive structure for more than a century. The entire unitary executive debate assumes a cornerstone that we suggest is incorrect and consequential.

The unbundled executive proposal has an air of absurdity to it with respect to federal law, but this basic structure is an existing feature of legions of state and local governments in the United States. Most states directly elect state attorneys general—as well as numerous other executive officers⁷—and dividing executive authority does not usually produce any of the pathologies that critics of divided executives suggest.⁸ Prohibiting an executive from appointing cabinet mem-

⁵ See Federalist 70 (Hamilton), in *The Federalist* 471, 471 (Wesleyan 1961) (J.E. Cooke, ed) (arguing that the energy in a single executive is critical for security and steady implementation of laws).

⁶ See Baron de Montesquieu, *The Spirit of Laws* 156 (Hafner 1949) (Thomas Nugent, trans) (“The executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many.”).

⁷ See William N. Thompson, *Should We Elect or Appoint State Government Executives? Some New Data Concerning State Attorneys General*, 8 *Midwest Rev Pub Admin* 17, 17 (1974) (noting that attorneys general are elected in forty-two states and that many other state-level executives are elected).

⁸ See, for example, Montesquieu, *The Spirit of Laws* at 156 (cited in note 6). See also William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *Yale L J* 2446, 2453–55 (2006) (discussing interaction between elected attorneys generals and governors and observing that “debilitating conflict” does not occur). Marshall’s work is probably the closest to our own.

bers connotes a debilitating lack of coordination and efficiency. Yet, most state and local governments, whatever their faults, do not appear to be debilitated in this way. In reality, the closest empirical approximations to the unbundled executive in state and local governments seem to produce systematic shifts in public policy outcomes towards public preferences.⁹ Unbundling executive authority enhances democratic accountability and government performance; the plural executive regime does not cease to function.

This empirical regularity that unbundled executives produce political outcomes closer to public preferences has a natural and intuitive foundation in legal theory. An unbundled executive systematically reduces agency problems in representative government by enhancing accountability to national citizen constituencies. Unbundling executive authority reduces the risk of nonuniform implementation of federal law. And the unbundled executive would be as energetic and strong as a bundled executive. Put simply, the unbundled executive performs better along the very dimensions that are typically used to justify the single, strong, unitary executive structure that Article II articulates;¹⁰ that is, the unbundled executive outperforms the single unitary executive on its own turf.

Unbundling government authority does, however, also generate concrete costs, which we identify and discuss. We show how and why there can be too much unbundling of government authority. These costs, however, must be traded off against the gains in executive performance that our system would generate. While we think it implausible that executive authority should be entirely unbundled such that hundreds of executives would be directly elected, it is nearly as implausible that a single perfectly bundled executive represents the optimal executive structure. Given that this is, in fact, the current regime, some rethinking of executive authority is surely in order.

Modern legal theory is replete with detailed and careful analysis of the costs and benefits of centralizing or fragmenting authority *across* branches. The dispersion of power among the branches of government is a key organizing principle sounded loudly in the Federalist Papers,¹¹ which also echoes throughout both more ancient and more modern

⁹ See Christopher R. Berry and Jacob E. Gersen, *Fiscal Consequences of Electoral Institutions*, 52 J L & Econ (forthcoming 2009).

¹⁰ See *Hamdi v Rumsfeld*, 542 US 507, 580–81 (2004) (Thomas dissenting) (“The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains.”); *Clinton v Jones*, 520 US 681, 712–13 (1997) (Breyer concurring) (explaining that Article II seeks to focus all executive responsibility in a single person).

¹¹ See, for example, Federalist 48 (Madison), in *The Federalist* 332, 335 (cited in note 5).

constitutional theory.¹² There is, however, a comparative dearth of scholarship analyzing the internal allocation of authority within branches,¹³ particularly the executive branch.¹⁴ This is unfortunate given that the internal structure of power within branches is likely to produce impacts on democratic governance that are at least as severe as cross-branch distributions.

To the extent that this theoretical space has been occupied at all in recent years, it has been largely the unitary executive debate that occupied this terrain.¹⁵ Many pages in the law reviews and Supreme Court reporters have been filled with fights over what the Constitution permits and requires on this front;¹⁶ must the president have strong, weak, or complete hierarchical control over all administrative officials?¹⁷ What is the permissible structure that Congress may estab-

¹² Compare Montesquieu, *The Spirit of Laws* at 152 (cited in note 6) (“There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, [that of the legislature,] that of executing the public resolutions, and of trying the causes of individuals.”), with Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 S Ct Rev 225, 236 (“The substantive interpretation of the constitutional principle of separation of powers would reduce to a single, simple rule: Congress may not create a Fourth Branch of the federal government.”).

¹³ There is, of course, a significant literature on the allocation of authority within the US Congress. See generally Kenneth Shepsle and Barry Weingast, *Positive Theories of Congressional Institutions* (Michigan 1995).

¹⁴ This idea is related to (but also distinct from) recent work emphasizing internal separation of powers as an organizing principle for the executive. See Neil Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 Yale L J 2314, 2318 (2006) (arguing that separation of authority within executive departments could provide a check on the aggrandizement of arbitrary executive power). There is, of course, no shortage of work on the importance of bicameralism in this regard. See, for example, Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 Intl Rev L & Econ 145, 149 (1992) (clarifying conditions under which multiple decisions produce superior outcomes in the legislature). See also William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation 75–77*, 383–91 (West 2001).

¹⁵ See, for example, Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 Iowa L Rev 601, 730–31 (2005); Robert V. Percival, *Presidential Management of the Administrative State: The Not-so-Unitary Executive*, 51 Duke L J 963, 966 (2001); Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv L Rev 1153, 1208–13 (1992). See also note 10.

¹⁶ See, for example, *Clinton*, 520 US at 711–13 (Breyer concurring) (arguing that the president cannot constitutionally delegate “ultimate responsibility or the active obligation to supervise that goes with it”); *Morrison v Olson*, 487 US 654, 660 (1988) (holding that the independent counsel provisions of the Ethics in Government Act do not impermissibly interfere with the separation of powers established by the Constitution); *Myers v United States*, 272 US 52, 176 (1926) (recounting historical debates over the scope of executive power and concluding that the president does not have the power to remove inferior officers).

¹⁷ See, for example, Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U Chi L Rev 1, 15–16 (1995); Geoffrey P. Miller, *Independent Agencies*, 1986 S Ct Rev 41, 45; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum L Rev 573 (1984).

lish for relations between the president and administrative officials?¹⁸ May Congress restrict the president's ability to remove an officer appointed by the president? Does the president have the authority to negate the judgments of any and all administrative officials?¹⁹ Could the president unilaterally substitute her own judgment for that of any administrative official?²⁰

On one view, independent agencies—those headed by officials who cannot be removed by the president without good cause—are legally uncontroversial; on the other, they are an abomination clearly inconsistent with the explicit constitutional structure.²¹ This is a good and important debate as far as it goes; but as a matter of constitutional possibility, it is meager. Constitutional theory could be a bit more ambitious.

In the remainder of this Article, we articulate and defend our theory of the unbundled executive. We survey the theoretical debates about structuring executive authority and show how and why the unbundled executive performs better than a single unitary executive. Although our discussion is mainly conceptual, we draw on empirical evidence about how unbundled authority affects public policy whenever relevant. We clarify the relation between the unbundled execu-

¹⁸ Roughly speaking, this debate has two fault lines, one historical and one normative. There is disagreement about the historical question of whether the Founders intended a strong unitary executive. Compare Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L J 541 (1994) (yes), Calabresi and Rhodes, 105 Harv L Rev at 1191–92 (cited in note 15) (yes), with Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 2 (1994) (no). In addition to this historical question, there is a separate normative question about whether a strong unitary executive is desirable on pragmatic or consequentialist grounds. Compare Lessig and Sunstein, 94 Colum L Rev at 2 (desirable), with Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L J 1725, 1810–36 (1996) (undesirable). For variants of the argument that Article II's Vesting Clause settles the question of plural versus single executive but not the question of strong versus weak hierarchical control, see Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Fall of the Reagan Administration's Theory of the Unitary Executive*, 57 Geo Wash L Rev 627, 634 (1989) (suggesting that the unitary executive theory is a myth generated for political reasons); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 Geo Wash L Rev 506, 529–31 (1989) (arguing that the text of the Constitution does not shed sufficient light on the issue of a strong versus weak unitary executive); Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 Tenn L Rev 757, 762 (1979) (comparing theories about the hierarchy of congressional and presidential powers).

¹⁹ See, for example, Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 Colum L Rev 263 (2006) (arguing that the president has no direct authority to administer laws when Congress grants power to executive officers subject to presidential control unless the statute grants the authority to the president by name).

²⁰ See Percival, 51 Duke L J at 966 (cited in note 15).

²¹ Compare Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U Chi L Rev 123 (1994) (arguing that the growth of national government makes arguments for a strongly unitary executive less powerful), Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 Harv L Rev 421, 447 (1987), with Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv L Rev 1231 (1994).

tive and both current and historical debates in constitutional law. We also revisit the relevant debates about plural executive structures. Our work can, but need not, be read as an attack on many of the pragmatic justifications for a strong unitary executive. As such, the work is directly relevant to ongoing disputes about whether Article II should be interpreted to require a unitary executive structure in addition to a single executive structure. These questions of numerosity and unitariness have been treated almost identically in the literature; in reality, they are conceptually distinct.

To be clear at the outset, we are adamantly not arguing that the Constitution does, in fact, establish a plural unbundled executive regime. But the sky might not fall if it did. Systems of plural or divided executives have long been ridiculed in constitutional theory. If the unbundling story is even plausible, there is a significant set of unappreciated benefits to some plural executive regimes. Although we estimate the probability of institutional reform in the United States to be approximately zero, it would not be nearly as perverse as it first appears to design an unbundled executive. If so, taking steps within the given constitutional order to bring executive authority closer to the unbundled executive ideal could make for a better fit between institutional performance and constitutional ideals.

I. UNBUNDLING GOVERNMENT AUTHORITY

This Part provides a general conceptual overview of the unbundled executive. We explain the dynamics of unbundling authority in government, emphasizing the ways in which unbundled authority often enhances democratic accountability. The link between issue unbundling and democratic theory was pioneered by Timothy Besley and Stephen Coate, who initially argued that the unbundling intuition explains differences in the performance of elected versus appointed regulators and the power of citizen initiatives.²² We then provide some empirical institutional details about the extent of executive unbundling in state and local governments. Although our goals in this Article are mainly conceptual rather than empirical, unbundled authority is consistently associated with meaningful differences in policy outcomes in state and local government. The degree of unbundling in government matters not just in theory, but also in practice.

²² Timothy Besley and Stephen Coate, *Elected versus Appointed Regulators: Theory and Evidence*, 1 J Eur Econ Assn 1176 (2003); Timothy Besley and Stephen Coate, *Issue Unbundling via Citizens' Initiatives* (unpublished manuscript, 2000) (suggesting that issue bundling explains the relevance of direct democracy in a representative system where candidates must already compete for the right to control policy). We owe an obvious intellectual debt to Besley and Coate, as we have built upon their work here and elsewhere.

A. The Unbundled Executive in Theory

One of the obvious defining features of the US Presidency is the national electoral constituency.²³ The institutional design choice to make the president directly elected rather than selected by the legislature largely distinguishes the presidential system from the parliamentary system.²⁴ Direct electoral accountability to a national constituency is critical.²⁵ Indeed, elections are often said to be the cornerstone of constitutional democracy.²⁶

Of course, any idealized view of elections as translating popular preferences into public policy has long since faltered.²⁷ Voter ignorance or information asymmetries often undermine the use of elections to control officials.²⁸ The very notion of popular will to be translated into policy by officials is either incoherent²⁹ or nonexistent.³⁰ Public choice theory suggests a plethora of reasons to be dubious of most facets of the political process, including elections.³¹

Chief among these is that the relationships between voters and politicians, be they executives or legislators, are riddled with agency

²³ Compare Jide Nzelbe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L Rev 1217, 1231–43 (2006) (arguing that the Framers did not think the president would better represent nationalist interests than Congress); James W. Ceaser, *Presidential Selection: Theory and Development* 47, 64–75 (Princeton 1979) (describing the Framers' vision of executive power).

²⁴ See Alan Siaroff, *Varieties of Parliamentarism in the Advanced Industrial Democracies*, 24 Intl Polit Sci Rev 445, 446–47 (2003); Bruce Ackerman, *The New Separation of Powers*, 113 Harv L Rev 633, 664–65 (2000); Alfred Stepan and Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism*, 46 World Politics 1, 3–4 (1993).

²⁵ See Dennis M. Simon, *Presidents, Governors, and Electoral Accountability*, 51 J Politics 286, 286–87 (1989) (“According to this perspective, electoral accountability is imposed on a systemic or national basis through voting which is *presidency-centered, retrospective, and result-based.*”).

²⁶ See Jane Mansbridge, *Rethinking Representation*, 97 Am Polit Sci Rev 515, 516–25 (2003) (developing models of representative democracy). See also generally Robert A. Dahl, *Democracy and Its Critics* (Yale 1989); Amartya Sen, *Poverty and Famines* (Oxford 1983).

²⁷ See, for example, Torsten Persson and Guido Tabellini, *Political Economics: Explaining Economic Policy* (MIT 2000) (providing a masterful survey and synthesis of the contemporary literature on democratic policymaking).

²⁸ See R. Douglas Arnold, *Can Inattentive Citizens Control Their Representatives?*, in Lawrence C. Dodd and Bruce I. Oppenheimer, eds, *Congress Reconsidered* 401, 404–06 (CQ Press 5th ed 1993); Anthony Downs, *An Economic Theory of Democracy* 219 (Harper & Row 1957); Arthur Lupia and Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* 79 (Cambridge 1998).

²⁹ See generally Angus Campbell, et al, *The American Voter* (Wiley 1960) (documenting widespread lack of information and opinions about politics).

³⁰ See John R. Zaller, *The Nature and Origins of Mass Opinion* 311–13 (Cambridge 1992) (finding that public opinion is created by officials and elites rather than preexisting in voters); William Riker, *Liberalism against Populism* 136 (Freeman 1982) (explaining that there is “an unresolvable tension between logicity and fairness” that prevents discovery of a true majority preference through electoral voting mechanisms).

³¹ See generally Dennis C. Mueller, *Public Choice III* (Cambridge 2003).

problems.³² Because politicians will often have information and expertise that voters lack, politicians will have a significant degree of discretion. If voter information is worse than politician information, voters will often not be able to tell whether a policy that diverges from their own preferences diverges for good reasons (politician expertise) or bad reasons (divergent legislative preferences or self-interest). The agenda control exercised by elected officials may also allow politicians to enact policy that systematically diverges from voter preferences.³³ So long as representatives propose a new policy that is far from voter preferences but less far than the status quo ante, voters may not be able to obtain desired policy outcomes. Elections help manage or mitigate these agency problems because elections provide a mechanism for voters to select representatives who will take desirable actions,³⁴ sanction politicians who fail to enact policy consistent with voter preferences,³⁵ or both.³⁶

³² Seminal contributions to the literature on agency problems in politics include Robert Barro, *The Control of Politicians: An Economic Model*, 14 *Pub Choice* 19, 22–26 (1973) (explaining that in the absence of electoral consequences, a politician will seek to maximize his own utility), and John Ferejohn, *Incumbent Performance and Electoral Control*, 50 *Pub Choice* 5, 5–26 (1986) (arguing that voters should pay more attention to actual performance than to campaign promises, and presenting a model by which to do so).

³³ See Thomas Romer and Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 *Pub Choice* 27, 27–28 (1978) (“When the setter has monopoly power, voters are forced to choose between the setter’s proposal or the status quo or fallback position.”).

³⁴ Gautam Gowrisankaran, Matthew F. Mitchell, and Andrea Moro, *Electoral Design and Voter Welfare from the U.S. Senate: Evidence from a Dynamic Selection Model*, 11 *Rev Econ Dynamics* 1, 2 (2008); Sanford C. Gordon, Gregory A. Huber, and Dimitri Landa, *Challenger Entry and Voter Learning*, 101 *Am Polit Sci Rev* 303 (2007); Scott Ashworth and Ethan Bueno de Mesquita, *Delivering the Goods: Legislative Particularism in Different Electoral and Institutional Settings*, 68 *J Pol* 168, 169 (2006); James Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance*, in Adam Przeworski, Susan C. Stokes, and Bernard Manin, eds, *Democracy, Accountability, and Representation* 55, 82 (Cambridge 1999) (suggesting that, while elections serve both selection and sanctioning purposes, it may be more reasonable for voters to focus on using elections as a method of selecting good candidates rather than as a sanctioning mechanism); John Zaller, *Politicians as Prize Fighters: Electoral Selection and the Incumbency Advantage*, in John G. Geer, ed, *Politicians and Party Politics* 125–86 (Johns Hopkins 1998).

³⁵ Torsten Persson, Gerard Roland, and Guido Tabellini, *Separation of Powers and Political Accountability*, 112 *Q J Econ* 1163, 1166 (1997); Paul Seabright, *Accountability and Decentralisation in Government: An Incomplete Contracts Model*, 40 *Eur Econ Rev* 61, 61–89 (1996); David Austen-Smith and Jeffrey Banks, *Electoral Accountability and Incumbency*, in Peter C. Ordeshook, ed, *Models of Strategic Choice in Politics* 121, 122 (Michigan 1989); Ferejohn, 50 *Pub Choice* at 22–23 (cited in note 32); Barro, 14 *Pub Choice* at 26–32 (cited in note 32).

³⁶ Scott Ashworth and Ethan Bueno de Mesquita, *Electoral Selection, Strategic Challenger Entry, and the Incumbency Advantage*, 70 *J Pol* (forthcoming 2008); Timothy Besley and Michael Smart, *Fiscal Restraints and Voter Welfare*, 9 *J Pub Econ* 755 (2007); Timothy Besley, *Principled Agents? The Political Economy of Good Government* (Oxford 2006); Scott Ashworth, *Reputational Dynamics and Political Careers*, 21 *J L, Econ, & Org* 441 (2005); Brandice Canes-Wrone, Michael C. Herron, and Kenneth W. Shotts, *Leadership and Pandering: A Theory of Executive*

With respect to a democratic control of a national executive, elections are clearly an imperfect mechanism. Presidential elections every two years would provide greater public accountability than elections every four but would also generate greater participation costs for the public. The extent of slack—divergence between public preferences and political decisions or behavior—varies as a function of electoral institutions. Our conceptual model holds constant electoral frequency and instead restructures the executive authority that is regulated by elections. Specifically, we suggest there are many benefits from unbundling executive authority.³⁷

What would an unbundled executive look like? Suppose in a given jurisdiction there are j policy dimensions. On any given dimension, the executive can choose either a special interest–friendly policy or a voter-friendly policy. A majority of voters prefers the voter-friendly policy on each dimension. However, there is an interest group in each domain that prefers the special interest policy, and the group will provide a private benefit to the executive if the special interest’s preferred policy is enacted. This benefit may be a campaign contribution that the executive can use to improve her lot at election time or a bribe that can be used for private consumption. The executive would like to receive the side payments from the interest groups, but only if doing so will not cost her the next election.

Suppose there is only one single elected executive who has responsibility for all j policy dimensions. This is the “general purpose” executive familiar in the US context; the single executive will be ascribed all the blame and all the credit for executive policy decisions, and rightly so. But because elections require voters to make a single elect-reject decision, the crudeness of the electoral sanction is a weak way for voters to control the single executive on any particular policy dimension. Voters must make a decision on a bundle of policy dimensions. As a result, the official can enact special interest–friendly policies in some dimensions, as long as she enacts voter-friendly policies on a sufficient

Policymaking, 45 Am J Polit Sci 532 (2001); Jeffrey S. Banks and Rangarjan Sundaram, *Optimal Retention in Agency Problems*, 82 J Econ Theory 293, 294 (1998).

³⁷ See Besley and Coate, 1 J Eur Econ Assn at 1184–85 (cited in note 22) (explaining that direct elections will lead to more pro-consumer regulatory regimes); Besley and Coate, *Issue Unbundling via Citizens’ Initiatives* (cited in note 22). Our own revisions and applications are presented in Berry and Gersen, *Fiscal Consequences* (cited in note 9). For other work on elected versus appointed officials, see generally Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary* (The University of Chicago Law & Economics, Olin Working Paper No 357, Aug 2007) (using independence, productivity, and opinion quality to compare and evaluate appointed and elected judges); Gregory A. Huber and Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 Am J Polit Sci 247 (2004) (evaluating the effects of elections on the behavior of trial judges in sentencing proceedings).

number of dimensions to secure reelection. For general purpose executives, elections will not completely mitigate agency problems, though naturally they produce more policies that are closer to majority-voter preferences than an executive system without elections.

Contrast the general purpose (bundled) executive with the possibility of “special purpose” executives. Suppose there are only three important policy dimensions about which the public cares. Rather than elect one executive to oversee all of them, the jurisdiction elects three executives, each of whom is responsible only for one of the policies. When one executive has exclusive responsibility for providing only a single policy—for example, water or sanitation or defense—citizens need not aggregate judgments across multiple policy issues at election time. A vote for or against the special purpose executive summarizes voter preferences on a single policy dimension. An executive who enacts an interest group-friendly policy in her single domain will not be able to placate voters with voter-friendly policies on other issues.

The above discussion emphasizes the desirable incentives for elected officials produced by the unbundled executive. The unbundled executive also produces beneficial selection effects. The selection problem for voter is to identify a “good type” executive, typically meaning a mix of capability, expertise, experience, judgment, and so on. Candidate quality, however, may vary dimension by dimension. Candidates who would make for good executives during war may not be executives who will be good economy executives. In the single completely bundled regime, voters must select one candidate who is either an average good type or who is a good type on some dimensions, but less capable on others. In the unbundled executive regime, voters are free to select a good environmental type as the environment executive while selecting a good military type as the war executive. The unbundled executive allows voters to better match expertise, ability, and other characteristics that make for government performance to the underlying jurisdiction of government offices.

Specialized elected executives therefore make elections more effective mechanisms for selecting and controlling officials; the greater the unbundling, the greater the mitigation of agency problems in government.³⁸ In short, an unbundled executive is more electorally accountable than a single executive.

³⁸ See generally Robert D. Cooter, *The Strategic Constitution* 158–61 (Princeton 2000). The logic of issue unbundling has been applied sporadically in other settings. For example, one paper provides empirical support for the issue unbundling argument by contrasting elected and appointed utility regulators. See Besley and Coate, 1 J Eur Econ Assn 1176 (cited in note 22). Using panel data for US states, they find that elected regulators systematically enact more consumer-friendly policies than appointed regulators. See *id.* at 1191. The unbundling intuition has also been

If so, why not design an executive structure with hundreds of directly elected executives? There is a theoretical limit to the benefits that can be achieved by executive unbundling because there are costs produced by increasing the number of elected executives.³⁹ Consider two cost variants: monitoring costs and coordination costs. The addition of new elected executives produces an increase in monitoring costs. Each additional officer added to the ballot requires additional work on the part of voters. As the number of elected executives grows, the costs to citizens of monitoring a legion of public officials increases and may outweigh any marginal benefits associated with issue unbundling.

Although monitoring costs might entail many factors, we focus on two components. The first is a function of the number of issues for which an executive provides policy. A voter has to determine whether each policy has been set at the level she prefers. This first component is a function of the number of aggregate policy dimensions and (importantly) largely independent from the number of elected executives. The second is a function of the number of elected executives rather than the number of overall issues. For each executive, the citizen must be able to identify the incumbent and assess her responsibility for a particular service or services.

Consider a random voter at the polls. On the ballot, she sees a list of offices, and for each office a list of names. The ballot often does not identify the incumbent, and in most cases it does not even list a politi-

used to explain one of the benefits of citizen initiatives. See John G. Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 103 J Pol Econ 587, 590 (1995). For an extension of the implications of the direct democracy argument for the executive branch, see John G. Matsusaka, *Direct Democracy and the Executive Branch* *23–24 (unpublished manuscript, 2007), available online at http://www-rcf.usc.edu/~matsusak/Papers/Matsusaka_DD_Executive_2007.pdf (visited Aug 29, 2008). By unbundling a single issue from a legislative logroll—be it budgetary or policy—voters are thought to be able to better ensure outcomes close to majoritarian preferences for the given policy dimension. *Id.* at *24. This same theme is at play in the scattered assortment of justifications given for single-subject limitations in state constitutions, for instance in Colorado and Florida. See Robert D. Cooter and Michael D. Gilbert, *Chaos, Direct Democracy and the Single Subject Rule* *11 (Berkeley Program in Law & Economics, Working Paper No 183, Feb 2006), online at <http://repositories.cdlib.org/blewp/art183> (visited Aug 29, 2008); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U Pitt L Rev 803, 812–21 (2006) (setting forth the history of and principal justifications for the single-subject rule); Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 Harv J on Legis 103, 114–16 (2001) (explaining the purpose of single-subject limitations in state constitutions). The single-subject limitation is supposed to preclude logrolls in which policies favored only by a minority of politicians or voters are enacted together. The logic of unbundling then is general, and we are agnostic about whether unbundling in any particular instance is good or bad. In the single-subject context, logrolls could easily be welfare enhancing so long as the value to the minority receiving benefits along each dimension is high enough. The point is merely that the idea of unbundling has been usefully applied in a handful of other legal and policy contexts.

³⁹ Berry and Gersen, *Fiscal Consequences* at 6–7 (cited in note 9).

cal party affiliation.⁴⁰ At a minimum, a voter must be able to identify the incumbent for each office and match the incumbent to an assessment of the service(s) performed by the office in question. Where there is only one general purpose executive, all services can be attributed to one official. The voter needs only to know which candidate is the incumbent and to form an overall assessment of the incumbent's performance. Where there are many offices, the task becomes considerably more challenging. In practice, it is not at all unusual to find two dozen or more elected offices on a local government ballot. We use the term monitoring costs to denote the total effort required to evaluate all services in a jurisdiction and match them to the relevant incumbent officials.

In addition to monitoring costs, unbundling executive authority also produces coordination costs. When two similar policies are produced by different executive authorities without coordination, these policies might conflict or at least not work as well in tandem as might be the case if the policies were produced by a unified policymaker. For policies that are jointly produced by two specialized elected offices, these coordination costs will be most severe.

Some unbundling of executive authority should reduce slack, making policy more democratic. Too much unbundling could actually increase slack, allowing politicians to implement personal rather than public preferences. As monitoring costs increase, each elected executive might receive less scrutiny from voters. Officials governing specialized domains could then adopt special interest–friendly policies without suffering electoral reprisals. Similarly, for certain subsets of policies, coordination costs could swamp democratic benefits.

When executive authority is unbundled and given solely to a specialized executive directly elected by the public, this is the purest form of executive unbundling. The general purpose executive now has responsibility for $j - 1$ policy dimensions and the special purpose official responsibility for one. There are, however, intermediate variants, involving different appointment and removal schemes that produce more complicated tradeoffs.

Consider first a straightforward theoretical example. Suppose a specialized environment executive is appointed by a general purpose executive. Environmental issues are partially unbundled in the sense that one official exists who primarily oversees environmental policy.

⁴⁰ About three-quarters of local elections are nonpartisan. Brian F. Schaffner, Matthew Streb, and Gerald Wright, *Teams without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 *Polit Rsrch Q* 7, 7 (2001), quoting Victor S. DeSantis and Tari Renner, *Contemporary Patterns and Trends in Municipal Government Structure*, in *The Municipal Year Book 1991* (ICMA 1991).

However, because the choices of who to appoint and how to regulate and when to remove are still maintained by the general purpose executive, environmental issues are not perfectly unbundled. Part of what makes the unbundled executive intuition attractive is that there is one executive with exclusive authority to make decisions about one policy dimension. To the extent that the authority to make final decisions is somewhat shared, the crispness of the pure scheme wanes.

The general purpose executive can obviously be disciplined by voters if, for example, she selects a bad environment executive. But the general purpose executive would still be able to appoint poor specialized executives on some dimensions, so long as policy was good enough on a majority of dimensions. If the environment executive is directly elected, the reelection vote only need summarize approval on one policy dimension. When executive authority is parceled out to officials who are not directly elected, things are significantly more unwieldy. Net effects depend on whether the authority is exclusive or overlapping and whether the appointment is vested in the discretion of only one institution or several.

Now consider the unwieldy empirical reality. The range of mechanisms for selecting executive officials in the states is quite extensive.⁴¹ When appointment power is given to the governor, sometimes no approval from another political institution is needed; sometimes the senate must approve; sometimes both houses of the legislature must approve; sometimes either house can approve; sometimes a board or council must approve; sometimes only a legislative committee must do so. For certain offices, an agency head appoints without approval from another institution; sometimes the governor must approve; sometimes the senate or a legislative institution must do so. For other offices, a board or council appoints, subject to approval by the governor and/or the senate. For still other offices, the legislature directly appoints administrative officials.

These different appointment schemes also produce different degrees of unbundling and therefore of public control over policy. If direct election of a special purpose executive official results in the most unbundling, appointment of an official by one institution—be it the governor, the legislature, or a state board or commission—with the consent of another institution, where policy jurisdiction is shared, constitutes the least unbundling. In this case, not only can the appointed official not be directly sanctioned by the public, but it is not clear

⁴¹ Any volume of the *Book of the States* contains multiple examples. See, for example, 39 *Book of the States* 181 (Council of State Governments 2007) (providing an overview of selection methods for state administrative officials in the fifty states as well as in American Samoa, Guam, the Northern Mariana Islands, and the US Virgin Islands).

which institution should be punished for a bad appointment. Standard models of appointments emphasize that both the nominating and the consenting institution will affect the selection and approval of officers.⁴² Without the ability to blame or credit a single elected official, public sanctions will be less effective. Moreover, when the appointed official shares authority for policy implementation with other officials or institutions, it is difficult to know who to blame for failure or to credit for success. Appointment of executive officials with overlapping jurisdiction may be desirable for other reasons, but there is little in the way of unbundling benefits. Whereas unbundling by independent election *clarifies* which public officials can be held responsible for which public policies, the hybrid appointment schemes *muddle* responsibility. Indirect appointment schemes are less effective for controlling moral hazard in politics.⁴³ Between these two extreme positions fall officials who are appointed by a single elected official (usually the governor) with exclusive policy authority (more unbundling) and officials who are appointed with the consent of multiple institutions with exclusive policy authority (less unbundling).

Democratic accountability or responsiveness is only one design consideration among many. However, it is a particularly prominent one in constitutional design. On this dimension of comparison, the unbundled executive should outperform the single executive. The unbundled executive produces greater accountability in the executive than the single completely bundled executive. We turn to other design considerations momentarily; however, we pause briefly to show that the unbundled executive is not merely a construct of scholarly imagination. Variants of unbundled executive regimes do exist in practice.

⁴² See generally Nolan McCarty, *The Appointments Dilemma*, 48 Am J Polit Sci 413 (2004) (developing a model that demonstrates the problems arising from a system that divides appointments from responsibility); David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J L, Econ, & Org 438 (2001); Timothy P. Nokken and Brian R. Sala, *Confirmation Dynamics: A Model of Presidential Appointments to Independent Agencies*, 12 J Theoretical Polit 91 (2000) (presenting an agenda control model to explain how a president may capture an independent agency through appointments or how the Senate may prevent the president from doing so); Susan K. Snyder and Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J L, Econ, & Org 269 (2000) (applying a model to NLRB appointments and finding that both the president and the Senate influence board policy); Nolan McCarty and Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 Am J Polit Sci 1122 (1999) (“[I]nefficiency arises because the executive chooses an agent whose preferences diverge too much from those of the legislature. The legislature then responds by reducing the resources available to the agency.”).

⁴³ See Persson, Roland, and Tabellini, 112 Q J Econ at 1167 (cited in note 35) (“Direct control by the voters keeps the executive more accountable, as it minimizes the danger of collusion between the legislature and the executive over reappointment of the latter.”).

B. The Unbundled Executive in Practice

The federal government does not rely on an unbundled executive structure, but state and local governments certainly do.⁴⁴ Indeed, partial unbundling of executive authority is the norm rather than an exception in virtually all nonnational government units in the United States, of which there are more than eighty thousand. Authority that the governor or mayor would otherwise exercise is frequently given to a specific state or local officer. Often these officers are directly elected by the public; other times they are elected by the legislature; other times still, they are appointed by another state official. These arrangements are only approximations of the unbundled executive ideal because there is residual responsibility or authority for the policy in the general purpose executive. Still, as executive authority is even partially unbundled and primary responsibility for specific policy domains is given to a directly elected official, policy outcomes should move closer to public preferences along that dimension. Both the general purpose and the special purpose executives should be more responsive to public preferences.

To give a sense of the institutional variation which we are describing, Table 1 presents aggregate measures from the Census of Government, revealing that there were nearly 19,000 elected officials in state governments as of 1992. Of these, members of state legislatures represented roughly 7,500 and members of other elected state boards accounted for

⁴⁴ The most comprehensive survey of the impact of state political and legal institutions on politics and policy is Timothy Besley and Anne Case, *Political Institutions and Policy Choices: Evidence from the United States*, 41 J Econ Lit 7 (2003). See, for example, Alessandro Lizzeri and Nicola Persico, *The Provision of Public Goods under Alternative Electoral Incentives*, 91 Am Econ Rev 225 (2001) (assessing the effects of different electoral systems on the provision of public goods); James M. Poterba, *Budget Institutions and Fiscal Policy in the U.S. States*, 86 Am Econ Rev 395 (1996); Timothy Besley and Anne Case, *Does Electoral Accountability Affect Economic Policy Choices? Evidence from Gubernatorial Term Limits*, 110 Q J Econ 769 (1995); Rigard G. Niemi, Harold W. Stanley, and Ronald J. Vogel, *State Economies and State Taxes: Do Voters Hold Governors Accountable?*, 39 Am J Polit Sci 936 (1995) (finding that a poor state economy, an increase in taxes, and poor personal finances cause voters to vote against incumbents); James E. Alt and Robert C. Lowry, *Divided Government, Fiscal Institutions, and Budget Deficits: Evidence from the States*, 88 Am Polit Sci Rev 811 (1994) (discussing the effects of partisan division of power on state budgets); James M. Poterba, *State Responses to Fiscal Crises: The Effects of Budgetary Institutions and Politics*, 102 J Polit Econ 799 (1994) (suggesting that state fiscal institutions and political environments affect state budget deficits); John E. Chubb, *Institutions, the Economy, and the Dynamics of State Elections*, 82 Am Polit Sci Rev 133 (1988) (evaluating the electoral consequences of increasing institutionalization and importance of state governments). See also G. Bingham Powell, Jr. and Guy D. Whitten, *A Cross-national Analysis of Economic Voting: Taking Account of the Political Context*, 37 Am J Polit Sci 391 (1993); Arend Lijphart, *The Political Consequences of Electoral Laws, 1945–85*, 84 Am Polit Sci Rev 481 (1990) (evaluating the effects of electoral systems on proportionality and multipartism across countries with different types of electoral systems).

another 1,300. The majority of state officials fell into the *other* category, comprising those individual elected offices outside any board or legislative body. The bulk of these are unbundled executives.

Interestingly, the number of these independent elected officials grew spectacularly from 1967 to 1992, more than doubling from 4,200 to over 10,000. In comparison to the national government, it is perhaps startling that there are more elected state officials outside the state legislature than within it. This trend is new, emerging only within the past forty years. Moreover, the variation in executive unbundling *across states* is, if anything, even more dramatic than the changes over time, as evidenced in Tables 2 and 3. There are only 80 state elected officials in Delaware, while there are 1,200 in Pennsylvania. As of 1992, New Jersey had only one elected official outside the state legislature (that is, the governor), whereas four other states—Texas, Pennsylvania, New York, and Florida—each had over six hundred nonlegislative elected officials.

Turning to the specific executive offices, Table 4 shows that the governor is the only position that is elected in every state. As of 2002, the attorney general is elected in forty-three, while the treasurer and secretary of state are each elected in thirty-eight states. Beyond these familiar offices, a number of more obscure executive positions are elected in a handful of states. For instance, utility regulators, education commissioners, and comptrollers are elected in less than half the states, while the adjutant general is elected in only one. Comparing the figures for 1977 and 2002, we see the emergence of several new elected executive offices within the past quarter century. Banking regulators, election administrators, finance offices, and community affairs representatives all joined the ranks of state elected officials for the first time during this period.

Individual states show substantial differences in the extent of electoral unbundling of the executive branch (Table 5). Of the twenty-two executive offices that were elected in at least one state, there is no single state in which more than half of these different offices are elected. Maine, New Hampshire, and New Jersey stand out as the only states in which the governor is the sole elected executive officer. At the other extreme, five states—Florida, Idaho, North Dakota, South Carolina, and Washington—each hold elections for eleven different executive offices. The average number of elected executive offices per state was 6.7 in 2002, up from 6.0 in 1977. All told then, state and local governments unbundle executive authority to a significant degree, at least when compared to the complete bundling that occurs in the federal government.

Elsewhere, we have estimated the impact of different degrees of executive unbundling on public policy.⁴⁵ Using various measures of unbundling, different estimation techniques, and different data sources, the extent of unbundling consistently produces differences in policy outcomes. This is true not only from jurisdiction to jurisdiction, but also within a political jurisdiction over time. Some unbundling produces outcomes closer to public preferences and too much unbundling produces more slack. The result holds not only for state government but also for local government structures. This simple empirical result has far-reaching implications for institutional design and constitutional theory.⁴⁶

II. EXECUTIVE DESIGN PRINCIPLES AND PROBLEMS

A. Unbundled versus Concurrent Authority

Our model of an unbundled executive is closely related to two debates in constitutional theory, one active and one dormant. Rather than analyze the costs and benefits of the unbundled executive in isolation, we rely on these disputes as a lens through which to view the unbundled executive model.

The dormant dispute is whether there should be a single or plural executive. This executive numerosity question is dormant with good reason. The US Constitution clearly resolves it in favor of the single executive. In other times and places, this question has been resolved otherwise, and our work suggests the single executive position is not the only tenable one. Elsewhere there is far more variation in the way that executive authority is structured. In ancient Rome, there was a dual magistracy.⁴⁷ Andorra is technically structured as a duumvirate, ruled by two co-princes.⁴⁸ These arrangements are obviously somewhat different from the pure version of an unbundled executive, but comparative contexts do show far more variation.

The second, more active dispute is whether the single executive should have strong or weak hierarchical (vertical) control over the execution or administration of law. Does and should the Constitution establish strong vertical or hierarchical control by the president over all

⁴⁵ See generally Berry and Gersen, *Fiscal Consequences* (cited in note 9).

⁴⁶ Compare Timothy Besley and Stephen Coate, *An Economic Model of Representative Democracy*, 112 Q J Econ 85 (1997). See also Eric Maskin and Jean Tirole, *The Politician and the Judge: Accountability in Government*, 94 Am Econ Rev 1034, 1035–37 (2004) (comparing decisions in direct democracy, representative democracy, and judicial settings and assessing the role of accountability).

⁴⁷ Karl Loewenstein, *The Governance of Rome* 48–51 (Martinus Nijhoff 1973).

⁴⁸ A.H. Angelo, *Andorra: Introduction to a Customary Legal System*, 14 Am J Legal Hist 95, 98 (1970).

officials who implement federal law? Properly cabined, this is or should be the key question in the unitary executive debate.

A critical additional question only becomes intelligible if the numerosity question is resolved in favor of multiple executives. Given multiple executives, should their authority be concurrent, partially overlapping, or exclusive vis-à-vis each other? The single versus plural debate generally assumes that multiple executives must exercise overlapping authority, and for this reason concludes the arrangement produces ineffective or inefficient government. This assumption is defensible on historical grounds because most plural executives were councils, the members of which shared concurrent authority. Once the assumption of overlapping authority is relaxed, however, the force of many standard critiques of plural executive systems wanes.

One reason the unbundled executive appears startling is that these separate analytic questions have become conflated. If the single-plural question has been resolved in favor of one executive, the unbundling question seems nonsensical. If executive authority can only be overlapping, then a plural executive looks ineffective. If one favors a strong unitary executive, any plural system first looks unappealing because authority that is not centralized tends to be weak. Thus, in this Part, we try to keep these dimensions of potential institutional choice distinct, matching existing critiques and intuitions to the relevant dimension.

We emphasize two claims throughout this section. First, any general criticism of plural or unbundled executives must somewhat reconcile dire predictions about government failure that would derive from a plural executive and the reality of successful state governments in the United States. It is possible that state and local governments would be even better without unbundled authority, but it is uncharitable in the extreme, not to mention empirically unsustainable, to describe all unbundled state governments as completely dysfunctional. Second, there is an essential difference between unbundled authority and concurrent authority. The most prominent critiques of the plural executive model target schemes in which several executives act in consort with overlapping authority. Such schemes may well produce government dysfunction, unaccountability, or trend towards tyranny, but the unbundled executive does not.

B. Executives, Single and Plural

The reasons that a plural executive regime was rejected and a single executive regime embraced are many. But there are only a handful of recurrent themes that truly dominate this debate. First and foremost is a suggestion that single executives are democratically accountable; plural executives are not. As we have now repeatedly suggested, this is simply a mistake deriving from confusion about what features

of plural executives are necessary and which are merely common. Single executives are also said to be better at providing uniformity and coordination in the implementation of law.⁴⁹ Single executives are often required by the inherent nature of policy issues that constitute important cores of executive authority, like war and trade. A common suggestion in the convention era debates was that only a single executive could provide the energy, strength, and agility necessary to sustain the fledgling executive branch; another, that something inherent in the notion of separation of powers requires a single executive.⁵⁰ Each of these ideas has an intuitive superficial appeal, but each is also wrong, or at least not quite right. Along virtually all of these dimensions the unbundled executive performs as well or better than the single executive. When considered as a whole, rather than dimension by dimension, the case for the unbundled executive is all the stronger. Our discussion no doubt loses much of the nuance in these complex debates. Nonetheless, we attempt to address the most common collection of relevant ideas and arguments related to numerosity and unitariness.

1. Accountability.

The most frequent argument in favor of a single and strong executive has to do with democratic accountability. The president is the only elected official with a truly national constituency. Multiple executives would create confusion and ambiguity about which officials were responsible for what policy. The same claim is made with respect to independent agencies in the unitary executive debate. The inability to impose electoral sanctions would undermine the democratic process, debilitating the ability of voters to select and discipline politicians, or so the argument goes. Hamilton articulated this idea with some force:

But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is that it tends to conceal faults and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to

⁴⁹ Lessig and Sunstein, 94 *Colum L Rev* at 2 (cited in note 18).

⁵⁰ See Calabresi and Prakash, 104 *Yale L J* at 602 (cited in note 18). Although Calabresi and Prakash are focused on the question of executive unitariness rather than singularity, many of these same ideas were levied against plural executives. The application to unitariness is probably the extension rather than vice versa.

any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.⁵¹

Whether or not this passage supports the strong unitary executive vision as it is sometimes taken to do,⁵² it clearly favors a single rather than plural executive. The underlying ideas are intuitive and the rhetoric powerful, but in our view, the central claim is simply incorrect. It assumes a plural executive must entail overlapping or concurrent authority rather than exclusive authority. When multiple parties share authority, it may in fact be difficult to assign blame or credit. But as noted above, the single versus plural executive dimension is conceptually distinct from the overlapping versus exclusive jurisdiction dimension.⁵³ In theory at least, it is straightforward to construct a plural executive with exclusive authority or jurisdiction. Our model of the unbundled executive does just that.

True, as a historical matter, the multiple executive structures of which we are aware, often entailed overlapping authority, and therefore, this slippage is understandable. It is also true that when authority for a policy is given to many actors, none of whom is clearly in control, it will be difficult for voters to blame or credit any single official and impose electoral sanctions accordingly. This idea from Federalist No 70 was echoed elsewhere in the convention era debates, along with familiar claims about shirking and free riding in multimember bodies. “We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in them.”⁵⁴ These arguments were offered again and again against those who favored executive councils. Indeed, this is part of the difficulty with using elections to sanction officials in the legislative branch: it is a multimember body, and when multimember bodies fail, parsing responsibility is difficult.

⁵¹ Federalist 70 (Hamilton), in *The Federalist* 471, 476 (cited in note 5).

⁵² See, for example, Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 Ill L Rev 701, 732 (arguing that, at the time of the founding, people understood that the president had power over the execution of all laws, including control over others who were responsible for execution); Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive during the First Half-century*, 47 Case W Res L Rev 1451, 1487 (1997).

⁵³ Contrast Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 S Ct Rev 201, 207–36, 242–43 (clarifying the distinction between overlapping, concurrent, and exclusive agency authority in the context of administrative law).

⁵⁴ Speech of James Wilson, *Pennsylvania Ratifying Convention* (Dec 4, 1787), in Kurland and Lerner, eds, 3 *The Founders' Constitution* at 501 (cited in note 2).

The simple difference between the unbundled executive and the typical plural executive critiqued by political and legal theorists is that the former involves (more or less) exclusive authority of the individual executives, while the latter entails (more or less) overlapping authority. The unbundled executive would involve parceling it out to well-identified and directly elected officials, which facilitates rather than undermines the democratic process—clarifying authority rather than ambiguating it. To reiterate an earlier point, a vote for or against a presidential candidate is remarkably crude; it is a weighted average of voter approval of dozens if not hundreds of policy dimensions. A vote for or against an elected secretary of education is less so. Directly electing one official to oversee one policy does not obviously create more democratic slack than electing one official to oversee hundreds of policies. So long as unbundling is coupled with exclusive authority within a jurisdiction, the unbundled executive is preferable on accountability grounds.

2. Functional duties and single executives.

Even if the unbundled executive serves state and local governments well, maybe the characteristics of the national presidency differ in critical ways. For example, one frequent assertion is that functional characteristics of the national presidency demand that one single individual have all executive authority. Governors, for example, do not manage armed conflicts or foreign policy; they do not negotiate with other sovereign states. When war and peace are at stake, it is especially important that the country speak with one voice capable of quick and decisive action. In the same way that spreading authority across multiple institutions slows the pace of action when a rapid response is required,⁵⁵ dispersing this authority among multiple executives does so as well. Controlling militaries and dealing with war require a single, strong executive.⁵⁶

To start with, we note a minor historical point. In the 1700s, the single versus plural executive issue was distinct from whether the executive should have authority to make war or peace (exclusively or concurrently). Charles Pinckney, for example, favored a single vigorous executive but did not want the executive power to entail authority

⁵⁵ See Eric A. Posner and Adrian Vermeule, *Terror in the Balance* 16 (Oxford 2007) (“The real cause of deference to government in times of emergency is institutional: both Congress and the judiciary defer to the executive during emergencies because of the executive’s institutional advantages in speed, secrecy and decisiveness.”).

⁵⁶ See Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L J* 231, 252–62 (2001) (emphasizing the importance of singularity or one voice in the domain of foreign affairs).

to make war and peace.⁵⁷ A single executive did not necessarily imply the power to make war; the power to make war did not necessarily prohibit a plural executive. Others favored an independent but plural executive.⁵⁸ These questions are related, of course, but one does not dictate the other, either as a matter of theory or history.

Nonetheless, suppose we assume foreign relations as a policy issue does require that a single individual exercise ultimate control, and that being commander in chief is similar in this respect. Nothing in this view implies that a single executive should have control over all executive authority. It means only that each individual policy of this sort should be controlled by one executive official. The claims about rapid response or speaking with one voice—even if correct—mean only one executive officer should have exclusive policy jurisdiction in the relevant domain; these claims support a single executive *within* a policy dimension, but not necessarily *across* policy dimensions.

The critical question from the unbundled executive perspective is whether one single individual should have authority over this entire set of executive policies. To give a purely hypothetical example, it is easy to imagine a case in which voters might wish to remove, say, the secretary of defense over the conduct of a failed war without replacing the president. When the two offices are bundled together in a single executive, voters must make a single elect-reject decision in the presidential election. If the secretary of defense were directly elected, voters could express displeasure over the war without throwing out a president who was succeeding on many other dimensions. Confusion about the relationship between numerosity and exclusivity in government authority is common; the unbundled executive helps clarify matters, or so we hope.

3. Energy.

Energy is another important principle used to support both the single executive and later the unitary executive.⁵⁹ Many of the framers were explicitly concerned with designing a national executive with suf-

⁵⁷ See Max Farrand, ed, 1 *Records of the Federal Convention of 1787* 64–65 (Yale rev ed 1966) (Madison, June 1) (“Mr. Pinkney [sic] was for a vigorous Executive but was afraid the Executive powers of (the existing) Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one.”).

⁵⁸ See, for example, William Symmes, Letter to Capt Peter Osgood, Jr., in Herberg J. Storing, ed, 4 *The Complete Anti-Federalist* 60 (Chicago 1981) (acknowledging that an independent executive is necessary but questioning whether the power should be vested in a single person). See also Calabresi and Prakash, 104 *Yale L J* at 604–06 (cited in note 18) (arguing that the mention of “Heads of Departments” or “principal officers” referred to actors within the executive branch).

⁵⁹ Calabresi and Prakash, 104 *Yale L J* at 639 (cited in note 18) (“The Framers wished to construct a unitary Executive since they felt it was conducive to energy, dispatch, and responsibility.”).

efficient energy, fearing a national government that was too weak would crumble. In these early debates, energy quite literally refers to the incentive for government officials to be diligent in the performance of public functions. In Federalist No 37, for example, Madison argued that “[e]nergy in Government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good Government.”⁶⁰ Hamilton went further:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy.⁶¹

The trouble with this view is that there is slippage between the claim that one individual with control over one policy will be optimally energetic and the conclusion that one individual with control over all relevant policies will be optimally energetic. We are aware of no especially compelling reason that a single executive with authority over j policy dimensions would be more energetic—in the parlance of the Founders—than j executives each of whom has exclusive responsibility for one dimension. If the claim were correct, then legions of state and local governments are “suboptimal” on the energy dimension. Perhaps so, but the extent of state and local government failure is not particularly high. If the US states constitute fifty data points of government continuity and the national government one, it seems odd to conclude that the fifty have insufficiently energetic governments, and the one does not.

More plausible is that there is something akin to economies of scale in executive authority, which makes control of j policy dimensions by one executive more efficient than control by j executives. If so, then it is suboptimal to entirely unbundle executive authority, but we have already said as much above. Moreover, just as the corner solution of complete unbundling is unlikely to be optimal, so too is the opposite corner solution of no unbundling. More likely, at least in our view, is that the relevant economies of scale suggest that some executive unbundling is better than none or all.

⁶⁰ Federalist 37 (Madison), in *The Federalist* 231, 233 (cited in note 5).

⁶¹ Federalist 70 (Hamilton), in *The Federalist* 471, 471 (cited in note 5).

4. Balance of powers.

If energy alone does not justify a single executive, perhaps the background separation of powers in the constitutional structure does indirectly. In order for each branch to guard against infractions by the others, a single executive may be required. One idea on this front is historical: because of the inherent weakness of the president and the relative strength of the legislature during the founding era, institutional features needed to be calibrated to ensure a balance between the two. For example, bicameralism was necessary to weaken the legislative branch, and a strong single and unitary executive was needed to strengthen the president to create rough parity.⁶²

The problems with this view are extensive. A first mistake is conceptual, equating strength with a lack of numerosity. Three executives who cannot agree are surely weaker than one executive, but three executives of similar mind, acting in consort, are not obviously so. If anything, they would seem as strong as or stronger than one executive. Alternatively, claiming the Founders worked ardently to strengthen the executive borders on disingenuous. Some sought a strong executive and favored a single executive for that reason; others were concerned that a single executive naturally trends toward monarchy, a result to be avoided.⁶³ Indeed, the ideas seem an odd overlay to inter-branch relations in the 1700s. The president had comparatively narrow authority and resources: granting one president strong hierarchical control over virtually nothing seems a peculiar corrective to concerns about a too powerful Congress.

Alternatively, perhaps the relevant claim is that a single executive is necessary to protect against incursions by an aggressive legislature. Balance of powers would be one criterion, but not the only one. Another question is how well a given executive structure would be able to patrol and protect the borders of its authority. The trouble for the single executive view is that there is no particularly good reason to suspect a single executive would more aggressively protect her purview over j policy dimensions than would j executives, each of whom

⁶² Id at 472–73 (arguing that subjecting the executive, “in whole or in part, to the control and co-operation of others” would undermine the executive’s status as a co-equal branch with the legislature).

⁶³ See Farrand, 1 *The Records of the Federal Convention* at 66 (Madison, June 1) (cited in note 57) (“Mr. Randolph strenuously opposed a unity in the Executive magistracy. He regarded it as the foetus of monarchy.”). On the other hand, there was skepticism about growth of authority of a plural executive as well. See id at 74 (Pierce, June 2) (“Mr. Wilson said that in his opinion so far from a unity of the Executive tending to progress towards a monarchy it would be the circumstance to prevent it. A plurality in the Executive of Government would probably produce a tyranny as bad as the thirty Tyrants of Athens, or as the Decemvirs of Rome.”).

has responsibility for a single policy dimension. If anything, unbundling authority in this way might create stronger incentives for protecting turf because the proportional losses to a given executive would be greater from congressional incursion. In general form, the single executive view suggests grounds would be better patrolled by one guard than a dozen simply because the average (per guard) energy exerted would be lower in the plural setting; the relevant criterion of course is the aggregate energy and it would be altogether surprising if plurals did not do better on this front than one.

5. Uniformity.

What of other values that a single executive is supposed to serve like uniformity and coordination?⁶⁴ We have already suggested that the unbundled executive is preferable on accountability grounds, but what about coordination and uniformity in a world of unbundled executive authority?

Properly cabined, the legal value of uniformity concerns the similar application of one legal principle in many different settings. That is, uniformity is about consistent application of law *within* a policy dimension. Serving the interests of uniformity is sometimes said to require a single executive, a unitary executive, or both. A single executive without unitary hierarchical control might not be able ensure that different subordinates always apply the law in identical or at least similar ways. Multiple executives might apply or implement the same law in different ways in different contexts or to different people. In either case, uniformity would be undermined and faith in the rule of law sacrificed.

Again, however, the assumption of overlapping authority obfuscates matters. The unbundled executive framework starts with the premise that policy responsibility can be taken away from a general purpose executive and given to a special purpose executive. No doubt this is something of an abstraction, but it is important to distinguish principled objections from practical ones. If policy can be distributed in this way, then uniformity is no longer an objection. Multiple executives with concurrent jurisdiction might produce a lack of uniformity, but multiple executives with exclusive jurisdiction would not—or at least would do so no more or no less than a single executive.

In point of fact, there is likely to be even greater uniformity in the unbundled executive scheme. Why? In the single bundled executive structure, there is ultimately one person who must ensure the uniform

⁶⁴ See Lessig and Sunstein, 94 Colum L Rev at 2 (cited in note 18) (“A strongly unitary executive can promote important values of accountability, coordination, and uniformity in the execution of laws, and to whatever extent these were the framers’ values, they are certainly now ours.”).

implementation of federal law across dozens or even hundreds of different policy domains. The best case scenario is that this is enormously difficult and costly; the worst case scenario is that it borders on impossible. In the unbundled executive scheme, one executive must ensure the uniform implementation and application of federal law in a single domain. This is hard as well, but it is an order of magnitude less difficult than in the completely bundled regime. Moreover, the residual general purpose executive who must ensure uniformity in many policy domains (in the partially unbundled world) must now do so for a subset of the total set of policy domains. The costs of doing so may still be substantial, but they are strictly lower than those faced by the general executive in the bundled regime. General purpose executives must by their nature focus on an expansive list of policies; specialized purpose executives need focus on only one. This is the flipside of the “blindness” or “tunnel vision” problem that agencies with a single mission sometimes have in regulatory policy.⁶⁵ Importantly, institutional designers who care a great deal about uniformity might well prefer strong unitary hierarchical control for each executive within their domain, a point about which we are agnostic. Ensuring intrapolicy uniformity, however, does not require a single executive.

6. Coordination.

The concern about coordination, in our view, is quite different from uniformity in that it focuses on *interpolicy* effects rather than *intrapolicy* effects as uniformity does. The simple underlying claim is that a single strong executive will be better able to coordinate related policies and make sensible tradeoffs across those policies. If coordination is the overriding principle of government organization, then the unbundled executive is likely worse than a single strong unitary executive. Although we are open to clever counterarguments, we will assume that a single executive with responsibility for j policy dimensions will be better able to coordinate across dimensions. If interpolicy coordination is more important than accountability, uniformity, energy, or efficiency, then perhaps institutional designers should reject the unbundled executive. If coordination is one value among many, then the calculus is far more complicated and does not obviously disfavor the unbundled model.

⁶⁵ See Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 11 (Harvard 1993) (describing tunnel vision as “a classic administrative disease [that] arises when an agency so organizes or subdivides its tasks that each employee’s individual conscientious performance effectively carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good”).

Although coordination is a laudable goal, it clearly is not the only constitutional value at issue. Congress has enacted, the president has signed, and the Supreme Court has upheld a series of institutional arrangements that are arguably inconsistent with the strong unitary executive position. Although these cases have generated enormous debate, current doctrine upholds as constitutional independent prosecutors⁶⁶ and the insulation from plenary presidential control of agency heads who are not pure or core executive officers.⁶⁷ The Constitution, as applied, has already sacrificed the pure goal of coordination in the service of other competing principles.

We will leave the debate about whether this sacrifice is desirable to others. Still, compared to the current state of affairs, the unbundled executive is likely superior on interpolicy coordination grounds. The ultimate principal—the public—would select and sanction each of the specialized executives. This arrangement gives the public better mechanisms for ensuring interpolicy coordination compared with a system in which the president appoints but cannot remove agency heads. Thus, as a comparative matter, the unbundled executive might be preferable on coordination grounds to the current state of affairs, even if a strong unitary executive with plenary control of the administration would be a first-best alternative along this one dimension.

It is also a mistake to conflate or equate centralization and coordination. Centralization is neither a necessary nor a sufficient condition for coordination. Strong vertical control over subordinates may facilitate coordination, but there seems to be no shortage of lackadaisical supervisors in the world. Moreover, the key to effective coordination is accurate information. The centralized official, for example the chief executive, must generally depend on information provided by the very decentralized agents (or agencies) that are to be coordinated. Because agency preferences diverge from the coordinated outcome (or else there is no need for centralized control), there is a risk that biased information will be generated, undermining the coordination benefit of centralization.⁶⁸

⁶⁶ See *Morrison v Olson*, 487 US 654, 659–60 (1988).

⁶⁷ See *Mistretta v United States*, 488 US 361, 409 (1989) (sentencing commissioners); *Wiener v United States*, 357 US 349, 356 (1958) (War Claims Commission). See also *Humphrey's Executor v United States*, 295 US 602, 629 (1935) (concluding that the president does not have unlimited removal power over individuals who serve in a quasi-legislative or quasi-judicial position). But see *Myers v United States*, 272 US 52, 176 (1926) (holding that the president's right to remove officers who he appointed with the advice and consent of the Senate cannot be restricted by Congress).

⁶⁸ See generally Ricardo Alonso, Wouter Dessein, and Niko Matouschek, *When Does Coordination Require Centralization?*, 98 Am Econ Rev 145 (2008).

C. Strong Unitarians and Unbundled Executives

The unitary executive fight is often miscast in politics and the media. In constitutional law it has little to do with the breadth of presidential authority. Although many constitutional theorists have strong views about how broad executive authority is or should be, we abstract away from this debate entirely. Whatever one's view about the proper scope of executive authority, there is always a subsequent question about how that authority should be optimally structured. A constitution could establish a plural executive with broad authority or a unitary executive with narrow authority. A constitution could unbundle executive authority irrespective of the stock or scope of executive authority.

Properly understood, the unitary executive debate is simply about the extent of hierarchical control over executive or administrative officers that the Constitution establishes.⁶⁹ In the US context, virtually everyone favors a unitary executive of one sort or another.⁷⁰ The key distinction is between "strong" unitary executives and "weak" unitary executives.⁷¹ There are many nuances in individual views within various camps, but strong unitary executive types tend to believe that Congress cannot insulate administrative officers from presidential control, for example, by only allowing removal for cause. Weak unitary executives tend to believe that the president must have plenary con-

⁶⁹ The Supreme Court has said that Congress may not restrict the president's ability to remove purely executive officers. See *Myers*, 272 US at 176. Congress may not reserve for itself the authority to remove an executive officer by means other than impeachment. It is also apparently impermissible for Congress to specify a list of potential nominees from which the president may choose. It is not clear that no variant of this arrangement would be constitutional. However, the list method in combination with other features of the appointment and authority scheme was rejected in *Hechinger v Metropolitan Washington Airports Authority*, 36 F3d 97, 104 (DC Cir 1994) (explaining that there is a difference between Congress maintaining an influential role over agencies and creating a structural relationship that allows Congress to coerce the agency). The Supreme Court rejected a similar scheme in *Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise, Inc.* See 501 US 252 (1991) (calling the scheme an "impermissible encroachment"). See generally Jack M. Beermann, *Congressional Administration*, 43 San Diego L Rev 61 (2006). But this default appointment and removal scheme does not begin to constitute the full range of possibilities, either theoretically or empirically. Suppose Congress was given the authority to appoint members of the president's cabinet or other agency heads. Alternatively, suppose the legislature was given no role in the appointment of these officials; either the president might select unilaterally or the nominee might be subject to confirmation by another political institution, perhaps a nonpartisan board or commission.

⁷⁰ See, for example, Terry Eastland, *Energy in the Executive: The Case for the Strong Executive 2* (Free Press 1992). But see, for example, Michael Fitts, *The Paradox of Power in the Modern State*, 144 U Pa L Rev 827, 892 (1996) (critiquing some of the rationale for supporting a strong unitary executive and explaining how a strong unitary executive structure creates political challenges for the president); Flaherty, 105 Yale L J at 1821 (cited in note 18) (discussing the evolution of the separation of powers doctrine throughout US history and explaining how the result of this shift has given extensive powers to the executive).

⁷¹ See Lessig and Sunstein, 94 Colum L Rev at 8 (cited in note 18).

trol over certain principal purely executive officers, but that officers who exercise authority that is not purely executive can be insulated to a greater or lesser extent.⁷²

To oversimplify just a bit, there are two main types of justifications for a strong unitary executive. The first is historical or originalist: because the constitutional structure would have been understood at the time of the founding to create a strong unitary executive, that is the meaning that the Constitution should be given.⁷³ The second is more or less consequentialist:⁷⁴ because of other shifts in government behavior and social development, a strong unitary executive is laudable since it would help support a desirable constitutional structure.⁷⁵

As should be evident by now, there is much overlap between the justifications for a unitary executive and justifications for a single executive. Therefore many of the normative justifications for the strong unitary executive position are natural counterpoints to our model of an unbundled executive. Although we suspect that most strong unitary executives would oppose the unbundled executive, in our view the positions are not conceptually inconsistent, at least setting aside the originalist or historical justification. To the extent that one favors strong hierarchical control of executive subordinates, it is possible to favor an unbundled executive in which each executive exerts complete vertical control. Each unbundled executive could remove subordinates at will, veto policy judgments, or even substitute his own judgment in lieu of a subordinate officer's.

We have said nothing about whether this strong form of vertical control is desirable. If it is (according to some external theory of executive authority), one could favor a strong unitary unbundled executive system. If not, one could favor a weak unitary unbundled executive system. Executive authority would be unbundled, but independent agencies and officers would still exist. The modest conceptual point is that the degree of vertical control of an executive over subordinates is distinct from the existence or extent of unbundling in the executive. Moreover, if we are correct that the unbundled executive better serves the underlying principles that unitary executives claim as their own, the case for the unbundled executive is all the stronger.

⁷² Id at 8–9.

⁷³ See, for example, Calabresi and Prakash, 104 Yale L J at 599 (cited in note 18).

⁷⁴ One could also hold originalist interpretive sympathies on pragmatic grounds. See generally, for example, John O. McGinnis and Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 Nw U L Rev 383 (2007).

⁷⁵ See, for example, Lessig and Sunstein, 94 Colum L Rev at 3 (cited in note 18) (explaining that although the Constitution does not require it, there is a nonhistorical argument for a strong unitary executive); Flaherty, 105 Yale L J at 1811 (cited in note 18).

There is a sense, however, in which the unbundled executive is at least in tension with the unitary executive position. A dominant, if not the dominant, pragmatic justification for a unitary executive is that only a single executive with control over all implementation of federal law is democratically accountable. Insofar as this is merely a claim that a single unitary executive is more democratically accountable than a single executive combined with independent agencies, it could—but need not—be right.⁷⁶ Insofar as it is a statement that a single unitary is more accountable than any divided or plural executive structure, we obviously disagree. The partially unbundled executive should produce greater accountability than the single unitary executive vision.

D. Weak Unitarians and Unbundling

To this point, we have suggested that unitary executive types should actually prefer (or at least not despise) the unbundled executive regime because it performs as well or better along the very dimensions that supposedly justify a single unitary executive. While the strong unitary executive camp is vocal, it is probably wrong to describe it as a majority position, either in academia or politics. What of weak unitary executive types, who are willing to tolerate if not embrace independent agencies and officers who the president cannot remove except for cause?⁷⁷

Again, properly understood, the unitary executive camp is mainly concerned with vertical control, and therefore one can favor the unbundled executive independent of one's views on unitary structure. Nonetheless, to the extent that weak unitary executives support many of the same principles that strong unitary executives do, all that we have said above applies here as well. What is different for weak unitary executives is support for a lack of complete presidential control over some administrative officers. This position could mean: (a) some agencies or officers should be beyond the control of *any* executive; or (b) some agencies or officers should be beyond the control of *the* executive.

This ambiguity is not usually evidenced, because in the US system, we only have one president. But once the possibility of several executives is on the table, there is some vagueness in the weak unitary executive position. For example, suppose one favors independent members of the Federal Election Commission (FEC) or the National La-

⁷⁶ See generally Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 *Mich L Rev* 53 (2008) (arguing that a single executive does not always represent voter preferences better than an independent agency because the policy position of the executive favors some voters over others).

⁷⁷ See generally Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin L Rev* 1111 (2000) (surveying the evolution of growing acquiescence to independent agencies among weak unitarians).

bor Relations Board (NLRB), where independent means that the president cannot remove a commissioner without cause. If one likes independence because it insulates policy decisions from voters (by weakening presidential control), then having a directly elected labor executive or election executive who makes those policy decisions will look unattractive. Unbundling gives greater control to voters, which (by assumption in the political insulation view) is a state of affairs to be avoided. By the same token, if the important feature of executive-commissioner relations is presidential “selection” of independent commissioners, this could be accomplished with an unbundled executive regime as well. The directly elected labor executive would appoint NLRB members who would then only be removable for cause. This is an example of a hybrid unbundling and insulation regime.⁷⁸ If, according to some external theory of good governance, political insulation is desirable, the unbundled executive regime is flexible enough to accomplish it. Moreover, the unbundled labor executive is likely to have more policy-specific expertise and therefore to select better commissioners, which could in turn increase the average quality of decision-making within independent agencies.

Alternatively, if one favors independent agencies in the current system because some policy decisions should be made by actors with local policy expertise who are not subject to generalist political pressure, then conceivably one might prefer doubly unbundled executives without political insulation. FEC commissioners could themselves be either directly elected by the public or, more likely, selected by a directly elected executive, who could then remove them for any reason or no reason at all. Again, the unbundled executive regime accomplishes the relevant goals as well as or better than the current single executive with independent officers regime.

E. Unbundling, Concentration, and Dispersion

Although advocates of a strong executive are many, there is also a storied tradition in political theory and law that is suspicious of the concentration of authority in one institutional actor like the president, or more apropos an even stronger executive like a dictator.⁷⁹ Dispersing authority among multiple institutions is generally thought to be a

⁷⁸ Consider Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 Mich L Rev 2073, 2119–20 (2005) (critiquing arguments that accountability is most effective in direct election or delegation to local institutions and instead suggesting that accountability is most effective in a structure of administrative bureaucracy).

⁷⁹ See generally, for example, Arend Liphart, *Patterns of Democracy* (Yale 1999).

key strength of the US separation of powers system.⁸⁰ By requiring multiple actors to sign onto controversial government actions, dispersing government authority allegedly protects citizens. The dark side of dispersion, long appreciated, is that the benefits of efficiency and speed (and perhaps expertise) are forgone.⁸¹ As a matter of institutional design, there is obviously a tradeoff between these values; the optimal balance will depend on time and place.⁸² Many debates about the structure of executive authority are cast in terms of the centralization of authority. This is true of the federal US context, but it is also true of the comparative literature⁸³ and some very early work on state government structure in the 1950s and 1960s.⁸⁴ Political scientists and lawyers have long studied how different constitutional structures, such as presidential versus parliamentary systems, produce different political outcomes.⁸⁵ More recently, economists have estimated the effect of different constitutional structures on economic policy, development, taxing, or spending.⁸⁶

⁸⁰ The concentration versus dispersion theme also has close parallels in work on redundancy in bureaucratic organizations. See Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal L Rev 1655, 1676–79 (2006) (setting forth a list of benefits of redundancy and applying this benefits analysis to the context of administrative agencies).

⁸¹ See Posner and Vermeule, *Terror in the Balance* at 16 (cited in note 55).

⁸² See Flaherty, 105 Yale L J at 1776–77 (cited in note 18) (disputing a strict formalist interpretation of separation of powers, as presented by Calabresi and Prakash, and concluding that at the time of the founding, “‘separation of powers’ and related terminology were malleable”).

⁸³ See generally Torsten Persson and Guido Tabellini, *The Economic Effects of Constitutions* (MIT 2003); Persson and Tabellini, *Political Economics: Explaining Economic Policy* (cited in note 27).

⁸⁴ See, for example, Thomas R. Dye, *Executive Power and Public Policy in the States*, 22 W Polit Q 926, 932 (1969) (exploring the relationship between executive “fragmentation” and public policy at the state level).

⁸⁵ See generally Lijphart, *Patterns of Democracy* (cited in note 79); Alberto Alesina and Nouriel Roubini, with Gerald D. Cohen, *Political Cycles and the Macroeconomy* (MIT 1997) (discussing “how the timing of elections, the ideological orientation of governments, and competition among political parties influences unemployment, economic growth, inflation, and various monetary and fiscal policy instruments”); Roger Myerson, *Theoretical Comparison of Electoral Systems*, 43 Eur Econ Rev 671 (1999); Matthew Soberg Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge 1992); G. Bingham Powell, Jr., *Contemporary Democracies: Participation, Stability and Violence* (Harvard 1982).

⁸⁶ See Torsten Persson, *Do Political Institutions Shape Economic Policy?*, 70 *Econometrica* 883, 902–03 (2002); Alessandro Lizaeri and Nicola Persico, *The Provision of Public Goods under Alternative Electoral Incentives*, 91 *Am Econ Rev* 225, 226 (2001) (assessing targetability and efficiency in the distribution of public goods in competing electoral systems); Rolf R. Strauch and Jurgen von Hagen, eds, *Institutions, Politics and Fiscal Policy* (Kluwer 2000); Allen Drazen, *Political Economy in Macroeconomics* 21–22 (Princeton 2000); Torsten Persson, Gerard Roland, and Guido Tabellini, *Comparative Politics and Public Finance*, 108 *J Polit Econ* 1121, 1122, 1152 (2000) (finding that parliamentary regimes result in larger government as compared to presidential-congressional regimes); Dani Rodrik, *Why Do More Open Economies Have Bigger Governments?*,

What of these scholars who distrust the centralization of authority? How should they receive the unbundled executive? Whether this group of scholars should favor the unbundled executive depends on precisely what is to be accomplished by decentralizing authority. This is not always fleshed out with sufficient clarity, but one camp seems to be concerned with the sum of all power that is given to one executive or government official. Too much centralization, on this view, really implies too much power in one place. For supporters of this position, our theory has much to recommend it. By definition, the unbundled executive regime carves up general executive authority and gives it exclusively to different executive officers. As a consequence, the aggregate executive power held by any one individual in our regime is less than the aggregate executive power held by any individual in the single executive regime. The unbundled executive is as good as any other fragmentation or decentralization scheme in this regard, and, for the various reasons we emphasize, potentially much better.

An alternative understanding of executive fragmentation, however, is concerned not so much with aggregate authority, but with the lack of veto points that a single executive with centralized authority must negotiate. On this view, the problem is not that one executive can exercise power over a lot of things, but that one executive can exercise power over the objection of other government officials without obtaining their assent. When scholars of this ilk advocate fragmentation, they are really advocating councils or committees—multimember decision-making bodies—in which the consent of all or most members is needed for executive action. Although this is not the majority position in the fragmentation literature, for one who holds this view, the unbundled executive is not likely to be significantly more attractive than the current regime. To see why, recall that exclusive policy authority within a domain is a critical element of the unbundled executive model. It is the lack of necessary consent from other executives that supports greater accountability in the model because there is clarity rather than ambiguity about which official is responsible for which policy. That said, the unbundled executive is no worse on this front than the current regime; each allows one executive official to exercise complete policymaking authority. And to the extent that any background concerns about the centralization of too much power in one place linger in the shadows, the unbundled executive might still be preferred on those grounds.

* * *

The unbundled executive then does both more and less in avoiding the concentration of executive authority. It does less in the sense that an unbundled executive could have extremely broad authority to act in a given domain, say the field of national defense, without assent from other political institutions. The unbundled executive does more because it enhances democratic control over both the specialized executive and the generalized executive. It does not make it harder for unbundled executives to act, but it does make it easier for the public to monitor, reward, and sanction those actions.

F. Selection Effects

We have focused predominantly on incentive effects: how does the unbundling executive authority alter the behavior of executives? We have also discussed first order selection effects: how does the unbundled executive affect the ability of voters to select effectively good types for elected office?⁸⁷ This section addresses selection effects in greater detail. Would an unbundled plural executive scheme attract or select different candidates to executive positions and would any changes be normatively attractive or disheartening?⁸⁸ The dynamics that generate such effects are likely to be complex, and we do not want to present a false sense of certainty. Nonetheless, some tentative observations are warranted.

It is possible, but we think unlikely, that the unbundled executive would produce no new selection effects. In this world, all the unbundled executives would look essentially the same as the single bundled executive. For this to occur there would have to be near perfect overlap in the characteristics that make for a good executive across all policy domains. The same attributes that make for a good education executive would have to make for a good war-powers executive. No doubt, there will be some overlap—for example the ability to inspire. But the characteristics that make one a good wartime leader are not necessarily those that make for a good peacetime leader.⁸⁹ The greater the overlap across domains, the less the selection benefit of the un-

⁸⁷ See generally Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 Va L Rev 953 (2005) (discussing how different constitutional rules generate incentives for good or bad actors to enter government).

⁸⁸ See Fearon, *Electoral Accountability*, in Przeworski, Stokes, and Manin, eds, *Democracy, Accountability, and Representation* 55, 56 (cited in note 34). In political science, it has now become the norm to emphasize selection effects of elections. We focus on both types of effects with respect to executive officials as both seem crucial for any sensible regime of executive structure.

⁸⁹ In fact, it seems likely the constraint of only selecting one executive has created an artificial tradeoff between policy dimensions like these. The unbundled executive regime would reduce some of these necessary tradeoffs, likely producing more effective military executives and more effective domestic policy executives, or so we argue.

bundled executive. The unbundled executive regime would almost certainly produce some executives who have attributes quite different from the general purpose executive. As discussed above, the unbundled executive requires fewer tradeoffs regarding ability or expertise across executive domains.

Would the unbundled executive regime attract a different population of potential executive candidates to run for executive office? Suppose potential presidential candidates are attracted to the possibility of being *the* leader of the free world rather than *one of a handful* of leaders of the free world. The unbundled executive might drive some candidates away from executive elections. This is a possible effect, but if it exists it tends to support rather than undermine the case for an unbundled executive.

First, it is not at all clear that having six unbundled executives would make the office(s) significantly less attractive to qualified applicants. Those who run for president in the United States are often former senators, representatives, and governors. If the potential candidates came from Congress, the prospect of being one of many powerful national leaders was not a sufficient disincentive to drive them from public life. If the candidate were a former governor, recall that most state executives are already somewhat unbundled. If unbundling in the state government context nonetheless attracts high quality candidates to public life, we are hard pressed to see why unbundling in the national government context would not do so. Of course, perhaps part of what makes serving in Congress or state governorships attractive is the possibility of moving on to higher office; maybe if the presidency were unbundled even those offices would be less attractive? Again, this is possible, but barely so. The probability of winning the presidency is sufficiently small for any senator, congressman, or state governor that adjusting the expected reward of winning an executive election seems unlikely to produce anything but an inframarginal selection effect for these officials.

It is also often said that governors make good presidents because they have prior executive experience. The unbundled executive regime would produce a larger pool of candidates with some executive experience in national government; perhaps this would make presidential races more competitive, creating ever stronger executive candidates. In countries where the chief government executive is significantly weaker than the president is in the United States, there is no evidence that systematically lower quality politicians serve. Without entering irresolvable political debates, it seems safe to say that prime ministers in the United Kingdom are not of systematically lower quality than presidents in the United States. If one peruses the list of prominent world leaders in the past two hundred years, it is hard to

see an obvious trend as to intellect, strength, and leadership that is correlated with the presence of presidential or parliamentary systems. If the unbundled executive does attract a different pool of candidates to run for office, it is hard to imagine that the new pool would be of systematically lower quality.

Still, to make any rigorous progress on the selection effect problem, we need to know whether the unbundled executive reduces the probability of selecting a truly great executive (the top part of the potential executive distribution), reduces the probability of screening out the worst executives (eliminating the bottom portion of the distribution), and raises or lowers the median or average executive elected. If the unbundled executive screens out the best potential executives or selects the worst potential executives, that would be a significant problem.

The candidates most likely to run for president in the current regime who would not do so in the unbundled regime are likely to be candidates for whom aggregate power is the most important concern. These candidates prize being *the* person in control of *everything*. Perhaps this group of candidates makes for especially good presidents, but they seem to have most in common with megalomaniacs. In other countries, this would be a group of likely dictators, not responsive and responsible officials. Making the election of megalomaniacs or aspiring dictators less likely hardly seems a mark of shame for any executive regime.

What about the top of the distribution? Would the unbundled executive still manage to select the best candidates? No electoral system is perfect, but there are good reasons to suspect the unbundled executive would perform better on this front than the bundled regime. Indeed, this is part of the beauty of the unbundled executive regime. In a world with a single executive, voters must trade off desirable executive attributes on less important dimensions for desirable attributes on more important dimensions. The unbundled regime requires fewer of these tradeoffs. Voters need not find a single person who is strong and wise and compassionate and so on; citizens can tailor the importance of a single executive attribute to a single policy domain. This should make for higher quality executives along each dimension. Not only are voters better able to calibrate, but potential executives who could not win a general executive election—because of the tradeoff problem—may now run for executive office. A candidate who cannot look “tough on crime” and would therefore not run for president might run for education executive in the unbundled regime. The unbundled executive regime should do a better job of selecting the right potential executive and should encourage higher quality candidates to enter executive politics than does the current regime. Therefore, the average executive quality within a domain would likely rise. Although it is possible that in some select domains the unbundled regime would select

worse executives, on balance, the net selection effects are either quite positive or negligible.

III. COLLATERAL CONSEQUENCES

The burden of persuasion for this Article is significant, but what if all we have said thus far is correct and the unbundled executive would outperform the current bundled executive? Would this revision to the constitutional order generate other collateral consequences that are clearly undesirable? The answer to this question is yes and no. Adopting an unbundled executive would produce collateral consequences for the constitutional structure. Some of these are desirable; others are undesirable but straightforward enough to remedy with other relatively minor institutional adjustments. The relevant thought experiment is to maintain the basic contours of the US Constitution and compare the current perfectly bundled executive to a partially unbundled executive. The list of collateral consequences we consider below is not exhaustive, but it does include the more prominent concerns.

A. Separation of Powers

Suppose Article II was altered to create an unbundled executive. What are the implications for separation of powers principles? If the concern is *balance* of powers, then so long as the scope or breadth of legislative, executive, and judicial powers are held constant, the unbundled executive does not disrupt whatever parity of powers does (or does not) exist in the current system. The executive might have too much or too little power vis-à-vis Congress today, but the unbundled executive would not upset this balance. The unbundled executive need not aggrandize or decrease the aggregate amount of executive authority.

A related separation of powers problem is avoiding encroachment by one branch on the institutional prerogatives of another branch. Along this dimension, the unbundled executive might actually fare better. Elected executives with responsibility for only one policy dimension would be less likely (because less able) to trade legislative encroachments in one policy area for executive gains in another. That is, the unbundled executive helps avoid legislative encroachments achieved by bargain rather than by fiat.⁹⁰ The overwhelming majority of recent

⁹⁰ Virtually all modern separation of powers cases are the result of a consensual bargain between the president and Congress. The cases challenge statutes passed by Congress and signed by the president. Characterizing most of these as power grabs by the legislature or the president is awkward since both institutions consented. This is not to say that such arrangements are or ought to be permitted by the Constitution. But it is important to bear in mind that the unpermitted arrangements are generally supported by Congress and the executive.

prominent separation of powers cases like *Bowsher v Synar*⁹¹ or *INS v Chadha*⁹² involve consensual arrangements between the legislative and executive branches—not unilateral power grabs. If these arrangements are unconstitutional, then the unbundled executive serves a kind of prejudicial enforcement function, making it less likely that judges will be called on to strike down statutory agreements between the executive and the legislature.⁹³ Violations of separation of powers principles tend to occur with the consent of two branches rather than unilateral incursion by one. If the unbundled executive prevents even some of these, branch relations would be improved because courts would be called on less often to invalidate the judgments of the other branches.

However, because the unbundled executive increases public control over executive policy, there is a sense in which the unbundled executive is more *constrained* than the bundled executive. It seems awkward to call this executive weaker instead of more accountable, but for the sake of argument suppose unbundling does make the executive less powerful relative to the legislature. The unbundled executive still does not produce legislative dominance.

The reason is that the extent of unbundling in the executive branch is not the only dimension along which institutional arrangements can be adjusted. The unbundled executive could easily be adjusted to preclude independent officers—that is to create stronger unitary control that would enhance the power of various unbundled executives. Other alternatives might also ratchet up executive power to compensate easily for any marginal reduction stemming from unbundling. More importantly, the extent of executive power has grown exponentially since the founding. Congress's powers have grown, but clearly at a less rapid pace. If the Founders's intent was to produce an initial balance or parity among the branches, surely it is the executive branch's power that is now out of whack. If the unbundled executive weakens the executive branch—although again, we think it does not—it might actually bring the branches closer to parity, bringing the balance of power closer to that originally contemplated, and in the process enhancing the degree of accountability in the executive branch.

⁹¹ 478 US 714, 736 (1986) (holding that the Balanced Budget and Emergency Deficit Control Act of 1985 violated the separation of powers doctrine because the Comptroller General was responsible for the execution of the laws but was removable only by Congress).

⁹² 462 US 919, 951–59 (1983) (holding that one house of Congress striking down an act by an executive official was inconsistent with the separation of powers doctrine).

⁹³ Presumably, these agreements make both branches better off, and therefore preventing them may be worse for both institutions. However, that is also the case anytime the courts strike down an otherwise valid statute on separation of powers grounds.

B. Presentment

The unbundled executive also raises novel questions about other constitutional provisions. For example, Article I, § 7 requires bicameralism and presentment to enact a valid law.⁹⁴ With multiple executives, who would sign? All the executives? None? One? Questions like these are far from the path on which we started, and therefore our views are necessarily tentative. However, several scenarios are possible.

Most simply, an institutional actor like the House or Senate parliamentarian could designate the executive with the relevant policy authority. Transportation legislation would be signed by the transportation executive. Military legislation signed by the military executive. This could create the opportunity for gaming, of course. Legislation could be framed as a transportation bill when in fact it was a welfare bill. But these are standard problems within Congress already. House and Senate rules typically require that legislation be referred to the committee with the most relevant jurisdiction.⁹⁵ Historically some gaming emerged, but for the most part, committees guard their turf and bills are sent to the appropriate legislative body. Legislative precedents and norms generally have been sufficient to prevent a breakdown of the rules. If the practice works reasonably well within Congress, there is no reason to think it would work substantially worse across branches.

Even better would be to designate links between congressional committees and special unbundled executives *ex ante*. Then decisions about which committee to send a bill to would produce an automatic decision about to which executive the bill must be presented. Here too there could be gamesmanship, but these initial decisions would be made behind the veil, so to speak, making strategic behavior much more difficult. Although our informal intuition is that these problems are not nearly as severe as others that plague the current state of affairs, our system cannot avoid them entirely. Still, the unbundled executive entails a straightforward method of disciplining such behavior. If the transportation executive signs welfare legislation, and if voters care, it is easier to express displeasure with electoral sanctions in the unbundled executive world than in the bundled executive world.

⁹⁴ US Const Art I, § 7.

⁹⁵ See, for example, Rule XVII, Standing Rules of the Senate, 110th Cong, 1st Sess (Sept 14, 2007), online at <http://rules.senate.gov/senaterules/Rules091407.pdf> (visited Aug 29, 2008) (setting forth procedure for assigning matters to the appropriate committee); Rule XII(2)(a), Rules of the House of Representatives, 110th Cong, 1st Sess (Mar 11, 2008), online at <http://www.rules.house.gov/ruleprec/110th.pdf> (visited Aug 29, 2008) (stipulating that each matter be referred to the committee with responsibility for that subject).

C. Logrolls

If unbundled executives could only sign legislation within their policy domain, would that not eliminate the possibility of logrolls and omnibus legislation? To start, within a policy domain, big legislative packages and logrolls would still be possible. Therefore, it seems likely that the current practice of enacting big transportation bills or farm bills every several years would continue; such legislative packages do contain and would continue to contain plenty of logrolls and side deals, for better or for worse.⁹⁶

Across policy domains, however, logrolls and omnibus legislation would be marginally more difficult. This does not seem especially tragic and there are those who would applaud the effect. State constitutions regularly restrict bills to a single subject and prohibit the mixing of appropriations legislation and substantive legislation. Some logrolls, however, are welfare-enhancing, not wasteful. When the minority that benefits from a provision benefits a great deal, oftentimes a logroll will be welfare-enhancing. If interpolicy logrolls are especially important according to some external theory of the good, then the unbundled regime could be adjusted to allow for them. Consider the following proposal: legislation covering two policy domains must be presented to both the relevant executives. If both sign, the bill becomes law. If neither signs, the legislature could override the veto with a supermajority vote of two-thirds. If one executive signs and the other does not, the legislature could override the single veto with a vote of three-fifths (or some other lesser supermajority variant). Upon more serious consideration, these alternative regimes might be good or bad, but the basic unbundled executive structure is flexible enough to incorporate them if desirable.

D. Administrative Agencies

Although the executive has many important duties, managing administrative agencies and regulatory policy is surely near the top of the list. Would the unbundled executive turn administrative law and regulatory policy into morass? We cannot say that there would be no complications, but the most obvious trouble spots do not suggest a drastic institutional overhaul would be necessary.

⁹⁶ The single-subject limitation is supposed to preclude logrolls in which policies favored only by a minority of politicians or voters are enacted together. See Gilbert, 67 U Pitt L Rev at 813–15 (cited in note 38) (discussing logrolling as “the principal evil that single subject rules seek to check”); Dragich, 38 Harv J on Legis at 114–16 (cited in note 38) (explaining and describing the purpose and objective of single-subject rules).

First, consider the dominant trend over the past several decades toward more centralization and coordination of administrative agencies.⁹⁷ Does this not suggest we are swimming upstream in current even stronger than it first appears? Not necessarily. One of the main justifications for increasing presidential control over agencies is to increase democratic accountability.⁹⁸ The president is directly elected by a national constituency and agency heads are not. More presidential control over agencies is more democratic, better ensuring majoritarian preferences in regulatory policy.⁹⁹ Of course, in the unbundled executive world, each executive is directly elected. A directly elected environment executive is vastly more democratically accountable than a single general purpose executive who oversees environmental policy—along with hundreds of other policies—indirectly. To the extent that centralization of administrative oversight seeks to make agency policy more democratic, the unbundled executive is likely more effective.

The other main pragmatic justification given for centralized control of the bureaucracy is the need for interpolicy tradeoffs—a specific type of coordination problem. Just as agencies with a single mission might pursue policy goals with blinders, so too might unbundled executives.¹⁰⁰ A lack of coordination could produce bad policy, although whether it would typically produce policy that is better or worse on average seems to be an open question. The simplest thing to say is that this is a genuine cost. The comparative advantage of the unbundled executive, however, is that if the public is upset that some unbundled executive is pursuing policy goals too single-mindedly, then the public can vote that person out of office. The relevant unbundled executive has done a bad job; our structure provides a more effective way to correct this problem than the current bundled structure. So far as we are aware, however, no president in the current regime has lost an election because of the failure to make efficient interpolicy tradeoffs in regulatory policy.

⁹⁷ See Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2282–346 (2001) (documenting and defending the extensive mechanisms by which presidents exert control over administrative agencies). See also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum L Rev 1749, 1763–65 (2007); Nicholas Bagley and Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum L Rev 1260, 1312–14 (2006) (disputing the emerging consensus in the administrative law literature that OMB review is simply one more neutral tool that the president can use to further her administration's agenda).

⁹⁸ But see Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel before a New President Arrives*, 78 NYU L Rev 557, 604 (2003) (arguing that policies may be less majoritarian if old presidents can entrench policies); Edward L. Rubin, *Getting Past Democracy*, 149 U Pa L Rev 711, 758 (2001) (“[M]any observers tend to over-estimate the significance of elections.”).

⁹⁹ But see generally Stephenson, 107 Mich L Rev 53 (cited in note 76) (suggesting that executive control may favor voters with some policy preferences).

¹⁰⁰ See Breyer, *Breaking the Vicious Circle* at 11 (cited in note 65).

Another alternative, which we note only in passing, would be to create an interpolicy tradeoff executive. Her specific policy domain would be interpolicy or interrisk trades and nothing else. A public frustrated with the tunnel vision of unbundled executives could either discipline the executive behaving with tunnel vision or discipline the coordinating executive. In effect, there could be an unbundled executive in charge of the Office of Information and Regulatory Affairs (OIRA).¹⁰¹ The details of whether the OIRA executive could veto or initiate new rules would have to be worked out, and we certainly have not done so. However, we suspect one could do so in a sensible way that would not debilitate either the administrative state or the unbundled executive scheme. The downside, of course, is that this latter structure would reduce clarity about which executive is responsible for policy failure, making it harder for voters to sanction the right official with genuine confidence.

The unbundled executive might even help solve some standard problems in administrative law. For example, it has long been unclear how courts should deal with deference to agencies with overlapping jurisdiction.¹⁰² Standard deference doctrines encourage courts to defer to agencies, but when agencies share jurisdiction, courts must decide to which agency deference is owed. In the current regime, this is a problem mainly because of overlapping regulatory jurisdiction; it is easy to solve by creating agency jurisdiction that is exclusive rather than shared.¹⁰³ The unbundled executive with exclusive policy authority actually solves this *Chevron* problem.¹⁰⁴ There is a clear institutional actor—the given unbundled executive—to whom deference is owed or not, as standard deference doctrine dictates. By trending towards, indeed by requiring, exclusive policy jurisdiction, the unbundled executive would help resolve them.

E. Majoritarianism and Minoritarianism

A major advantage of the unbundled executive is greater democratic responsiveness: the structure enhances accountability. Another line of attack on the unbundled executive would go as follows. Institu-

¹⁰¹ See Bagley and Revesz, 106 Colum L Rev at 1304–10 (cited in note 97) (concluding that the role of OIRA in the administrative state cannot be justified by reference to the checking function that has been its hallmark since its inception).

¹⁰² See Gersen, 2006 S Ct Rev at 202–03 (cited in note 53).

¹⁰³ Id at 208 (arguing that Congress might intentionally generate exclusive or concurrent agency jurisdiction to encourage or discourage agencies from regulating in new policy domains).

¹⁰⁴ See *Chevron U.S.A., Inc v NRDC*, 467 US 837, 844 (1984) (requiring courts to give “considerable weight” to agency interpretations of statutes in the event that Congress has expressly delegated regulatory authority). For a more elaborate discussion, see generally Jacob E. Gersen and Adrian Vermeule, *Chevron As a Voting Rule*, 116 Yale L J 676 (2007).

tional design in a constitutional democracy must balance many goals. The Constitution is hardly a majoritarian document. It is riddled with provisions that make it harder rather than easier to enact majoritarian views, including bicameralism and presentment. Protecting minority views is an important constitutional value that competes with pure majority preferences, and the unbundled executive could produce too much accountability.

We agree that the Constitution does and should balance the implementation of majoritarian views with the protection of minority positions. If the existing Constitution gets the mix exactly right, then any deviation towards more or less accountability would be suboptimal, our proposal included. However, there is a way in which the unbundled executive is, or could be, minoritarian, albeit in a subtle way. Recall that as executive authority is unbundled, there is a corresponding increase in monitoring costs. Suppose executive authority was unbundled such that there were twenty executives. When policy issues are unbundled by creating specialized executives with exclusive authority to make policy, the costs of participation for voters, for example, through gathering information and voting, increase. A plausible inference is that as a result of increasing costs, participation will be lower in unbundled elections than bundled elections or that there might be a falloff such that voters vote for some but not all of the unbundled executives on the ballot.¹⁰⁵ A given citizen will be more likely to participate in the executive election for the issue she cares about most. Citizens with high interest in the issue are more likely to constitute a majority of voters for the given unbundled executive office, even if they are a minority of all voters. This is essentially a selective participation effect, in which minorities will control elections (and by extension outcomes) in the policy domains they care most about. This result is not inevitable, but it is entirely plausible. Thus, while the general theme of the unbundled executive is majoritarian, there are scenarios in which the unbundled executive can protect and even enhance the ability of minorities to control politics most important to their lives.

F. Emergencies and Change

Much of our analysis is static in an important sense. It assumes that the relevant policy dimensions can be identified *ex ante* and that a specific unbundled executive could be elected to control those poli-

¹⁰⁵ There is empirical evidence to support the supposition that participation is selective in unbundled elections. For example, Terry Moe has shown that teachers' union members are up to seven times more likely to participate in school board elections than the average registered voter. See Terry M. Moe, *Political Control and the Power of the Agent*, 22 J L, Econ, & Org 1, 22 (2006).

cies. In the real world, things are not so straightforward. New policy dimensions emerge; others fade away. When there is but one general purpose executive, these shifts take care of themselves. When authority is unbundled, matters are more complicated. If the bundled executive is better able to adapt or deal with emergencies, is this not a significant knock on the unbundled executive?¹⁰⁶

The ability of institutional structures to incorporate changing circumstances is important, but there are two reasons the unbundled executive does not completely falter. First, throughout the discussion, we have emphasized the optimality of *partial* unbundling. At no point was it argued that perfect or complete unbundling would be desirable. Thus, in the proposed regime, there is always what might be termed a *residual executive*, an executive who has authority over all issues that have not been unbundled. At the margin, this executive is still more accountable than a single general purpose executive but less accountable than the unbundled executives with control over a single policy domain.

When new policies or problems arise, the residual executive could address them just as the current perfectly bundled executive does. This is true of gradual change, but it is also true of more acute challenges like emergencies. The unbundled executive is not debilitated when emergency strikes, or at least is no more debilitated than the existing bundled executive would be. In fact, because the residual executive has fewer policy domains to manage, she is likely better able to respond quickly and decisively when emergency strikes. The ability to react to subtle or sudden changes in social circumstances is a value of both the current and proposed regimes.

This response addresses the most severe concern about the unbundled executive and emergencies. But what if new issues emerge that would best be unbundled or previously unbundled regimes wane in importance? This problem has been faced by state and local governments for many years. New elected offices are created with some frequency in the United States. There are costs to doing so, but they are not insurmountable. The structure of the executive branch has changed enormously from the founding; today's cabinet level officers

¹⁰⁶ Consider Eric A. Posner and Adrian Vermeule, *Accommodating Emergencies*, 56 *Stan L Rev* 605 (2003) (criticizing two major arguments that oppose judicial deference to the executive during times of emergency); Bruce Ackerman, *The Emergency Constitution*, 113 *Yale L J* 1029 (2004) (proposing guidelines that could be incorporated into a statute to govern division of powers during an emergency); Adrian Vermeule, *Self-defeating Proposals: Ackerman on Emergency Powers*, 75 *Fordham L Rev* 631 (2006) (critiquing Ackerman's proposed statute to adjust the allocation of power during emergencies); Eric A. Posner and Adrian Vermeule, *Emergencies and Democratic Failure*, 92 *Va L Rev* 1091 (2006) (considering the relationship between democratic failure and emergencies and concluding that democratic failure is not more likely in times of emergency than in other times).

are not the same as those established early in our history. Although it is somewhat rarer to eliminate offices than to create them, offices are eliminated at all levels of government. As society changes, political institutions do as well. If old unbundled executives should be eliminated and new unbundled executives created, so be it. An easy solution is to accompany each executive election with an option to eliminate the office entirely. These are real design questions, but they are also third-order considerations. If the unbundled executive is to be rejected, we doubt it will be on these grounds.

CONCLUSION

Our vision of the unbundled executive is preliminary, and perhaps it is a singularly unlikely one as well. Still, unbundling executive authority would seem to produce desirable effects on political institutions in representative democracies.¹⁰⁷ Although our proposal is more in the spirit of a thought experiment than a true reform proposal, reform movements in the states have long experimented with different structures of executive authority, and constitutional theory might benefit from some of these lessons.¹⁰⁸ At a minimum, our work provides a counterweight to many wrong-headed assumptions in modern constitutional theory about the relationship between singularity, centralization, the structure of executive authority, and electoral controls. The unbundled executive project is mainly about constitutional possibility rather than constitutional reality. We do not claim that the most sensible or even any plausible reading of the US Constitution establishes a plural unbundled executive; but perhaps it should. To the extent the current constitutional structure would allow for modest adjustments toward the unbundled executive ideal, our work suggests such reforms would produce a government structure more in keeping with the democratic ideals most commonly said to justify the single unitary executive. The plural executive position has long been lampooned in constitutional theory. The unbundled executive suggests it should be lampooned somewhat less.

¹⁰⁷ See Marshall, 115 Yale L J at 2468 (cited in note 8) (noting the success of the divided executive in state governments).

¹⁰⁸ See generally Dye, 22 W Polit Q 926 (cited in note 84) (exploring the connection between institutional structure and public policy in state governments).

TABLE 1
STATE GOVERNMENT ELECTED OFFICIALS, 1967–1992

	1992	1987	1977	1967
Total	18,828	18,134	15,294	13,038
Members of state legislatures	7,461	7,461	7,562	7,613
Members of other elected boards	1,331	1,300	1,229	1,230
Other elected officials	10,036	9,373	6,503	4,195

Source: *Census of Governments*

TABLE 2
ELECTED OFFICES BY STATE, 1992 AND 1967

State	Total		Members of legislatures		Members of other elected boards		Other elected officials	
	1992	1967	1992	1967	1992	1967	1992	1967
Alabama	436	275	140	141	11	3	285	131
Alaska	255	415	60	60	139	341	56	14
Arizona	239	228	90	90	117	120	32	18
Arkansas	349	205	135	135	0	0	214	70
California	226	177	120	120	4	4	102	53
Colorado	280	214	100	100	16	11	164	103
Connecticut	333	352	187	213	0	0	146	139
Delaware	80	71	62	53	12	12	6	6
Florida	934	354	160	165	0	3	774	186
Georgia	465	389	236	259	5	5	224	125
Hawaii	91	89	76	76	13	11	2	2
Idaho	171	141	126	105	0	0	45	36
Illinois	623	633	177	235	9	9	437	389
Indiana	506	386	150	150	0	0	356	236
Iowa	319	275	150	185	0	0	169	90
Kansas	343	240	165	165	10	0	168	75
Kentucky	565	275	138	138	3	3	424	134
Louisiana	629	404	144	144	155	92	330	168
Maine	210	186	186	185	15	0	9	1
Maryland	356	261	188	185	0	0	168	76
Massachusetts	225	303	200	280	8	17	17	6
Michigan	652	310	148	148	32	33	472	129
Minnesota	623	283	201	202	0	3	422	78
Mississippi	296	263	174	174	6	6	116	83
Missouri	994	553	197	197	448	236	349	120
Montana	201	203	150	159	0	3	51	41
Nebraska	201	114	49	49	21	17	131	48
Nevada	141	101	63	60	22	14	56	27

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State	Total		Members of legislatures		Members of other elected boards		Other elected officials	
	1992	1967	1992	1967	1992	1967	1992	1967
New Hampshire	430	430	424	424	5	0	1	6
New Jersey	121	90	120	89	0	0	1	1
New Mexico	220	173	112	112	13	13	95	48
New York	950	417	211	207	0	0	739	210
North Carolina	593	284	170	170	0	0	423	114
North Dakota	205	181	159	146	3	3	43	32
Ohio	231	202	132	132	21	23	78	47
Oklahoma	362	250	149	147	3	3	210	100
Oregon	290	156	90	90	0	0	200	66
Pennsylvania	1,200	464	253	253	0	0	947	211
Rhode Island	155	155	150	150	0	0	5	5
South Carolina	195	198	170	174	0	0	25	24
South Dakota	155	147	105	110	3	3	47	34
Tennessee	321	257	132	132	3	3	186	122
Texas	815	534	181	181	18	24	616	329
Utah	200	140	104	97	9	5	87	38
Vermont	186	186	180	180	0	0	6	6
Virginia	143	143	140	140	0	0	3	3
Washington	537	452	147	148	207	210	183	94
West Virginia	205	175	134	134	0	0	71	41
Wisconsin	450	193	132	133	0	0	318	60
Wyoming	121	111	94	91	0	0	27	20

Source: *Book of the States*

TABLE 3
ELECTED OFFICIALS PER CAPITA, BY STATE, 1992 AND 1967

State	State government				Local government			
	Total officials		Per 10,000 population		Total officials		Per 10,000 population	
	1992	1967	1992	1967	1992	1967	1992	1967
United States	18,828	13,038	0.76	0.67	493,830	508,720	19.9	26
Alabama	436	275	1.08	0.78	3,949	3,785	9.8	10.8
Alaska	255	415	4.64	15.26	1,674	557	30.4	20.5
Arizona	239	228	0.65	1.41	3,050	1,949	8.3	12.1
Arkansas	349	205	1.48	1.05	8,059	10,084	34.3	51.6
California	226	177	0.08	0.09	18,699	18,079	6.3	9.6
Colorado	280	214	0.85	1.08	8,325	6,478	25.3	32.8
Connecticut	333	352	1.01	1.22	8,814	10,509	26.8	36.6
Delaware	80	71	1.20	1.39	1,091	800	16.4	15.6

State	State government				Local government			
	Total officials		Per 10,000 population		Total officials		Per 10,000 population	
	1992	1967	1992	1967	1992	1967	1992	1967
Florida	934	354	0.72	0.60	4,654	4,716	3.6	7.9
Georgia	465	389	0.72	0.87	6,064	6,837	9.4	15.3
Hawaii	91	89	0.82	1.24	92	95	0.8	1.3
Idaho	171	141	1.70	2.03	4,604	3,714	45.7	53.5
Illinois	623	633	0.55	0.59	41,713	35,721	36.5	33.3
Indiana	506	386	0.91	0.78	11,118	10,898	20.1	22.2
Iowa	319	275	1.15	1.00	16,160	20,726	58.2	75.4
Kansas	343	240	1.38	1.07	18,552	18,089	74.9	80.4
Kentucky	565	275	1.53	0.86	6,495	6,286	17.6	19.8
Louisiana	629	404	1.49	1.12	4,422	4,357	10.5	12.1
Maine	210	186	1.71	1.89	6,346	6,665	51.7	67.8
Maryland	356	261	0.74	0.72	1,767	1,680	3.7	4.7
Massachusetts	225	303	0.37	0.56	21,948	11,535	36.5	21.4
Michigan	652	310	0.70	0.37	18,052	23,074	19.4	27.6
Minnesota	623	283	1.42	0.79	18,247	26,007	41.9	72.7
Mississippi	296	263	1.15	1.13	4,458	4,498	17.4	19.3
Missouri	994	553	1.94	1.23	16,287	16,660	31.8	37
Montana	201	203	2.52	2.89	4,905	4,880	61.5	69.5
Nebraska	201	114	1.27	0.78	13,698	19,159	86.8	131.6
Nevada	141	101	1.17	2.22	1,077	797	9	17.6
New Hampshire	430	430	3.88	6.31	6,917	5,808	62.4	85.3
New Jersey	121	90	0.16	0.13	8,921	9,362	11.6	13.6
New Mexico	220	173	1.45	1.69	1,981	1,997	13.1	19.5
New York	950	417	0.53	0.23	24,982	24,091	13.9	13.2
North Carolina	593	284	0.89	0.57	5,227	5,220	7.9	10.4
North Dakota	205	181	3.21	2.78	15,277	16,145	239.1	248.4
Ohio	231	202	0.21	0.20	19,135	20,636	17.7	20
Oklahoma	362	250	1.15	1.02	8,627	9,210	27.5	37.5
Oregon	290	156	1.02	0.80	7,543	7,529	26.6	38.5
Pennsylvania	1,200	464	1.01	0.40	29,276	33,890	24.6	29.3
Rhode Island	155	155	1.55	1.73	983	1,125	9.8	12.5
South Carolina	195	198	0.56	0.77	3,748	2,880	10.8	11.1
South Dakota	155	147	2.23	2.16	9,529	16,161	136.9	237
Tennessee	321	257	0.66	0.66	6,629	7,620	13.6	19.6
Texas	815	534	0.48	0.50	26,813	22,504	15.8	20.9
Utah	200	140	1.16	1.39	2,511	2,081	14.6	20.6
Vermont	186	186	3.30	4.59	8,348	7,059	148.3	174.3
Virginia	143	143	0.23	0.32	2,961	3,444	4.8	7.6
Washington	537	452	1.10	1.52	7,187	7,497	14.8	25.2

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	State government				Local government			
	Total officials		Per 10,000 population		Total officials		Per 10,000 population	
State	1992	1967	1992	1967	1992	1967	1992	1967
West Virginia	205	175	1.14	0.98	2,567	3,373	14.3	18.8
Wisconsin	450	193	0.92	0.46	17,379	20,165	35.5	48.5
Wyoming	121	111	2.67	3.37	2,621	2,288	57.7	69.5

Source: *Book of the States*

TABLE 4
INDEPENDENTLY ELECTED STATE OFFICES

Office or function	Number of states where elected	
	2002	1977
Governor	50	50
Lieutenant Governor	45	41
Attorney General	43	42
Treasurer	38	39
Secretary of State	38	37
Post-audit	19	17
Comptroller	16	9
Education	15	20
Pre-audit	15	12
Agriculture	12	11
Insurance	12	8
Public Utility Regulation	7	8
Community Affairs	6	0
Finance	5	0
Labor	4	4
Election Administration	4	0
Revenue	2	1
Banking	2	0
Adjutant General	1	1
Natural Resources	1	1
Social Services	1	0
Transportation	0	1

Source: *Book of the States*

TABLE 5
 NUMBER OF INDEPENDENTLY ELECTED
 EXECUTIVE OFFICES, BY STATE, 2002 AND 1977

State	2002	1977	State	2002	1977
Alabama	7	7	Montana	7	6
Alaska	3	2	Nebraska	6	7
Arizona	7	5	Nevada	6	7
Arkansas	5	6	New Hampshire	1	1
California	10	8	New Jersey	1	1
Colorado	5	5	New Mexico	7	6
Connecticut	6	7	New York	7	3
Delaware	7	6	North Carolina	10	10
Florida	11	9	North Dakota	11	12
Georgia	10	5	Ohio	8	6
Hawaii	2	2	Oklahoma	8	10
Idaho	11	8	Oregon	8	6
Illinois	8	8	Pennsylvania	6	4
Indiana	8	8	Rhode Island	6	5
Iowa	7	7	South Carolina	11	10
Kansas	6	6	South Dakota	8	7
Kentucky	8	8	Tennessee	2	2
Louisiana	8	9	Texas	10	7
Maine	1	1	Utah	6	5
Maryland	4	4	Vermont	7	6
Massachusetts	6	6	Virginia	3	3
Michigan	4	4	Washington	11	9
Minnesota	6	5	West Virginia	6	6
Mississippi	9	12	Wisconsin	6	5
Missouri	6	6	Wyoming	9	4
Average				6.72	6.04

Source: *Book of the States*