University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 144

JANUARY 1996

No. 3

ARTICLES

THE PARADOX OF POWER IN THE MODERN STATE: WHY A UNITARY, CENTRALIZED PRESIDENCY MAY NOT EXHIBIT EFFECTIVE OR LEGITIMATE LEADERSHIP

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Presidential power is the power to persuade.¹

INTRODUCTION

Numerous scholars have written in recent years about presidential influence, although from widely different perspectives. On the one hand, many commentators have criticized what they see as the tyrannical and unchecked power of the president, who is often thought to ignore the views of Congress, the federal bureaucracy, and the public regarding appropriate policy.² On the other hand,

¹ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER* 10 (1980) (emphasis omitted).

² See, e.g., JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 1-11 (1993) (discussing the constitutional rationale for the delegation to Congress of the power to declare war and observing President George Bush's remark that "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait"); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 6 (1990) ("Congress can and should seek to alter recurrent patterns of wayward executive behavior by restructuring the institutional attributes that now

some observers have discussed at length the supposed weaknesses of the president, who is often viewed as unable to affect, let alone direct, events in many policy areas.³

Not surprisingly, these diverse factual conclusions often mirror contrasting normative positions on the *value* of a strong president. On one side, proponents of a strong president argue that a government more directly controlled by a single decisionmaker—that is, a strong unitary executive—frequently avoids many of the collective action problems endemic to legislative bodies or dispersed government organizations, such as Congress or a plural executive. Borrowing from public choice theory, these proponents conclude that the exercise of power by a centralized but politically visible and

create incentives for executive officials to act irresponsibly and for congressional and judicial officials to permit such actions.”); THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* at x-xi (1985) (stating that “[i]n a single office, the presidency, the powers of the American people have been invested, making the most powerful office in the world” and describing the new American regime as a “plebiscitary republic with a personal presidency”); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* at viii (1973) (“The constitutional Presidency . . . has become the imperial Presidency and threatens to be the revolutionary Presidency.”); JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 33 (1981) (“The President of the United States has grown into a position of overmastering influence over the legislative department of the government. . . . Congress is subservient to his will; its independence is in eclipse.” (quoting HENRY C. BLACK, *THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION* at v, 1 (1919))); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (1987) (“Presidents regularly ‘go over the heads’ of Congress to the people at large in support of legislation and other initiatives.”).

³ See, e.g., TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG EXECUTIVE* 2 (1992) (“[N]o presidency that is weak can expect to govern as well as it might. Only the strong presidency will do.”); AARON WILDAVSKY, *THE BELEAGUERED PRESIDENCY* at xi (1991) (attributing the “picture of beleaguered presidents to the growth of political dissensus . . . based on conflict between (largely Democratic) egalitarians and (largely Republican) individualists and hierarchists”); L. Gordon Crovitz & Jeremy A. Rabkin, *Introduction to THE FETTERED PRESIDENCY* 1, 2 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (“[T]he Reagan administration . . . had finally fallen victim to the mysterious political curse that had brought down each of its predecessors of the previous two decades. This curse, of course, relates to the general theme of a fettered executive branch and how legal constraints adversely affect its performance and thus the performance of government generally.”); Gordon S. Jones & John A. Marini, *Introduction to THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS* 1, 1 (Gordon S. Jones & John A. Marini eds., 1988) (“America faces a constitutional crisis stemming from two causes: the congressional failure to observe traditional limits on its power, and the acquiescence of the other two branches of government in the resulting arrogation of power.”). See generally *THE TETHERED PRESIDENCY* (Thomas M. Franck ed., 1981) (discussing the struggle for power between the president and Congress and examining the prospects for a foreign policy created by both branches).

electorally accountable institution, such as the president, often serves as the most effective and democratic form of government. In a sense, it is a better form of "enterprise liability." Critics of presidential power, on the other side, emphasize the failures of recent presidents: their lack of accountability to many important political constituencies (both majoritarian and minoritarian); their inability to exercise effective leadership; and their apparent lack of competence, let alone expertise.⁴ The succession of scandals surrounding each of the last three presidents reinforces this view. Proponents of this position ask why more power should be placed in such a discredited and potentially tyrannical institution.

Despite these different assessments of the president's appropriate role, most contributors to this debate seem to agree implicitly on one thing: vesting enhanced authority in the person of the president has increased his influence in the past and will continue to do so if additional centralizing changes are implemented.⁵ This view is especially prevalent among legal academics, who generally assume that giving greater formal legal control to the president through devices such as a line-item veto or executive order 12,291,⁶

⁴ See Juan Linz, *The Perils of Presidentialism*, 1 J. DEM. 51, 54-55 (1990) (discussing the relative merits of a parliamentary versus presidential democracy and noting the "fundamental contradiction" in presidential systems that creates "a strong, stable executive with enough plebiscitarian legitimation to stand fast," as well as a "latent suspicion" of the "personalization of power"); LOWI, *supra* note 2, at 156-57 (noting that classic constitutional restraints on presidential power have been "broken down," leaving the chief executive with vast powers and "no sense of priorit[ies]"). For an outline of the arguments in favor of greater administrative autonomy, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512-16 (1992) (claiming that agencies are the source of civic republican values and expertise).

⁵ I used the feminine pronoun for the president in a previous article. See Robert P. Inman & Michael A. Fitts, *Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record*, 6 J.L. ECON. & ORGANIZATION 79 (Special Issue 1990). In this Article, I will use the masculine pronoun for the president and the feminine pronoun for members of Congress.

⁶ Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (expanding presidential oversight of the regulatory process to require all administrative agencies to prepare and submit regulatory-impact-analysis reports), *revoked by* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (revoking Executive Orders 12,291 and 12,498 and requiring the centralized review of only significant rules), *reprinted in* 5 U.S.C. § 601 note (1994); *see also* Exec. Order No. 12,498, 3 C.F.R. 323 (1985) (providing for presidential oversight of the regulatory planning process), *revoked by* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), *reprinted in* 5 U.S.C. § 601 note (1994); Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501-3520 (1988)) (creating an executive agency that develops and implements federal information policies and guidelines).

will necessarily increase his ability to work his will over the bureaucracy, and the government in general.⁷ Formal legal power, in other words, will ultimately translate into real policy influence. Similarly, political science scholars who study the strategic implications of political organization suggest that the political singularity of the presidential persona is a source of immense informal political strength. By applying insights derived from game theory, these commentators delineate the president's strategic advantages in overseeing the modern state, chiefly his influence on the public agenda, ability to establish "focal points" for political bargaining, and freedom from the costs of collective decisionmaking and action.⁸ Indeed, even critics of a strong presidency recognize this

The Senate and the House of Representatives have each passed separate line-item veto bills that enable the president to strike certain provisions of large spending and taxation bills before signing them into law, thus increasing the president's formal power vis-à-vis Congress. See Line Item Veto Act, H.R. 2, 104th Cong., 1st Sess. (1995) (giving the president a general power to veto all or part of a budgetary item or to repeal any tax benefit if the president determines that the veto or repeal would reduce the federal budget deficit without impairing essential government functions or harming national interests); Legislative Line Item Veto Act of 1995, S. 4, 104th Cong., 1st Sess. § 2 (1995) (authorizing the president, under certain circumstances, to "rescind all or part of any dollar amount of any discretionary budget authority specified in an appropriation Act or conference report or joint explanatory statement accompanying a conference report on [this] Act, or veto any targeted tax benefit which is subject to the terms of this Act").

⁷ See Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1236-37 (1988) ("Effective executive coordination of these various lawmaking centers, many of which are executive in character, requires greater executive influence over policy initiation and implementation as well as greater executive control over the legal output of the bureaucracy." (citations omitted)); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1088 (1986) ("Both regulatory review and regulatory planning are necessary management tools . . . and no program can be implemented in the modern regulatory state without [them] by the Executive Office of the President."); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1986) ("[A] supervisory role by the President [over regulatory agencies] should help ensure that discretionary decisions by regulatory agencies are [more] responsive to the public generally.").

⁸ For the most part, rational choice scholars who focus on the problems of rational decisionmaking in multimember bodies have not added much to the debate. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 55-62 (1991) (distinguishing between the rational choice and the welfare implications of public choice); SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 5-27 (1992) (discussing the current conception of economics as a "conservative, laissez-faire movement" and arguing that a "credible progressive movement must incorporate a well developed respect" for costs and benefits). The reason is simple. Models of collective decisionmaking do not explain much about the operation of an institution headed by a single individual

centralization as an important—albeit unwelcome—source of the president's power.⁹

such as the president. Indeed, the so-called congressional dominance literature has attempted to model agency activities as solely a function of the changing oversight of legislative supervisory committees. For the classic study of the FTC, see Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking By the Federal Trade Commission*, 91 J. POL. ECON. 765, 765, 793 (1983) (hypothesizing that "agencies are controlled by the legislature" and concluding both that "FTC activity is remarkably sensitive to changes" in the composition of the sub-committee and that relevant oversight committees exert greater influence than does the rest of Congress). See also *infra* note 76. Although this is an interesting and powerful insight, it only provides a partial explanation of their behavior, if for no other reason than because it ignores the president. See Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORGANIZATION 213, 236 (Special Issue 1990) ("So far, the positive theory of institutions does not have much to say about presidents. . . . [P]residents ought to be far more central to a theory of political institutions.").

The one case in which rational choice scholars have systematically focused on the presidency is the case in which the presidency is modeled as a three-person voting game between the two houses of Congress and the presidential veto. See William N. Eskridge, Jr. & John Ferejohn, *The Article 1, Section 7 Game*, 80 GEO. L.J. 523, 528-33 (1992) (describing, in formal terms, the "sequential game" played by the president and the legislature in accommodating their respective policy preferences); Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737, 1769-73 (1992) (summarizing the literature and noting that the presidential power of the veto plays a major role in legislative determination); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements & the Political Control of Agencies*, 75 VA. L. REV. 431, 440-44 (1989) (arguing that administrative structures reflect ex ante agreements between the legislature and President which limit ex post opportunistic behavior); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 714 (1992) (noting that the legislative process is a collective action problem with three actors to be accounted for: the Senate, the House, and the president). See generally Gary J. Miller, *Formal Theory and the Presidency*, in RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES 289, 289-92, 296-303 (George C. Edwards III et al. eds., 1993) (summarizing the literature on the weakness of the veto but showing how the threat that the abnormal informed voter will become involved in political discourse and upset the normal condition of "pressure politics" operates as a major source of presidential power, which allows the president to play a "crucial role [in the] coordination of policy").

⁹ Of course, the results of the 1994 congressional elections may suggest that Congress is becoming a more powerful institution and that the presidency is becoming weaker by comparison. Generalizing about the events of 1994 and 1995 may be quite hazardous, however. Some have suggested that this is part of a period of political realignment in which traditional "ordinary" political relationships are reshaped. See Walter D. Burnham, *Realignment Lives: The 1994 Earthquake and Its Implications*, in THE CLINTON PRESIDENCY: FIRST APPRAISALS 363, 363 (Colin Campbell & Bert A. Rockman eds., 1996) (observing that "1994 bears many characteristics of an old-style partisan critical realignment"); see also WALTER D. BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 135 (1970) (evaluating the argument that the "country is now in a realigning sequence . . . [which is a] product of dynamic transformation in a quite separately developing socioeconomic system"); V.O. Key, Jr., *A Theory of Critical Elections*, 17 J. POL. 3, 3-4

As a result, the debates over whether the president is strong or weak, and whether his power should be increased or limited, have focused invariably on legal, structural, and political changes that would either vest or reduce personal presidential authority. On the one side, those who argue that the president is too strong tend to support expanded congressional oversight of the White House, limited use of the presidential veto, increased autonomy of the executive branch bureaucracy, and increased access for Congress and the press to government documents and deliberations under the Freedom of Information Act (FOIA),¹⁰ Government in the Sunshine Act (GSA),¹¹ and Federal Advisory Committee Act (FACA).¹² On the other side, those who perceive the president as too weak usually call for a more "unitary executive." These proponents tend to support the enactment of a law authorizing a

(1955) (formulating "a concept of one type of election—based on American experience . . . in which the depth and intensity of electoral involvement are high, in which more or less profound readjustments occur in the relations of power within the community, and in which new and durable electoral groupings are formed"). For a legal application, see generally 1 BRUCE ACKERMAN, *WE THE PEOPLE* 266-322 (1991). In such situations, heightened informal political forces may have a greater impact on decisions than the legal or political structure through which they are made.

¹⁰ 5 U.S.C. § 552 (1994).

¹¹ 5 U.S.C. §§ 551(14), 552b, 556(d), 557(d) (1994).

¹² 5 U.S.C. app. (1994); see also MORTON H. HALPERIN & DANIEL N. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW 39 (1977) ("[T]he prevailing system of disclosure [about matters concerning national security], while intrinsically capable both of assisting public debate and of harming national security, is primarily oriented toward the parochial needs of members of the executive branch."); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1059-60 (1986) (arguing that the OMB's "dominance under the present system is unwarranted" and that until Congress "eliminate[s] the OMB's involvement in the rulemaking process . . . the President . . . should impose restrictions on [the] OMB that eliminate the worst abuses"); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 929-32 (1994) (criticizing Congress for granting control over national security information to the president); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 672 (1989) (describing the Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425, 445 (1977), which noted that FOIA and GSA were constitutional regulations of the executive branch); Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 914-17 (1990) (arguing that FOIA should be rigorously applied to the president in the areas of national security and foreign policy). See generally Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984) (finding that executive oversight of agency decisions via the OMB creates interagency friction and thus diminishes agency effectiveness).

line-item veto, expansion of presidential supervisory powers over the bureaucracy through executive orders such as 12,291,¹³ 12,498,¹⁴ and 12,866,¹⁵ elimination of the independence of independent agencies, expansion of the executive privilege doctrine, and greater insulation of the president from public scrutiny under FOIA and FACA.¹⁶ As the breadth of this list indicates, resolution of most legal issues regarding the powers of the presidency turns on whether one views the president as either too strong or too weak.¹⁷ Both sides seem to agree, however, that increasing the centralization of power in the *person* of the president, both legally and politically, will significantly increase his influence.¹⁸

¹³ 3 C.F.R. 127, *reprinted in* 5 U.S.C. § 601 note (1982) (establishing a task force, among other things, to increase the efficiency and executive oversight of the regulatory process), *revoked by* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), *reprinted in* 5 U.S.C. § 601 note (1994).

¹⁴ 3 C.F.R. 323 (1985), *revoked by* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), *reprinted in* 5 U.S.C. § 601 note (1994).

¹⁵ 58 Fed. Reg. 51,735 (1993), *reprinted in* 5 U.S.C. § 601 note (1994).

¹⁶ *See, e.g.,* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 588 (1989) (arguing for some exemptions for the president from the review of the Office of Information and Regulatory Affairs in order to further effective policy control); Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 54 (1994) (arguing that FACA violates the separation of powers by limiting the president's information-gathering abilities); DeMuth & Ginsburg, *supra* note 7, at 1081 (defending White House review of all proposed and final regulations promulgated by executive agencies and arguing that "rulemakers should be accountable to the president before issuing their rules and should be obliged to demonstrate the costs and benefits of their rules as thoroughly as circumstances permit"); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437 (1990) (arguing that the item veto may be necessary to preserve the president's position in the constitutional balance of powers); Strauss & Sunstein, *supra* note 7, at 185-88 (arguing in favor of executive oversight through Executive Order No. 12,291).

¹⁷ This assumption is illuminated by the controversy over the special counsel law, which captures virtually all of the ideological cross-currents in Washington today. *See generally* TERRY EASTLAND, *ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE, 1789-1989* (1989) (providing an historical account of and argument against the independent counsel law). Opponents, most notably Justice Scalia in his dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting), argue that the special counsel law tips the balance against the president in political confrontations with the legislative branch and passes effective, although not formal, control of various traditional executive functions to legislative officials. Conversely, supporters see the special counsel law as an effective means of reigning in the improper exercise of power by the president and his high officials by investigating their compliance with criminal and ethical standards. For a review of the various positions, see *A Symposium on Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute*, 38 AM. U. L. REV. 255 (1989).

¹⁸ *See, e.g.,* David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 31-32 (explaining that the framers of Article II "concentrate[d] executive

This Article takes issue with some important elements of this analysis. I argue that the structural changes that appear to enhance the power of the president under public choice approaches and unitary executive principles can, at the same time, actually undermine the president's reputation, his ability to resolve conflicts, and ultimately, his political strength. As a result, formal attempts to strengthen the presidency may have "diminishing marginal returns" and perhaps even negative effects, at least in some contexts. The reasons are complicated but straightforward: the individuality, centrality, and visibility of the "personal unitary presidency," which is seen as an advantage in terms of collective choice and public debate, can be a disadvantage when it comes to conflict resolution and public assessment. By using the term "mediating conflict," I refer to the way in which a political leader or institution overcomes the social and political costs of resolving distributional and symbolic disputes.¹⁹ Due to his singularity and enhanced visibility,

power in the hands of a single person" because they believed that a unitary executive would provide the most effective leadership); Fitts & Inman, *supra* note 8, at 1757-73 (showing "how informal presidential resources might be used to fashion presidential coalitions from initially reluctant legislators" and "how the influence of these informal coalitions can be leveraged through the formal powers of the presidential veto to induce even major fiscal reforms"); Inman & Fitts, *supra* note 5, at 96-99 (describing how strong, independent presidents are able to exercise control over congressional fiscal policy); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 93-95 (1994) (asserting that a unitary presidency is needed to counter factionalism among the administrative agencies and increase accountability in the executive branch); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORGANIZATION 81, 95 (1985) (arguing that delegating "political authority to administrators" will improve "the responsiveness of government to the desires of the electorate" through the responsiveness of the president overseeing the bureaucracy); Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 47-48 (describing the Reagan Administration's opposition to independent agencies based on the belief that they limited the power of the president); Terry M. Moe, *Presidents, Institutions, and Theory*, in RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES, *supra* note 8, at 337, 364 (describing the president's "quest for control" as characterized by "a great deal of autonomy" and "freedom to fashion his own agenda and to pursue his own brand of control").

¹⁹ Generally, there is no "pareto" solution to distributional disputes. See Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 18, 28 (1982) (evaluating the bargaining interpretation of both the Coase theorem and the Hobbes theorem and determining that both are "illuminating falsehoods"); see also *infra* part II.A (explaining that the developing literature in game theory has shown that "there are no clear 'pareto superior' solutions or even clear outcomes to most decisions with pure distributional or symbolic effects"). The mediation process can avoid conflict in various ways—by changing public values or "preferences," avoiding issues, or reaching ex ante agreement on formal or informal mediating processes.

a unitary, centralized president may be less able to mediate many of these conflicts. At the same time, he may be politically evaluated more often under personal (rather than institutional) criteria and subjected to an overassessment of government responsibility and error. This combination of effects can undermine not only the popularity and perceived competence—what I will call “legitimacy”—of the person who holds the office, but indirectly, the president’s political influence as well. What the institution of the presidency seems to gain in strategic power from its centralization in a single visible individual, it may lose, at least in some contexts, as a result of the normative political standards applied to individuals.

This analysis is intended to explain a paradox in the current debate. Many commentators suggest that the presidency has become more centralized both legally and politically in recent years, as the president and his bureaucratic alter ego, the Executive Office of the President, have become more involved formally and informally in public policy decisions.²⁰ At the same time, some commentators, led by Theodore Lowi, have persuasively detailed the political weaknesses and perceived inadequacies of modern presidents.²¹ How can these observations be reconciled?²² Extending Lowi’s analysis, I argue that while the presidency may have become a more complex and effective institution bureaucratically and legally, in many ways it has also become more individualized politically, which can undermine its political legitimacy and strength. The legal theory of the unitary executive, for which I have some sympathy, can thus be at war with itself.

²⁰ See *infra* part I.A (discussing the “nature of the presidency in a modern state”).

²¹ See LOWI, *supra* note 2, at 211 (criticizing the office of the president and explaining that recent presidents “have been diminished by having to achieve so much more than past presidents and by having to use so much more deception to compensate for their failures”); see also GEORGE C. EDWARDS III, *PRESIDENTIAL APPROVAL: A SOURCEBOOK* 128-30 (1990) (finding that average presidential approval ratings have dropped since 1965).

²² Indeed, there does not seem to be any systemic relationship between changes in the structure of the presidency that are viewed as strengthening the power and influence of the office and the historical perceptions of the strength of individual presidents. See Inman & Fitts, *supra* note 5, at 104-05 (referring to a survey of 571 American historians as to the relative strength of each president according to the “strength of the role of the president played in directing the government and shaping the events of his day”). The strategic advantages of the presidency can only mark the beginning, not the end, of any institutional analysis. Standing alone, these advantages seem to suggest that the president is always more powerful than a multimember body such as Congress—a conclusion clearly not supported by the facts.

What are the implications of this analysis? First, legal scholars should appreciate the theoretical complexity of the problem. The debate over whether the president is too strong or too weak is in some cases a false dichotomy because the various legal and political changes serving to centralize formal and informal presidential resources may increase presidential influence in some contexts and diminish it in others.²³ Indeed, although a more central, unitary president may be stronger overall, he may nevertheless be perceived as less competent. In this sense, one important goal of this Article is to explore how the source of at least some of our frustration with the office of the presidency is the result of the structure of the position, rather than the personal "mistakes" of its inhabitants.

The second purpose of this Article, though far more speculative, is policy oriented: to suggest possible legal reforms and tactical approaches modern presidents could follow. Can structural mechanisms or approaches be developed that help the chief executive, when appropriate, mediate conflict and avoid certain types of individualized scrutiny? In the past, old-style political parties often filled this role,²⁴ but we are unlikely to return to that era.²⁵ In the alternative, I offer several legal, structural, and political changes that might improve the president's ability to mediate conflict, including (paradoxically) reassessment of the line-item veto, selected cutbacks in *direct* presidential oversight of agencies, and the judicious creation of commissions, such as the Commission on Base Realignment and Closure,²⁶ which operate

²³ As president after president receives similar criticisms, commentators need to appreciate that at least *some* of the failure is due to the nature of the office, not the person who inhabits it.

²⁴ That is, they served as an institutionalized system for conflict resolution.

²⁵ Whether parties are getting stronger or weaker organizationally, and in what form, is subject to intense debate. Most observers seem to agree, however, that the strength of the public's party identification and the impact of parties across the branches of government are diminishing. See JOHN H. ALDRICH, *WHY PARTIES?* 296 (1995) (explaining that the contemporary party is "candidate-centered," "designed by and meant to serve its office seekers," and "was intended to transform the conditions of party government into a reasonable approximation of that party government in practice").

²⁶ Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 203, 102 Stat. 2623, 2627-28 (1988) (codified at 10 U.S.C. § 2687 note (1994)) (describing the Commission's composition and its duty to recommend base closures); Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2902-2903, 104 Stat. 1485, 1808-12 (codified at 10 U.S.C. § 2687 note (1994)) (establishing a new Defense Base Closure and Realignment Commission

with less direct presidential control.

Part I describes the different ways in which the modern presidency has become more centralized legally and politically, making the office more visible and politically accountable. Under the analyses developed separately in the legal literature on the unitary presidency and in the political science literature on a centralized "modern" or "plebiscitary" presidency, these developments would seem to make the presidency a more effective and democratic institution. These writings, while focusing on different substantive areas, share common theoretical perspectives on the value of increasing centralized presidential power.

Despite these structural developments, the modern presidency does not seem to be a particularly strong institution. Parts II through V offer several possible theoretical explanations, exploring, from a general perspective, the different ways in which the president's visibility and centralization may, at the same time, delegitimize politically his exercise of governmental power. Specifically, increased visibility and centralization may diminish the president's ability to mediate conflict (Part II), subject him to an instrumentally inappropriate standard of personal moral evaluation (Part III), result in an overassessment of personal presidential error (Part IV), and lead to an overassessment of the president's responsibility for government and social outcomes (Part V). Although these potential consequences are powerfully affected by cultural perceptions and vary in importance according to context, taken together they can help explain many of the difficulties faced by a more visible and centralized modern presidency. At the same time, these generic effects serve to undermine some of the common analytic assumptions underlying the legal and public choice analyses of a unitary, centralized presidency. My point is *not* that a modern centralized presidency is overall weaker as a result of the changes (it probably is not), but only that the relationship between greater centralized authority and overall influence can be quite mixed. Finally, in the Conclusion, this Article explores specifically how we might alleviate some of these negative consequences through both legal and political changes.

In entering the legal and policy debate over the presidency, this Article reflects two rather distinct approaches. First, it focuses on the *informal* political consequences of legal structure, especially

and providing procedures for member selection and closure recommendations).

mediating political conflict and assessing error. Given the heightened visibility of and information about political actors, these informal consequences may be becoming more important in understanding the influence of the president.²⁷ Yet, as explained below, scholars writing in both the unitary president and public choice traditions often deemphasize the importance of these two informal effects. This is perhaps because public choice scholars operate under the assumption that "preferences" are given,²⁸ while legal academics tend to overlook the systemic impact of formal legal authority on informal political power.²⁹ Although I will rely in many places on public choice and legal analysis, this Article is a work of mid-level analysis. I seek to integrate the insights of the rational choice tradition with more textured claims about political psychology, information asymmetries, and American culture.

²⁷ As economists might conceptualize the point, the institutional allocations of political responsibility—the "property rights"—may become less important when informal political forces—reduced transaction costs—loom larger. At the same time, public choice scholars have a great deal of difficulty explaining why the president is influential in terms of the veto power alone. See Miller, *supra* note 8, at 296-303 (summarizing literature on formal analysis of the veto power and finding that a president cannot rely solely on his veto power to achieve legislative success).

²⁸ Making political or distributional decisions (that is, mediating conflict) necessarily requires "changing" preferences about distribution—inducing participants to accept a distribution that makes them worse off than their ideal. Unlike the case of private markets, where losers go away, in governmental conflicts losers can retaliate or refuse to participate. To put this in law and economics terms, political systems must deal with distributional questions for which there is no pareto solution and for which serious strategic and other costs may exist. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 78-81 (1977) (describing the circumstances under which there is no pareto (or "no-loss-to-anyone") solution); ROSE-ACKERMAN, *supra* note 8, at 187 (concluding that "the market cannot bear the entire burden of managing conflict" and that "[p]olitical institutions and decisionmaking procedures are required for decisions that can only be made collectively"); Cooter, *supra* note 19, at 14-24 (describing the problems of applying the Coase theorem to the bargaining process); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in *PERSPECTIVES ON PUBLIC CHOICE* (Dennis Mueller ed., forthcoming 1996) (manuscript at 9, on file with author) (describing the "well known" fact "that the division of any economic pie is a bargaining problem which may have no solution").

²⁹ At the same time, this Article serves to elucidate some long-lasting debates in political science about the benefits of political parties as opposed to presidents. Presidential systems appear to be ideal decisionmaking institutions under many public choice models but have been criticized by many traditional political scientists. See, e.g., AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 76 (1984) (recognizing that "the respective independence" of the executive and legislative branches "creates the potential of serious disagreements and deadlock between them").

Second, to understand the effects of these informal factors on the power of the presidency, this Article adopts a fairly abstract approach. References to individual presidents, which I plan to develop further in a future article, are offered primarily for illustrative purposes. This method contrasts with many political science pieces on the presidency that seek to explain the strength of the institution in terms of individual personalities or styles. These "great person" theories are rich in detail but offer no analysis that can be usefully generalized or evaluated.³⁰ Legal studies, on the other hand, tend to engage in a formal doctrinal analysis but ignore informal political factors or fail to incorporate them systematically into their formal analysis.³¹ If one broadens the analysis of the presidency to include these informal perspectives, however, the political singularity of the president—viewed positively under public choice models of collective action and unitary president proposals—emerges as a potential source of his weakness.³²

³⁰ See Colin Campbell, *Political Executives and Their Officials*, in 2 POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 383, 384 (Ada W. Finifter ed., 1993) ("[P]olitical scientists have tended to extrapolate from the approach and circumstances of each administration in making more general assertions about the state of the presidency which soon fail the test of time."); Terry M. Moe, *Presidential Style and Presidential Theory* (1990) (unpublished manuscript) (criticizing such studies as "promoting conceptual confusion, the endless proliferation of relevant variables, and more complications than any analysis can make sense of"), quoted in Campbell, *supra*, at 383.

³¹ The most notable exception is Steven Calabresi's recent article. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 29 (1995).

³² A final note: Due to the nature of the topic, the thesis is difficult to "test" in any rigorous empirical sense. There are only a small number of "observations" (that is, presidents) to which this or any other analysis of the presidency can be applied. Furthermore, the criteria used are necessarily imprecise. In order to minimize this concern, the explanation is presented in logical and general terms, so that it can be evaluated on its own merits and applied in different cases. See generally MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* (1949) (exploring the difficulty of causal proof in the social sciences).

Its generalizability should also serve to eliminate at least some of the political bias that clouds many analyses of the presidency. Writing in this area frequently occurs in the "heat of battle." Is Ronald Reagan acting "tyrannically" when he mines the harbors of Nicaragua? Is Bill Clinton being highhanded when he attempts to dictate health care reforms? In this regard, this Article appears at a relatively receptive historical moment. Our recent memory of presidents includes both a "Clinton" and a "Reagan," health care as well as tax cuts, and Haiti as well as Nicaragua.

I. THE PRESIDENCY

A. *The Modern Presidency*

What is the nature of the presidency in the modern state? Numerous political scientists and legal academics claim that our recent chief executives have inherited a "modern presidency,"³³ which began to develop with Franklin Roosevelt and is structurally distinct from earlier regimes.³⁴ Of course, the balance of power among the president, Congress, and the agencies is exceedingly complex, since the amount of bureaucratic activity and legislative oversight has increased greatly over the years. Nevertheless, "the resources of modern presidents [are thought by many to] dwarf those of their predecessors."³⁵ Commentators point to three related changes that centralize greater formal power in the institution and increase the informal political assets at the president's command.

The first change, which is to some extent considered the most important and defining quality of the modern presidency, is the increased visibility of the president as an individual within the electoral process. Prior to the Roosevelt Administration, the president was viewed more as a member of both a party and a complicated and elite system of government. He was also relatively distant from the population. The modern presidents, in contrast, are elected increasingly as individuals in the primary and general elections on the basis of direct public exposure in the media. This

³³ The modern presidency perspective has been developed in THOMAS C. CRONIN, *THE STATE OF THE PRESIDENCY* (1980); SAMUEL KERNELL, *GOING PUBLIC* (2d ed. 1993); NEUSTADT, *supra* note 1; RICHARD ROSE, *THE POSTMODERN PRESIDENT: THE WHITE HOUSE MEETS THE WORLD* (1988); Fred Greenstein, *Continuity and Change in the Modern Presidency*, in *THE NEW AMERICAN POLITICAL SYSTEM* 45 (Anthony Kink ed., 1979). The original "modern presidency" book was CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* (1956). The major challenge to the concept of a distinctive modern presidency is found in STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* (1993). Skowronek suggests that enduring patterns of presidential conflicts exist by which different types of presidents throughout American history can be categorized. Even Skowronek, however, believes that recent presidents may have experienced a waning of political time. See *id.* at 55-56.

³⁴ Most scholars trace the beginning of the modern presidency to Roosevelt and the New Deal. See, e.g., LOWI, *supra* note 2, at 8 ("One of the most important changes attributable to the New Deal is the change in President-Congress relations."). See generally SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES* (1993) (tracing, since the New Deal, the transformation of the American party system, specifically the relationship between the presidency and party politics).

³⁵ SKOWRONEK, *supra* note 33, at 409.

evolution, which has occurred over a number of years, is a result of social forces, such as the decline of political parties³⁶ and the rise of the media, as well as legal changes, such as the ascendancy of primaries.³⁷

Second, once in power, modern presidents have increasingly attempted to take greater formal and informal control of the executive branch, through policy expansion of the OMB and the Executive Office of the President and increased oversight of agencies under Executive Order 12,291³⁸ and its successor orders. Indeed, every president since Roosevelt has attempted to centralize power in the White House to oversee the operations of the executive branch and to make its resources more responsive to his policy and political needs.³⁹

³⁶ See generally MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES 1952-1984* (1986).

³⁷ See JAMES W. CEASER, *REFORMING THE REFORMS: A CRITICAL ANALYSIS OF THE PRESIDENTIAL SELECTION PROCESS* 32-33, 58-64 (1982) (showing the "dramatic growth in the number of primaries since 1968 and in the number of delegates chosen in primaries" and discussing the concomitant increase in media influence); NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 56, 69, 132 (1983) (noting that a series of party reforms generated a proliferation of primaries, a vast increase in the role of the news media, and a reevaluation of what the idea of a political party meant). Changes in the structure of party nominations have contributed to the process of enhancing the centrality of the candidates and the president as a person. For public choice analysis of the impact of primary changes, see JOHN H. ALDRICH, *BEFORE THE CONVENTION: STRATEGIES AND CHOICES IN PRESIDENTIAL NOMINATION CAMPAIGNS* 114 (1980); LARRY M. BARTELS, *PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE* 17-27 (1988). Likewise, the party primary process highlights the individual qualities of candidates and makes campaigns candidate-centered. Once elected, therefore, the president cannot rely as much on party members to diffuse conflict and maintain support; he becomes a truly personal president. See MARTIN P. WATTENBERG, *THE RISE OF CANDIDATE-CENTERED POLITICS* 164 (1991) ("Without a solid base of continuing partisan support, presidential candidate popularity has . . . shown long-term decline.").

³⁸ 3 C.F.R. 127 (1981), *revoked* by Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), *reprinted in* 5 U.S.C. § 601 note (1994).

³⁹ See, e.g., Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 31 U.S.C. § 1104 (1994)) (outlining the president's functions with respect to the national budget); National Security Act of 1947, Pub. L. No. 80-253, ch. 343, 61 Stat. 496 (codified at 50 U.S.C. §§ 401-432 (1988 & Supp. V 1993)) (vesting the president with broad powers over national defense); Reorganization Act of 1939, ch. 36, §§ 1-12, 53 Stat. 561, 561-64 (codified as amended at 31 U.S.C. §§ 701, 1101 (1994)) (giving the president the power to restructure agencies to reduce government expenditure and increase efficiency). For a general discussion of modern presidents' increased assertion of power over the bureaucracy, see JOHN P. BURKE, *THE INSTITUTIONAL PRESIDENCY* 24-49 (1992); JOHN HART, *THE PRESIDENTIAL BRANCH* (1987) (describing the evolution of the Executive Office of the President from its beginnings in the Brownlow Report during the Roosevelt Administration to

Finally, and relatedly, the modern presidency has become more centralized and personalized through its public media role—that is, its “rhetorical functions.”⁴⁰ Given changes in the press and the White House office, the president has become far more effective in setting the agenda for public debate, sometimes even dominating the public dialogue when he chooses.⁴¹ Economists would probably attribute the president’s ability to “transmit information” to the centralized organization of the presidency—an “economy of scale” in public debate.⁴² At the same time, the president can establish

its modern form in existence during the Reagan Administration); Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 239 (John E. Chubb & Paul E. Peterson eds., 1985) (“[T]he modern president is driven . . . to seek control over the structures and processes of government.”); Moe, *supra* note 18, at 371 (noting that “all modern presidents have rightly feared becoming captives of the bureaus and departments, and [as a result] they have incrementally moved toward the development of White House structures.”); cf. THEODORE J. LOWI & BENJAMIN GINSBERG, *AMERICAN GOVERNMENT* 244 (1990) (noting that “after F.D.R. . . . every president was strong whether he was committed to the strong presidency or not”); RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 13 (1983) (arguing that the president can exercise significant power independent of Congress through his control over the bureaucracy). For an analysis of how modern presidents, starting with Roosevelt, have increasingly used the bureaucracy as an independent political base, see generally MILKIS, *supra* note 34.

⁴⁰ TULIS, *supra* note 2, at 4.

⁴¹ On the importance of the president’s public role to his power, see KERNELL, *supra* note 33, at 55-114 (discussing the trend of recent presidents to “go public”); NEUSTADT, *supra* note 1, at 64-79 (discussing the role of the president’s “public prestige”); Richard E. Neustadt, *The Clerk Against the Preacher*, in *PROBLEMS AND PROSPECTS OF PRESIDENTIAL LEADERSHIP* 33 (James S. Young ed., 1982) (discussing President Carter’s attempts to “show himself outside Washington and to get local coverage outside the network news”). On the importance of public perceptions of the president to his influence in Washington, see GEORGE C. EDWARDS III, *AT THE MARGINS: PRESIDENTIAL LEADERSHIP OF CONGRESS* 101-25 (1989) (explaining the relationship between the president’s public approval and his success in Congress); Terry Sullivan, *Presidential Leadership in Congress*, in *CONGRESS, STRUCTURE, AND POLICY* 286-308 (Matthew D. McCubbins & Terry Sullivan eds., 1987) (hypothesizing that the president’s public approval will positively affect the likelihood that members of Congress will commit to the position of the president).

⁴² See Miller, *supra* note 8, at 311 (“The president’s most important source of power is that he, almost alone in the United States, has the ability to gain immediate and complete access to the flow of free information. He therefore has the potential to be the most powerful issue entrepreneur in the country.”). But see John H. Fund, *We Are All Pundits Now*, *WALL ST. J.*, Nov. 8, 1994, at A22 (noting that a “few gatekeepers [the traditional national news media] no longer have the power to control the flow of information” but that “the parameters of the debate” are now being set by cable television, talk radio, and alternative information networks such as computer bulletin boards). Similar forces may be leading prime ministers in parliamentary systems in the same direction. See PATRICK WELLER, *FIRST AMONG EQUALS: PRIME MINISTERS IN WESTMINSTER SYSTEMS* 180 (1985) (“Domestically and internationally

a "focal point" around preferred public policies.⁴³

This proposition can also be stated somewhat differently. As an institution embodied in a single individual, the president has a unique ability to "tell" a simple story that is quite personal and understandable to the public. As a number of legal academics have shown, stories can be a powerful mode for capturing the essence of a person's situated perspective, improving public comprehension of particular facts, and synthesizing complex events into accessible language.⁴⁴ Complex institutions, such as Congress, have difficulty

[prime ministers] speak for their nation, their government and their party. They appear frequently on the media, explaining and defending their actions, attacking their opponents and appealing to the voters for support.").

⁴³ See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57 (1980) (explaining the concept of a focal point as a "clue for coordinating behavior," the determination of which is a key strategy in any type of bargaining or negotiating situation); Fitts & Inman, *supra* note 8, at 1757-60 (describing the public media as an important presidential resource in establishing focal points and overcoming universalism in Congress); see also Miller, *supra* note 8, at 317, 322 (arguing that the "presidency has a unique role in American politics as the focal point of coordination" and a "special ability to overcome rational ignorance in the general public, creating the potential for mass mobilization on an issue that sparks the great changes in American politics").

⁴⁴ See, e.g., HOWARD GARDNER, *LEADING MINDS: AN ANATOMY OF LEADERSHIP* 14 (1995) (asserting that the "ultimate impact of the leader depends most significantly on the particular story that he or she relates or embodies, and the receptions to that story on the part of audiences"); see also Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 820-22 (1993) (noting that cognitive psychology literature links storytelling to practical reasoning, a frequently used method in decisionmaking processes); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2276-77 (1989) (noting that narratives are more attractive because they correspond more closely to the manner in which the human mind makes sense of experience than does the conventional rhetoric of law). See generally Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (describing the historical role of the narrative in understanding the law of our normative world, from biblical times to today's interpretation of the Constitution). As such, stories may be an effective means of organizing a mass of information, given the cognitive limitations of human beings and the infinity of potentially relevant facts. See JOHN R. ANDERSON, *COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS* 158 (1980); Martin Davies, *Reading Cases*, 50 MOD. L. REV. 409, 427-31 (1987) (noting that the familiarity of the language used in a narrative makes it easier for a listener to understand the message in terms of his store of relevant contexts, or his "cultural generator"). Institutions may be incapable of articulating such stories. Members of Congress can try, but presidents are probably in the structurally best position. For a discussion of this factual issue in the trial context, see Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 604-05 (1994) (attributing the "contemporary shift of focus . . . from deciding the truth or falsity of particular elements to deciding the relative plausibility of opposing stories" to the realization that jurors think in narrative terms rather than in terms of preponderance of evidence). See generally Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror*

assembling and transmitting information as part of a coherent whole; they represent a diversity—some would say a babble—of voices and perspectives. In contrast, presidents have the capacity to project a coherent and empathetic message, especially if it is tied to their own life stories. In this sense, the skill of the president in telling a story about policy, while sometimes a source of pointed criticism for its necessary simplicity,⁴⁵ may greatly facilitate public understanding and acceptance of policy.⁴⁶

B. *The Theory of the Unitary Presidency*

This picture of the modern presidency is quite consistent with those parts of the legal and political science literatures exploring the advantages of presidential (as opposed to legislative) power and advocating a more unitary or centralized presidency. According to this view,⁴⁷ power and accountability in government and in the executive branch should be moved more toward the top, giving the

Decision Making: The Story Model, 13 CARDOZO L. REV. 519 (1991) (theorizing that jurors impose a narrative organization on evidence, based upon their own life experiences, in order to more easily understand the information).

⁴⁵ See, e.g., LOWI, *supra* note 2, at 12 (criticizing the rhetorical presidency for its simplicity, and specifically its ability to use “planned appearances” to put “issues and criticisms in a better light” and “creat[e] the appearance of success”); TULIS, *supra* note 2, at 179 (stating that “the rhetorical presidency enhances the tendency to define issues in terms of the needs of persuasion rather than to develop a discourse suitable for the illumination and exploration of real issues”).

⁴⁶ See Lawrence R. Jacobs & Robert Y. Shapiro, *Issues, Candidate Image, and Priming: The Use of Private Polls in Kennedy’s 1960 Presidential Campaign*, 88 AM. POL. SCI. REV. 527, 535-36 (1994) (outlining the political advantages of tying a candidate’s personality to particular policy positions).

⁴⁷ In many respects I might be counted as one of its proponents. See generally Fitts & Inman, *supra* note 8 (showing how presidential influence may be used to encourage positive fiscal reform); Inman & Fitts, *supra* note 5, at 83-92, 96-99 (measuring the inefficiency created by endowing power to a decentralized body like Congress and emphasizing the importance of keeping the power in the unitary executive); cf. Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information As a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 920-22 (1990) [hereinafter Fitts, *Ignorance*] (arguing that in some circumstances, relying on strong, centralized political institutions to disseminate information to the public can have potential policy effects); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1655-58 (1988) (arguing that the ideals of civic republicanism, as opposed to strong and centralized political parties, may actually hurt the interests of minority groups and decrease political participation); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1603 (1988) [hereinafter Fitts, *Vices*] (arguing that “centralized political systems are thought to enhance majority rule, reduce collective action problems, and improve the operation of the decisional processes”).

president and his staff greater ability to make decisions themselves or to leave them, subject to oversight, in the hands of expert agency officials. In the legal literature, this position is usually associated with support for strengthening the president's directorial powers over the agencies, unfettered presidential removal authority, and *Chevron* deference to agency regulations⁴⁸ reviewed by the White House. Similarly, political scientists emphasize the plebiscitarian president's growing informal influence with the agencies and the public, as well as the association between a strong president and the "national" interest.⁴⁹

To be sure, legal proponents of a strong unitary presidency usually do not outline a comprehensive policy defense of the legal position but rely more on doctrinal justifications and related policy arguments.⁵⁰ By synthesizing and integrating the interrelated legal and policy rationales in the legal and political science literatures, however, one can sketch the outlines of a common theory. This analysis suggests that the structure of a more unitary, centralized presidency should enhance the power, legitimacy, and effectiveness of the office, especially as compared to Congress, in three different but related ways.

⁴⁸ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (articulating the deferential standard for judicial review of the actions and decisions of administrative agencies); see also Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 251 (1993) (arguing for centralized executive oversight of agencies' statutory interpretations).

⁴⁹ See, e.g., GRANT MCCONNELL, *PRIVATE POWER & AMERICAN DEMOCRACY* 367-68 (1967) (prescribing a stronger party system, presidency, and national government as ways to create a national constituency, thus serving the public interest and operating as an antidote to the American tradition of small constituencies); MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 51 (1982) (discussing the observations of political scientists that national policies would improve if party leadership were stronger in discipline and accountability).

⁵⁰ For the most part, the legal literature on the unitary executive does not usually present a comprehensive policy defense. Rather, most analyses combine the textual language and original intent of the Constitution with related citation to policy rationales. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 548-50 (1994) (relying on the text of the Constitution, its legislative history, and general historical evidence to support their theory of the unitary executive); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992) (summarizing the arguments of unitary executive theorists as wholly relying on Article II to support their claims that the president should have broad powers of control over the executive department). The major exception is Professor Calabresi's recent normative piece on the presidency. See Calabresi, *supra* note 31, at 29 (outlining a normative defense of the unitary presidency).

First, with respect to the *administration* of the executive branch, centralized power, or at least the opportunity for the exercise of centralized power, is thought to facilitate better development and coordination of national programs and policies. Because federal government programs interrelate in countless ways, a centralized figure or institution such as the president is seemingly in a good position to recognize and respond to the demands of the overall situation.⁵¹ For similar reasons, as social and political change accelerates, the president may be well-situated to foresee and implement adaptive synoptic changes—that is, to engage in strategic planning. One of the rationales for the existence of the federal government is the national effect of its policies, which under this view can be reconciled most easily at the top.⁵² To the extent that the president is successful in putting together such programs, he should receive political credit, which would redound to his political strength.⁵³

Second, centralized power facilitates greater *political accountability* by placing in one single individual the public's focus of government performance. If the public had to evaluate electorally the activities of hundreds of different officials in the executive branch, its information about the positions, actions, and effects of government behavior would be extraordinarily limited.⁵⁴ Only those most

⁵¹ See Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193-96 (1994) (noting that a unitary executive has an advantage over Congress in formulating policy because the presidency is more efficient and is politically accountable to a broader and much less organized constituency, which helps him withstand the pressures that interest groups exert on politicians who have smaller constituencies); Strauss & Sunstein, *supra* note 7, at 189 (noting that "the [p]resident is in a good position to centralize and coordinate the regulatory process"); cf. THE FEDERALIST No. 70, at 427-28 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("But the multiplication of the executive adds to the difficulty of detection . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall.").

⁵² See WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 145-51 (1964) (explaining why national decisionmaking can be more efficient than local decisionmaking); cf. Inman & Rubinfeld, *supra* note 28, at 6-10 (explaining why confederate republics may be inefficient).

⁵³ See Fitts & Inman, *supra* note 8, at 1771-73 (explaining how the president can benefit politically by using his coalition-building power to achieve major reforms).

⁵⁴ See WILLIAM A. NISKANEN, *STRUCTURAL REFORM OF THE FEDERAL BUDGET PROCESS* 6 (1973) (noting that in the budget context, the acquisition of information is difficult and expensive and that people therefore operate in "rational ignorance"). See generally THE FEDERALIST No. 70, *supra* note 51, at 479 ("The Executive power is more easily confined when it is one since there is a single objective for the jealousy and watchfulness of the people.").

interested in a particular function would be likely to have information about its behavior or attempt to influence that behavior through election, lobbying, or litigation. This is the standard concern with New Deal agencies captured by the so-called iron triangle of Washington politics.⁵⁵ By contrast, placing overall political responsibility in one individual is thought to facilitate broader political accountability. While this oversight can have mixed effects depending on presidential performance, it has the potential for strengthening the president's political support and influence.⁵⁶ Because he is more likely to approximate the views of the median voter,⁵⁷ a unitary president is thought to enjoy a clear majoritarian mandate, as the only elected representative of all "The People." This democratic legitimacy should be, in turn, a major source of his political strength.⁵⁸ As one commentator has

⁵⁵ See MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 3-4, 217 (1977) (describing and analyzing the view "that commissions are influenced excessively by the groups subject to regulation and are too easily molded into instruments to protect private interests"); OLSON, *supra* note 49, at 50-52 (arguing that members of Congress are affected to a greater extent by the lobbying of special interest groups than the president is because interest groups find it more rational to exert pressure on Congress, whose members are accountable to smaller constituencies).

⁵⁶ See Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 233 (1984) ("[C]entralized review of regulation can help the [p]resident check policy that may result from agency alliances with congressional committees or interest groups, enhancing his power against those forces."); Lessig & Sunstein, *supra* note 18, at 97-99 (noting that with the expansion of the New Deal, the president needed to counter factionalism and increase the accountability of government officers); Mashaw, *supra* note 18, at 95-99 (arguing that delegation of congressional authority to executive agencies is desirable because voters elect presidents for their broad policy goals and presidents can thus be held accountable for agencies' implementation of those goals); Strauss & Sunstein, *supra* note 7, at 189-90 (describing the efficiency advantages of greater presidential control over the regulatory process); M. Stephen Weatherford, *An Economic Theory of Democracy As a Theory of Policy*, in *INFORMATION, PARTICIPATION AND CHOICE: AN ECONOMIC THEORY OF DEMOCRACY IN PERSPECTIVE* 209, 220-22 (Bernard Grofman ed., 1993) (noting that an appeal by the president for a common commitment to national legislation can outweigh the more narrowly defined interests of legislators).

⁵⁷ For the original discussion of how political institutions can be structured to respond to the median voter, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 297 (1957) (discussing a rational-choice model of voting decisions and candidates' political positions and arguing that a two-party system will seek out "issues that a majority of citizens strongly favor").

⁵⁸ See EDWARDS, *supra* note 41, at 101-25, 144-66 (finding that a president must rely increasingly on direct public support for policy determinations as national party organizations deteriorate, special interest groups proliferate, and congressional party discipline erodes). In law and economics terms, a unitary presidency is thus a better and less costly "brand name." See Benjamin Klein & Keith B. Leffler, *The Role of*

argued: "Every deviation from the principle of executive unitariness will necessarily undermine the national majority electoral coalition."⁵⁹

Finally, on an elite political level, the existence of a single powerful political actor serves a *political coordination function*.⁶⁰ A dispersed government with a decentralized political structure has a great deal of difficulty in reaching cooperative solutions on policy outcomes. Even if it does reach cooperative solutions, it has great difficulty in reaching optimal results. Today, there are simply too many groups in Washington and within the political elite to reach the necessary and optimal agreement easily.⁶¹ A central and visible figure such as the president, who can take clear positions, can serve as a unique "focal point" for coordinating action.⁶² With the ability to focus public attention and minimize information costs,⁶³

Market Forces in Assuring Contractual Performance, 89 J. POL. ECON. 615, 616, 626-33 (1981) (discussing the importance of "reputations" and brand names as private devices that assure contract performance in the absence of any third-party enforcer). For a discussion of the value of brand names in the institutional context, see David M. Kreps, *Corporate Culture and Economic Theory*, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 106-11 (James E. Alt & Kenneth A. Shepsle eds., 1990).

⁵⁹ Calabresi, *supra* note 31, at 66.

⁶⁰ See Fitts & Inman, *supra* note 8, at 1738-39, 1755-73 (arguing that through the strategic use of informal resources and formal veto powers, the president can "fashion a legislative strategy of coalition building and position taking that draws all members of Congress into supporting an efficient fiscal outcome").

⁶¹ For discussion of how informal information networks can serve to further efficient and cooperative solutions, see Robert Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1320-21 (1993) (arguing that "groups are conducive to cooperation" when they provide members "with both the information and opportunity . . . to engage in informal social control"); Kreps, *supra* note 58, at 124-31 (discussing how the corporate culture lends itself to efficient decisionmaking through its hierarchical structure and its open lines of communication); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. (forthcoming 1996) (manuscript at 8, on file with author) ("[I]n a well-functioning group [a collection of people who choose to cooperate], the prisoner's dilemma either does not exist or exists only at the margin: members (or most members) cooperate because the payoff from cooperation exceeds the payoff from defection . . . ; in other words, cooperation is individually rational.").

⁶² A "focal point" is a point that "suggests itself" as the outcome for a group of participants. As such, it can avoid the social costs—including the prospect of strategic behavior—of reaching a specific agreement. See SCHELLING, *supra* note 43, at 57-59 (discussing the value of focal points or clues for coordinating group behavior and suggesting that imagination as well as "caustic logic" may lead individuals to find a unique or prominent commonality); Miller, *supra* note 8, at 318.

⁶³ Of course, the proliferation of new media sources outside the mainstream may diminish this role. See *infra* note 146 and accompanying text. Yet even with the ascendancy of Congress and Newt Gingrich during the last year, the media has continued to focus more attention on the presidency. See Katherine Q. Seelye,

a president can also be highly effective in overcoming narrow but powerful sources of opposition and in facilitating communication (that is, coordination and cooperation) between groups and branches.⁶⁴ In technical terms, he might be viewed as the "least cost avoider."⁶⁵ The budget confrontation between Clinton and Congress is only the most recent example of the president's strategic abilities.⁶⁶ In this regard, it is not surprising that most studies have found that the president's popularity is an important factor in his ability to effectively negotiate with Congress.⁶⁷

For all of these reasons, many scholars, citizens, and politicians believe that the development of the rhetorical and centralized presidency is an "unqualified blessing."⁶⁸ A president who is visible should be better able and more likely to garner public support and should also have an incentive to marshal such support for programs that respond to public needs. His centralization and

Clinton Edges Congress in Amount of Television Coverage, Study Says, N.Y. TIMES, Apr. 4, 1995, at D24 (citing a study by the Center for Media and Public Affairs that noted that the Clinton Administration received greater media coverage than Congress despite the Republicans' aggressive agenda in both the House and Senate).

⁶⁴ As Professor Miller has written:

The president's most important source of power is that he, almost alone in the United States, has the ability to gain immediate and complete access to the flow of free information. He therefore has the potential to be the most powerful issue entrepreneur in the country. . . . *The presiden[t] swamps all other contenders in his ability to get his ideas across to the public.*

Miller, *supra* note 8, at 311 (emphasis added).

⁶⁵ The unitary presidency literature does not employ this characterization, but I think that this is the most reasonable interpretation of its analysis.

⁶⁶ See generally Jerry Gray, *Battle over the Budget: The Overview*, N.Y. TIMES, Jan. 8, 1996, at A1; Eric Pianin & Ann Devroy, *Congress Leaves for Recess with Budget Unresolved*, WASH. POST, Dec. 23, 1995, at A1. For a more detailed example, see Fitts & Inman, *supra* note 8, at 1780-84 (discussing Reagan's confrontations with Congress).

⁶⁷ See NEUSTADT, *supra* note 1, at 67 (stating that "[t]he weaker [the president's] apparent popular support, the more . . . his opportunities are diminished"). Neustadt's classic study of the modern presidency emphasizes the president's ability to coordinate bargaining among political elites. With the decline of party control, the proliferation of interest group elites, and the expansion of the mass media, the president's coordinating role has become much more public, and probably more important. See KERNELL, *supra* note 33, at 13 ("[I]nstitutionalized pluralism promotes a . . . process of coalition building. . . . Presidential coalitions are usually temporary associations . . ."); *id.* at 31 (noting that a public address "[e]mployed at the right moment" may have "dramatic" results for presidential coalition-building).

⁶⁸ See TULIS, *supra* note 2, at 12. But see *id.* at 12-13 (stating that these assumptions are incorrect and noting that the rhetorical presidency is a political development with "considerable systemic costs").

visibility afford him the power to be effective, but, at the same time, these qualities increase his democratic accountability. And even though a modern president is certainly not unitary in the strong sense of that word, the analogy presumes that future legal and structural evolution should move in that direction.⁶⁹

Three different scholars of the presidency, writing in different traditions, have reached similar conclusions regarding the significance and advantages of stronger presidential power, especially as compared to legislative influence. Presidential scholar Terry Moe has described the influence of the modern president as follows:

When it comes to building structures of control . . . the battle between president and Congress is lopsided. The president is a unitary decision maker, he can take unilateral action in imposing his own structures, his individual interests are largely congruent with the institutional interests of the presidency, and he is dedicated to gaining control over government. Congress is hobbled by collective action problems, vulnerable to agenda manipulation by the president, and populated by individuals whose interests diverge substantially from those of the institution. The result is an asymmetry in the dynamic of institutional change, yielding an uneven but steady shift toward a more presidential system.⁷⁰

Or, as Professor Gary Miller has written:

[T]he president must compete for and represent those large blocks of Americans who do not belong to organized interests but who are concerned about issues such as inflation, tax reform, civil rights, and deficits. Furthermore, the president derives his influence in politics from the fact that he alone represents these latent national constituencies.

. . . [The president and presidential candidates] are the natural proponents of cooperative solutions to social dilemmas.⁷¹

And finally, Professor Steven Calabresi has written, in summarizing with approval the views of the founding fathers:

Hamilton asserted that a unitary executive would *both* cause

⁶⁹ To the extent that the poor performance of government is the result of information breakdowns and collective action problems, a visible and accountable presidency would seem to stand as the paradigmatic modern antidote, a modern political form of enterprise liability. See OLSON, *supra* note 49, at 50-51.

⁷⁰ Moe, *supra* note 18, at 376; see also SUNDQUIST, *supra* note 2, at 158 (contrasting the "endemic weakness" of Congress with the growing strength of the presidency).

⁷¹ Miller, *supra* note 8, at 328.

power and energy to accrue to the office *and* facilitate public accountability for and control over how that power and energy was exercised. Thus, whereas a plural executive would both dilute executive energy and popular accountability and control, a unitary executive would lead to the opposite result. Executive energy would be enhanced and so would the likelihood that it would be used *in conformity with the interests of the nation*.⁷²

Of course, proponents of a unitary executive must recognize that there will and should be extensive delegation to, and exercise of authority by, the agencies.⁷³ In some contexts, such as due process adjudication of individual rights, the Constitution presumably places limitations on direct political presidential intervention in the agencies.⁷⁴ Certain agency decisions, such as adjudication of individual social security benefits, should not be made by the *current* political process, at least not on a case-by-case basis. In other situations, advocates of a unitary presidency also have to recognize that decentralization promotes a division of labor, exercise of expertise, and a more incremental process of decision-making. In such cases, decisions should be made initially at a lower level by experts within the agencies.⁷⁵

Under the unitary presidential view, however, most agency decisions should be subject *ultimately* to presidential and White House oversight and political responsibility. The assumption is that the president generally should be in a principal-agent relationship with the agencies on issues subject to current political resolution.⁷⁶

⁷² Calabresi, *supra* note 31, at 44-45.

⁷³ The modern presidency certainly has not centralized all or even most formal and informal decisionmaking in the person of the president or the executive office of the president. Countless bureaucratic divisions of labor remain within the modern executive branch. See, e.g., Herz, *supra* note 48, at 219 (arguing that there are different categories of agency decisionmaking and putting forth four possible categories: adjudication, selection of regulatory strategies, value selection, and statutory interpretation).

⁷⁴ See A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1347 (1994) (stating that the relative independence of agencies furthers the constitutional objective of hindering tyranny); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 622-25 (1984) (describing the limitations on political intervention in agency adjudications suggested by a separation-of-functions rationale). See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838) (discussing constitutional limitations on presidential power over subordinate executive officials).

⁷⁵ See, e.g., Seidenfeld, *supra* note 4, at 1515 (arguing that, in the name of civic republicanism, agencies should have the discretion to draft broad policies because their officials have "greater expertise and fewer immediate political pressures than directly elected officials and legislators").

⁷⁶ The so-called congressional dominance literature has shown how Congress can

In other words, the president should be personally visible and politically accountable for *political* activities of the executive branch,⁷⁷ even though the actual administration of the branch, as with any system based on enterprise liability, would have to be largely delegated.⁷⁸ To this extent, the story of the modern presidency would seem to be positive, at least according to the proponents of the unitary executive and to theories of enterprise

oversee agency activities through an analogous type of fire alarm system. *See generally* Mathew D. McCubbins et al., *Administrative Procedures As Instruments of Political Control*, 3 J.L. ECON. & ORGANIZATION 243, 248-49 (1987) (noting how Congress can enforce its authority over agencies through removal, appropriations, public hearings, and legislative orders); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (describing one type of congressional oversight of agencies as "fire-alarm oversight," which is characterized by the establishment of rules and procedures that allow individual citizens or organized interest groups to examine and question agency decisions).

⁷⁷ Thus, activities that do not lend themselves to majoritarian political control, such as due process adjudication, would not be subject to presidential oversight. The theory of a strong unitary president is that the president should take primary responsibility for those activities of the executive branch that are conducive to majoritarian decisionmaking. Responsibilities that lend themselves to the exercise of greater expertise would be vested initially in the hands of expert agency officials but would ultimately be subject to political oversight.

The primary opponents of a unitary presidency emphasize the need for the exercise of nonmajoritarian influence, either in the form of autonomous expert executive agencies, congressional interest groups, or civic republican elites. *See generally* Thomas O. McGarrity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987) (arguing for more stringent congressional oversight of presidential control of agency decisions in order to preserve the integrity and expertise of agencies); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 24-26 (1994) (criticizing presidential control because it interferes with agency expertise).

⁷⁸ The theory of a unitary presidency is thus quite consistent with a division of labor in administration. Borrowing from the principal-agent analysis, the assumption is that the president retains the ability to oversee and, if he wishes, overrule decisions of the agencies, even though subordinates within the agencies will make most decisions. The critical points for the president are to appoint subordinates faithful to his goals and interests and to ensure the receipt of reliable information about their activities that are contrary to these interests. In this sense, Executive Orders 12,291, 12,498, and 12,866 each act as a type of "fire alarm" in service of the president rather than Congress. Thus, the theory of the unitary presidency is consistent with a bottom-up or incremental theory of decisionmaking. *See generally* Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 433 (1992) (explaining that, in bottom-up legal reasoning, "one starts with the words of a statute or other enactment, or with a case . . . and moves from there—but doesn't move far"); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993) (stating that, in analogical reasoning, which is a version of bottom-up thinking, "[i]deas are developed from the details, rather than imposed on them from above").

liability.

One final point: This attitude toward more centralized national power may seem contradictory, given the frequent support of some proponents of a unitary executive (most notably Justice Scalia) for more decentralized decisionmaking structures, such as private economic markets or local government.⁷⁹ Members of both the right and the left have argued that local decisionmaking can facilitate greater participation and accountability, as well as more consensual decisionmaking.⁸⁰ While a reconciliation of these views is beyond the scope of this Article, the presumption in favor of a more *politically* centralized federal government seems to be predicated on the national scope of its spending and taxing power⁸¹ and on the difficulty faced by the public in overseeing and effecting such diverse and complex decisions.⁸² These problems are

⁷⁹ Compare *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (arguing that the position of independent counsel "deprive[s] the President of the United States of exclusive control of" purely executive power) with *United States v. Lopez*, 115 S. Ct. 1624, 1625 (1995) (Scalia, J., joining majority opinion) (striking down under the Commerce Clause Congress's attempt to criminalize firearm possession in school zones). In general, the literature on private markets favors decentralized structures over monopolistic enterprises, assuming competitive markets and limited externalities. Some commentators make similar "Tiebout" type arguments on behalf of federalism. See Inman & Rubinfeld, *supra* note 28, at 11-13. As Elmer E. Schattschneider observed, "the people are powerless if the political enterprise is not competitive. It is the competition of political organizations that provides the people with the opportunity to make a choice." E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 140 (1960).

⁸⁰ See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1492-1500 (1987) ("[T]he limited sovereignty of state and federal governments promotes and vindicates the ultimate sovereignty of the People."); Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1326 (1994) ("[G]rass-roots participation in local government has occurred without the protections of federalism despite the formally subordinate status of local governments in state-local relations."); Gerald E. Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1059, 1121 (1980) (arguing that decentralizing power from a centralized state to the cities can be regarded as "a defense of freedom"); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 271 (1993) ("[S]tates could never engender the kind of democratic participation in public affairs that is possible on a local basis."); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-1500 (1987) (arguing that decentralized government is better able to reflect the diversity of interests of individuals, will reduce "externalities" in government structure, and will allow for innovation and competition in government). For an overview of arguments for decentralization and local decisionmaking, see generally DANIEL J. ELAZAR, *EXPLORING FEDERALISM* (1987).

⁸¹ See Inman & Rubinfeld, *supra* note 28, at 23-25 (describing the perverse incentives of a universalistic legislative body with national taxing and spending powers).

⁸² See NISKANEN, *supra* note 54, at 6 (noting that, in the budget context, the

not at issue at the local level to the same degree.⁸³ In this sense, the case on behalf of a centralized presidency is reminiscent of the traditional argument for synoptic over common law decisionmaking: When issues become sufficiently interrelated, microassessment may lose the complexity of the big picture.⁸⁴ Under the unitary view of the presidency, the chief executive is thought to be in the best institutional position to focus attention on complex *national* concerns in the modern New Deal state.⁸⁵

acquisition of information is difficult and expensive and therefore people operate in "rational ignorance"). These factors are considered less important, however, with respect to traditional local functions. See *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (stating that the authority of the states to determine the qualifications of their most important government officials "lies at the heart of representative government").

⁸³ The standard critique of the autonomous New Deal agency captured by the iron triangle of Washington illuminates these problems and the potential value of presidential intervention. The theory of vertical integration assumed by the unitary presidency approach could thus be understood under a transaction cost view of political and economic organization. See generally OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985) (discussing the transaction cost approach to economic organization, which maintains that the institutions of capitalism "have the main purpose and effect of economizing on transaction costs").

⁸⁴ See Posner, *supra* note 78, at 433 (advocating the use of "top-down" reasoning, in which existing and future judicial decisions are accepted or rejected, explained, and analyzed within the broader context of an adopted legal theory, as opposed to "bottom-up" legal reasoning, in which specific case law, rather than the underlying legal theory, is used as a starting point).

⁸⁵ See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 440 (1987) (arguing that the increased power of the president during the New Deal was a result of the reformers' view that the separation of powers prevented the government from taking action). Of course, at some point, those identified with "conservatism" may become suspicious of strong presidents because of the institution's ability to redistribute resources. The power of a strong political institution can be used to improve government performance, as well as to redistribute resources, either up or down. For a discussion of this aspect of parties, see Steven G. Calabresi, *Political Parties As Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1480 (1994) (discussing the idea that "the party system might be able to overcome the separation of powers by bringing together under informal arrangements what the founders were at pains to divide by formal ones"); Jonathan R. Macey, *The Role of the Democratic and Republican Parties As Organizers of Shadow Interest Groups*, 89 MICH. L. REV. 1, 4, 18-27 (1990) (explaining the role of parties as that of a political brokerage firm that both reduces the transaction costs of political organization and substitutes for ideology in determining a politician's future responses to issues). Perhaps for this reason, conservatives often temper their arguments for a strong president with a recognition of the need to protect individual rights, especially economic rights. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 7 (1962).

C. *The Problems of the Modern Presidency*

If the presidency has become a more visible and formally powerful institution in the eyes of some legal scholars, however, that development does not appear to have generated greater respect or support for its inhabitants. Indeed, while there may be a great deal of debate over whether a particular president did a good job, or whether the institution of the presidency is more effective than Congress, the public often seems to believe that individual presidents are ineffective. While this is certainly a result of presidential mistakes and cultural changes,⁸⁶ something more fundamental seems to be going on. As a general matter, the public is consistently more likely to favor their congressperson than the president, at least so long as the president remains in office. Since 1965, public approval ratings for presidents have generally declined,⁸⁷ leading to numerous descriptions of the modern chief executive as a "beleaguered president."⁸⁸ "The decline in presidential popularity is one of the most well-documented trends in recent American politics."⁸⁹ In contrast, even though we hate Congress as an institution, we tend to like our individual representative, particularly after she has served in the position for a number of terms. Something about the office of the presidency delegitimizes its exercise of power.

The individual statistics, which underscore these general observations, are sobering and seem to be getting worse over time. As one recent review of the literature concluded, "all presidents face a decline of support, in both the first and second term, that continues from the first year well into the third."⁹⁰ There are constant reports of "failed presidencies" during this period.⁹¹ While some presidents have been able to take actions that alter this trend, especially when they move into a campaign mode at the end

⁸⁶ See WILDAVSKY, *supra* note 3, at 133-49 (analyzing why the Democratic Party has lost five of the last six presidential elections and addressing negative campaigning, media influence and bias, size of constituency and desire to split control, and determining that a rise in egalitarianism is the root cause).

⁸⁷ See EDWARDS, *supra* note 21, at 129-30 (presenting year-by-year average presidential approval rates and suggesting that this decline can in part be traced to the public reaction to and residual effects of the Vietnam War and Watergate).

⁸⁸ WILDAVSKY, *supra* note 3, at 24.

⁸⁹ WATTENBERG, *supra* note 37, at 66.

⁹⁰ PAUL BRACE & BARBARA HINCKLEY, FOLLOW THE LEADER 10 (1992); see also EDWARDS, *supra* note 21, at 28-30 (noting that average presidential approval ratings have dropped since 1965).

⁹¹ WILDAVSKY, *supra* note 3, at 24.

of a term, the structural imperative for every president is noticeable. All things being equal, the president's exercise of power and articulation of public positions often undermine the confidence in and the informal power of his presidency. "Active presidents are *not* rewarded in the polls; popular presidents win more but generally ask less."⁹² One recent example of this relationship is the ascendancy of President Clinton in the polls after the Republicans won majorities in Congress and Speaker Newt Gingrich became the focus of political attention and activity—in effect, the informal president.⁹³

Why this skepticism toward presidential performance? Why are presidents, who presumably are the most astute and successful politicians before they assume office, often so unsuccessful in their position, especially as compared to the average congressperson? Although an analysis and comparison of post- and pre-New Deal presidents is beyond the scope of this Article, there does appear to be something about the modern presidency that undermines its support.

To understand the problems and tradeoffs raised by presidential accountability, one needs to move beyond the simple observation that a centralized and visible presidency can minimize "transaction costs." The next four Parts of this Article discuss the several ways in which the visibility and centralization of the presidency may undermine the influence of the office and help explain the paradox of the modern president's power.

II. CONFLICT MEDIATION

A. *What Is Conflict Mediation?*

The first way that the individuality and visibility of the president may undermine his power is by thwarting his ability to mediate conflicts, especially as compared to that of Congress. Put in its simplest terms, mediating conflict means overcoming the social and

⁹² BRACE & HINCKLEY, *supra* note 90, at 81 (emphasis added).

⁹³ See Richard Benedetto, *Clinton Gets a Bump, Gingrich Slides in Polls*, USA TODAY, Feb. 7, 1995, at 4A (reporting that shortly after the Republican-controlled Congress took power, President Clinton's overall job approval rating rose from 47% to 49%, while Newt Gingrich's disapproval numbers went up 13 percentage points to 48%); *New Poll Shows Clinton More Popular*, Reuters, Feb. 6, 1995 (noting that a February, 1995 poll reflected President Clinton's highest approval rating since June 11-12, 1994), available in LEXIS, News Library, Reuwl File.

political costs of resolving redistributive and symbolic disputes, that is, making real or symbolic tradeoffs. Such problems arise in countless contexts, from fights among interest groups over the distribution of government largesse to litigation over rules on abortion counseling or funding, to symbolic disputes over incommensurable values⁹⁴ or relative status.⁹⁵ As the developing literature in game theory has shown, there are no clear "pareto superior" solutions or even clear outcomes to most decisions with distributional or symbolic effects.⁹⁶ Thus, there is no logical "transaction cost" method for determining how the government pie should be

⁹⁴ See Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2168 (1990) ("[T]o endorse one value over another in a political choice . . . would be to subordinate one group of citizens to another."); Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 790 (1994) (debating the existence of incommensurable values); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 800 (1994) ("The claim of incommensurability is that no unitary metric accounts for how we actually think and that the effort to introduce one misdescribes experience.").

⁹⁵ See, e.g., Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 18-26 (1992) (discussing the effects of negative relative preferences). For examples of cases that raise such symbolic issues rather starkly, see *Rust v. Sullivan*, 500 U.S. 173 (1991) (ruling on Congress's prohibition against using federal funds for abortion counseling); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (ruling on Pennsylvania's statutory restrictions against the use of public facilities for performing abortions or providing reproductive counseling concerning abortion); *Texas v. Johnson*, 491 U.S. 397 (1989) (ruling on Texas's prohibition against flag burning). For a discussion of the flag burning controversy in particular, see generally Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357 (1992). For the classic discussion of status politics, see RICHARD HOFSTADTER, *The Pseudo-Conservative Revolt-1954*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 41, 87 (1967) ("[S]tatus politics does more to express emotions than to formulate policies.").

⁹⁶ This result does not depend on imperfect information. See generally Ken Binmore et al., *The Nash Bargaining Solution in Economic Modeling*, 17 RAND J. ECON. 176 (1986) (comparing two theories of bargaining and the different types of information used in formulating such models); Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 ECONOMETRICA 97 (1982) (discussing the effects of differing levels of information on contractual bargaining).

Politics necessarily involves confronting such issues—that is, preferring or seeming to prefer the interests or goals of some groups over others in defining and pursuing the overall public interest. Indeed, coordinating collective action can require treating some people as means and not ends by preventing them from second-guessing the substantive validity of governmental decisions. See FREDERICK SCHAUER, *PLAYING BY THE RULES* 162-63 (1991) (explaining that rules often sacrifice individualism to foster collective action by subordinating individual interests to the welfare of the group); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1197, 1214-15 (1994) (pointing out the advantage of inherent deception in rules as a means of overcoming collective action problems).

divided or public symbols chosen.

Unfortunately, such issues must be confronted when structuring political institutions—even in terms of simply evaluating their “efficiency” or “strength”—because disagreement and conflict over distributional and symbolic issues carry serious social implications. Because someone will always be made worse off than her *ideal* in such disputes, political actors may try to withhold support or strategically retaliate by refusing to give their assent, exercising a veto, or defecting to another coalition.⁹⁷ Such activities can lead, in law and economics terms, to high “inefficiencies” or, in political terms, to weak institutions.⁹⁸ To be effective or “powerful,” political institutions must be able to manage such disputes effectively over time.⁹⁹ From a political perspective, a leader or institution capable of resolving such disagreements can make political groups better than they would have been had they been left to their own strategic devices.

B. *How Political Institutions Mediate Conflict*

As a practical matter, methods for mediating conflict usually require some sort of agreement on substantive norms, on a process for generating norms, or on a system for avoiding choice. Because such devices are necessarily culturally contingent,¹⁰⁰ the way in which institutions mediate conflict varies. Political institutions and actors can, for example, secure *ex ante* agreement on a process that the public considers legitimate and that would resolve the conflict;¹⁰¹ they can avoid an explicit resolution by presumptively

⁹⁷ See 1 BRIAN BARRY, *THEORIES OF JUSTICE* 32 (1989) (explaining that parties with conflicting self-interests may threaten each other to increase their bargaining power in nonagreement contexts).

⁹⁸ The design of political institutions does not allow a neat separation of “distributive” issues from other questions for purposes of resolution by some “independent” institution. See ROSE-ACKERMAN, *supra* note 8, at 35-37; Cooter, *supra* note 19, at 19 (comparing the Coase theorem and the Hobbes theorem in the context of government efficiencies).

⁹⁹ The fact that the president has been elected by a majority of the population and thus can claim support from “We the People” does not allow him to avoid conflict. See *infra* part II.C.

¹⁰⁰ See DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 684 (1985).

¹⁰¹ See generally ALLAN LIND & THOMAS TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (arguing that people are more interested in issues of process than issues of outcome). For empirical evidence that a sense of fairness is crucial to parties’ ability to reach agreement, see Alvin E. Roth, *Toward a Focal-Point Theory of Bargaining*, in *GAME-THEORETIC MODELS OF BARGAINING* 259, 259-64 (Alvin E. Roth ed., 1985) (detailing experiments that found that credible bargaining

relying on the status quo;¹⁰² they can create "neutral" decisional rules, such as "universalism" or "something for everyone," that supposedly avoid moral or symbolic choice;¹⁰³ or they can affirmatively attempt to persuade the relevant actors through leadership or development of communal norms to change their views or "preferences."¹⁰⁴

One can identify examples of these approaches in different structures and procedures of various federal political institutions. For instance, in earlier periods of the House and Senate, particularly on the appropriations committees, an institutionally induced norm of cooperation was probably influential in promoting agreement.¹⁰⁵ In these situations, repeat players in a small group may feel social pressure to compromise.¹⁰⁶ This approach also

positions were focal points for subsequent negotiations).

¹⁰² See Stephen Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY 19, 20-21 (Jon Elster & Rune Slagstad eds., 1988) (summarizing Rawls's argument and maintaining that "theorists of justice can achieve their principal aim only by steering clear of irresolvable metaphysical disputes"); John Rawls, *Justice As Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 251 (1985) (arguing that the stability of the state is dependent on removing certain issues from the political agenda).

¹⁰³ See Pildes & Anderson, *supra* note 94, at 2166-75 (discussing the desirability of democratic institutions that employ cycling and neutrality, and that avoid extreme positions in decisionmaking).

¹⁰⁴ See JONATHAN BOSWELL, COMMUNITY AND THE ECONOMY: THE THEORY OF PUBLIC CO-OPERATION 130 (1990) (describing the role of "para-intermediaries" who "exercise leadership by perceiving needs and opportunities for public cooperation, . . . innovating methods for achieving it, and organizing it operationally"); see also Posner, *supra* note 61, at 5 (explaining the theory of group solidarity).

¹⁰⁵ See AARON WILDAVSKY, THE NEW POLITICS OF THE BUDGETARY PROCESS 95-96 (1988) (describing how the politics of the "old process" operated under consensus). See generally RICHARD FENNO, THE POWER OF THE PURSE (1966) (describing the internal decisionmaking of House and Senate Committees in the period between the late 1940s and the mid-1960s).

¹⁰⁶ For a general review of the literature and a discussion of the ability of groups to reach communal norms, see Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1008-25 (1995) (describing why the level of cooperation is much higher than economic theory would predict); see also WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS 51 (1962) (explaining that individuals in small groups are less likely to see problems as zero-sum games and are likely to value avoiding subjective animosity from others). As Professor Robert Putnam has noted, "Success in overcoming dilemmas of collective action and the self-defeating opportunism that they spawn depends on the broader social context. . . . Voluntary cooperation is easier in a community that has inherited a substantial stock of social capital, in the form of norms of reciprocity and networks of civic engagement." ROBERT PUTNAM, MAKING DEMOCRACIES WORK 167 (1993); see also JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-21 (1990) (explaining that shared religious ideology

may be reflected in doctrines developed under the National Labor Relations Act, such as the obligation to "bargain in good faith,"¹⁰⁷ which are felt to be helpful in inducing agreement but which are otherwise unexplainable under ordinary law and economics criteria.¹⁰⁸ Old style political parties, which were criticized for their homogeneity and hierarchy, served a similar function by pressuring members to come together for the "good of the group" on election day, thereby avoiding open disputes among participants.¹⁰⁹

In today's much more fluid and open political environment, various divisions of responsibility can promote agreement by avoiding conflict over inconsistent world views. The most common technique is to divide governmental decisionmaking authority, such as when Congress allocates control to committees through "universalism" or the president assigns political control of different agencies to different constituencies. This approach parallels the incremental or "muddling through" philosophy in budgeting and policymaking,¹¹⁰ which is thought to avoid long-term, and potentially divisive, issues in favor of a focus on more narrow and immediate concerns.¹¹¹ Divisions of responsibility also help

contributes to social capital and "social-structural connections"); Posner, *supra* note 61, at 46 (describing how unions use compromise to increase collective wealth). This process may also explain the ability of New Deal agencies and subunits to reach agreements. Unfortunately, their homogeneity, which facilitated agreement between the agency and regulated groups, was also a source of their normative illegitimacy.

¹⁰⁷ See National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1994).

¹⁰⁸ See generally Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349 (1988) (exploring the duty to bargain in good faith from an economic perspective).

¹⁰⁹ See Fitts, *Ignorance*, *supra* note 47, at 949 (explaining how political parties created a greater sense of collective identity).

¹¹⁰ See ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 16 (1971) (explaining that to "provide a high degree of mutual security for government and oppositions" requires wide "opportunities for oppositions to contest the conduct of the government"); CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* 335 (1965) (explaining that "appraisal of partisan mutual adjustment for purposes of control must be carried on through fragmented, disjointed, and incremental analysis rather than through synopsis"); see also Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 744 (1983) (arguing that the "pluralist political process leads to unstable political choice, and that such instability of choice in fact fosters the stability of pluralist political systems"); Posner, *supra* note 78, at 446 (describing the step-by-step approach to constitutional theory); Sunstein, *supra* note 78, at 759 (analyzing legal outcomes by working from analogies and low-level principles rather than from large theoretical principles). In effect, incrementalism uses the status quo as a normatively acceptable default rule.

¹¹¹ The need to avoid distributional conflict has been offered as one justification

explain Establishment Clause prohibitions against government involvement in certain religious issues, which would trigger socially divisive conflict in a religiously divided society.¹¹² As Professor Steven Holmes has observed, "Democracy becomes possible . . . only when certain emotionally charged solidarities and commitments are displaced from the political realm."¹¹³

A final way that modern political institutions can mediate conflict is by committing ex ante to a "neutral process or institution," such as the deficit restrictions adopted in the Gramm-Rudman-Hollings Act,¹¹⁴ the powers of standing committees in the House of Representatives,¹¹⁵ and the recommendations of the Commission on Base Realignment and Closure.¹¹⁶ All of these structures serve to create a type of real world veil of ignorance, which can facilitate agreement.¹¹⁷ When participants establish and assent to each of these procedures, they remain unaware of what or how many specific conflicts will be resolved.¹¹⁸ This analysis is

for a common law property rights system. See Richard A. Epstein, *Possession As the Root of Title*, 13 GA. L. REV. 1221, 1237 (1979); see also Alexander & Sherwin, *supra* note 96, at 1206, 1218-19 (arguing that utilitarian governments have an incentive to convince their citizens that property rights are based in natural law even if they were only accepted for utilitarian reasons because the natural rights pretext would prevent citizens from making personal evaluations of the utility of property rights); cf. Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, 144 U. PA. L. REV. (forthcoming May 1996) (describing a similar argument by Hobbes that favors the status quo in the selection of a form of government).

¹¹² For the classic exposition, see Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) ("While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall.").

¹¹³ STEVEN HOLMES, *PASSIONS AND CONSTRAINT* 207 (1995); see also GUIDO CALABRESI & PHILLIP BOBBIT, *TRAGIC CHOICES* 38 (1978) (outlining the problems involved in integrating values into political decisions); RIKER, *supra* note 106, at 174-75 (explaining that political instability may be moderated by "an internalized morality" or the "structure of the system").

¹¹⁴ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

¹¹⁵ See Fitts, *Ignorance*, *supra* note 47, at 972 (arguing that precommitment to committee structure in Congress may help diffuse conflict).

¹¹⁶ See *supra* note 26.

¹¹⁷ Compare JOHN RAWLS, *A THEORY OF JUSTICE* 135-42 (1971) (explaining a fundamental condition of his theory that hypothetical social contractors be unaware of information about themselves when deciding upon those principles that are to govern social institutions) with Fitts, *Ignorance*, *supra* note 47, at 922 (suggesting that less information makes political agreements easier to reach because actors with less information may avoid politically controversial issues).

¹¹⁸ See Fitts, *Ignorance*, *supra* note 47, at 966 (noting that a "veil of ignorance . . .

similar to traditional defenses of process-based theories of judicial review and of pluralism in general, which view current government political structures as legitimate because of the inability of political participants to predict how they will resolve a particular political dispute.¹¹⁹ Recent game theory analyses have lent some further support to this observation: Less clarity of results among participants can decrease strategic behavior because actors are less likely to take action based on the distributive effects of decisions.¹²⁰ Indeed, according to empirical studies conducted by social psychologists, the public accepts adverse outcomes more willingly if there is an *ex ante* perception of a "fair process."¹²¹

Under this analysis, the decentralized and multimember structure of Congress can be—ironically—an *advantage*, at least where political divisions become serious and conflict mediation becomes important. On a strategic level, members of Congress can always claim to be working for their constituents and their constituents alone. If they cannot satisfy all of their constituents' wishes, they can blame the institution's neutral processes, such as the rules committee and voting rules, which were put in place before any

around the consequences of social policy for individual groups' interests . . . may help promote a rational dialogue and forge a political consensus").

¹¹⁹ See JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980) (explaining that judicial review should only address "questions of participation" and not the "substantive merits of the political choice under attack"); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 830 (1991) (arguing that "political process theory is the only promising constitutional theory on the table"). But see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (criticizing the process-perfecting theory of judicial review as "radically indeterminate and fundamentally incomplete"). For the classic articulation of the pluralist view, see DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 501-35 (1951) (discussing the structure and operation of interest groups and concluding that the "total pattern of government over a period of time thus presents a protean complex of crisscrossing relationships that change in strength and direction with alterations in the power and standing of interests").

¹²⁰ Because a common source of strategic behavior is asymmetric information, eliminating the asymmetry through mutual ignorance eliminates this cause of the strategic behavior. See, e.g., Roger B. Myerson & Mark A. Satterthwaite, *Efficient Mechanisms for Bilateral Trading*, 29 J. ECON. THEORY 265, 265 (1983) (discussing the consequences of asymmetric information).

¹²¹ See LIND & TYLER, *supra* note 101, at 172 (offering one author's general set of criteria of procedural fairness in political settings); see also Albert P. Weale, *Representation, Individualism, and Collectivism*, 91 ETHICS 457, 463 (1981) (emphasizing the "importance to a group of having some of its members visibly present on major decision-making bodies" to reconcile members "to the inevitable disappointments of policymaking").

specific controversy arrived. Thus, the collective action problem becomes a mediation advantage because the institution, not the individual politician, is held responsible for the lack of institutional mediation.¹²² The complexity and size of Congress also allow the leadership to exercise agenda control, thereby permitting the institution to avoid reaching definitive decisions in difficult cases or to resolve divisive issues at an optimal moment.¹²³ At the same time, when it does "decide" an issue, Congress can speak in complex legislation with different voices, taking inconsistent positions and thereby avoiding some conflict. Thus, in legitimating negative or controversial outcomes, members of Congress can rely on their precommitment to certain institutional rules and procedures and the ambiguity of collective action. In this sense, the frequent *criticism* of Congress that it is inefficient and universalistic can have a silver lining—its decentralization can avoid open divisions and conflict. One well-documented result is the high incumbency rate in Congress—members can blame the institution for collective failure, avoid taking stands on controversial issues that may divide their constituency, and take credit for more narrow legislative action.¹²⁴

C. *Why the Structure of the Modern Presidency Can Undermine Conflict Mediation*

The theory of the modern presidency stands in stark contrast to this analysis. As noted above, one of the supposed *strengths* of the modern president is his ability to place himself at the focal point of government and to be the central mediator of more and more interests. This can be an important advantage in communicating with the public, facilitating cooperative solutions, and, in certain cases, exercising agenda control. The centrality of a unitary president is also thought to serve as a moderating influence, as the president is forced to forge a majority coalition among divergent

¹²² See *infra* note 236 and accompanying text.

¹²³ For a discussion on the value of agenda control, see DENNIS C. MUELLER, PUBLIC CHOICE II, at 87-94 (rev. ed. 1989); see also HOLMES, *supra* note 113, at 204 ("Legislatures are enjoined from officially discussing questions which, if placed under the control of electoral majorities, would (it is thought) induce government paralysis, squander everyone's time, or exacerbate factual animosities.").

¹²⁴ See MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 48-49 (2d ed. 1989) (arguing that the "incumbency effect" is a result of Congress members rationally devoting more resources to constituency service instead of policymaking).

groups.¹²⁵ These advantages *can be* an important source of power.

But as the president becomes increasingly able to perform these functions, that is, as he becomes more modern, unitary, and formally and informally powerful, he can become *less* able, as a structural matter, to perform many of the mediation and agenda control functions described above. The reasons for this development are related to his visibility and singularity, which can *undermine* the president's ability to avoid issues, control the agenda, and mediate conflict. Unitary, visible presidents have greater difficulty claiming that it is the "administration" or some neutral pre-commitment process of decisionmaking that led the executive branch to a particular position.¹²⁶ Under the theory of the unitary presidency, he alone must bear responsibility. For the same reason, the president may be less able to take inconsistent or vague positions on different issues or to refuse to take positions on the ground that inconsistencies should be left to stand.¹²⁷

While the president's singularity may give him the formal ability to exercise agenda control, which public choice scholars see as an advantage of presidential power, his visibility and the influence of the media may also make it more difficult for him to exercise it. When public scrutiny is brought to bear on the White House, surrounding such issues as gays in the military or affirmative action, the president must often take a position and act.¹²⁸ This can deprive him of the ability to choose when or whether to address issues. Finally, the unitary president may be less able to rely on preexisting congressional or agency processes to resolve disputes. At least in theory, true unitariness means that he has the authority to reverse the decisions or non-decisions of others—the buck stops

¹²⁵ See Calabresi, *supra* note 31, at 98 ("The advantage of presidential government . . . comes from the likelihood that the President will turn into the spokesperson of a centrist majority coalition . . .").

¹²⁶ Cf. RICHARD J. ELLIS, *PRESIDENTIAL LIGHTNING RODS: THE POLITICS OF BLAME AVOIDANCE* 1-14 (1994) (illustrating through historical case studies how presidents attempt to avoid accountability by shifting blame onto their advisers).

¹²⁷ See Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 302 (1993) (noting how an inconsistent position taken by President Bush with respect to the FCC's affirmative action policy led to a weakening of presidential control over the agency). For an analysis of Devins's approach, see Michael Fitts, *Ways to Think About the Unitary Executive: A Comment on Approaches to Government Structure*, 15 CARDOZO L. REV. 323, 332-35 (1993).

¹²⁸ See FRED I. GREENSTEIN ET AL., *EVOLUTION OF THE MODERN PRESIDENCY* at iii (1977) (arguing that "[p]residents have had to be leaders whether they chose to be or not").

with the president.¹²⁹ In this environment, "no politician can endure opposition from a wide range of opponents in numerous contests without alienating a significant proportion of voters."¹³⁰

Two types of tactics illustrate this phenomenon. First, presidents in recent years have often sought to deemphasize—at least politically—their unitariness by allocating responsibility for different agencies to different political constituencies. President Clinton, for example, reportedly "gave" the Department of Justice to the liberal wing of the Democratic party and the Department of the Treasury and the OMB to the conservatives.¹³¹ Presidents Bush and Reagan tried a similar technique of giving control over different agencies to different political constituencies.¹³²

Second, by invoking vague abstract principles or "talking out of both sides of their mouth," presidents have attempted to create the division within their person. Eisenhower is widely reported to be the best exemplar of this "bumbling" technique.¹³³ Reagan's widely publicized verbal "incoherence" and detachment from government affairs probably served a similar function.¹³⁴

Unfortunately, the visibility and singularity of the modern presidency can undermine both informal techniques. To the extent that the modern president is subject to heightened visibility about what he says and does and is led to make increasingly specific statements about who should win and who should lose on an issue, his ability to mediate conflict and control the agenda can be undermined. The modern president is supposed to have a position

¹²⁹ See discussion *supra* part I.B (discussing the theory of the unitary presidency); see also Michael Nelson, *Why Americans Hate Politics and Politicians* 28 POL. SCI. & POL. 72, 74 (1995) (describing the need of politicians and government officials to blame each other in the current political environment).

¹³⁰ WATTENBERG, *supra* note 37, at 160.

¹³¹ See Thomas L. Friedman, *Clinton Cabinet Choices Put Him at Center, Balancing Competing Factions*, N.Y. TIMES, Dec. 27, 1992, at 22 (observing that, in constructing his cabinet, Clinton "included representatives of many views rather than choosing between rival schools of thought within the Democratic Party").

¹³² See *id.* (reporting that "Ronald Reagan delegated large areas of responsibility to others, and often let rival factions fight it out"); see also Fitts, *supra* note 127, at 333 (discussing how Presidents Nixon, Bush, and Clinton appointed officials with conflicting views to different government positions in order to avoid conflict).

¹³³ See FRED I. GREENSTEIN, *THE HIDDEN-HAND PRESIDENCY: EISENHOWER AS LEADER* 66-72 (1982) (criticizing the perception that Eisenhower was more of a "bumbler" than a leader and discussing Eisenhower's effective use of ambiguous statements in press conferences).

¹³⁴ See BOB SCHIEFFER & GARY P. GATES, *THE ACTING PRESIDENT* 192-96 (1989) (discussing how Reagan avoided political decisions within his administration by remaining "hands-off").

on such matters as affirmative action, the war in Bosnia, the baseball strike, and the newest EPA regulations—the list is infinite. Perhaps in response to these pressures, each modern president has made more speeches and taken more positions than his predecessors, with Bill Clinton giving three times as many speeches as Reagan during the same period.¹³⁵ In such circumstances, the president is far less able to exercise agenda control, refuse to take symbolic stands, or take inconsistent positions. The well-documented tendency of the press to emphasize the strategic implications of politics exacerbates this process by turning issues into zero-sum games.¹³⁶ Thus, in contrast to Congress, the modern president's attempt to avoid or mediate issues can often undermine him personally and politically.

This tension may explain in part why pollsters who review the modern presidents have found that, even though they are more active, "the more positions a president takes—the lower [his public] approval ratings will be."¹³⁷ It also may reveal why the recent ascendancy and visibility of Newt Gingrich led to an increase in President Clinton's approval ratings: he was no longer the focus of attention as the "president." While proponents of a rule of law might see the president's visibility as a normative advantage,¹³⁸ and law and economics scholars might view it as a source of information and lower "monitoring costs," it is a disadvantage with respect to his ability to avoid issues or achieve agreement on distributive issues or value judgments—that is, his ability to mediate

¹³⁵ See Carol Gelderman, *All the Presidents' Words*, WILSON Q., Spring 1995, at 68, 70; see also *id.*, at 79 ("Clinton makes matters worse by trying to get back on track with speeches that play to public opinion, creating new disconnects between past proclamations and present ones.").

¹³⁶ See KATHLEEN H. JAMIESON, *DIRTY POLITICS* 191 (1992) (describing the press's tendency during campaigns to emphasize "the strategy, game plan, and horse race of campaigns" rather than policy discussions); THOMAS E. PATTERSON, *OUT OF ORDER* 129 (1993) (describing the "tendency of reporters" to focus on "strategy and personality").

¹³⁷ BRACE & HINCKLEY, *supra* note 90, at 81. Thus, when presidents take positions, they lower their public approval. "Active position taking on votes in Congress and domestic travel . . . hurt public support." *Id.* at 174.

¹³⁸ See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548 (1988) (naming the commitment to detached deliberation as a source of the contemporary appeal of republican thought). See generally BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) (arguing for the ideal of dialogue under a framework of neutral and consistent principles); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); JOHN RAWLS, *The Idea of Public Reason*, in *POLITICAL LIBERALISM* 212 (1993) (arguing for an ideal of "public reason" as the principle for public debate).

conflict.

Paradoxically, to the extent the modern unitary president is perceived as more powerful—that is, that he can use his position to effect greater change—the problem would be *exacerbated*.¹³⁹ The reason is that the public would assume that a unitary president who enjoys broad formal and informal authority could achieve greater change through presidential intervention.¹⁴⁰ The fact that the views and positions of a unitary presidency must be captured in the values of a single individual, rather than in a varied institution such as Congress, could complicate this problem, even though it is supposed to be a moderating *advantage* for him.¹⁴¹ Thus, although a modern president may have diminished ability to mediate conflict due to his unitariness, he may be increasingly faced by a public that may perceive greater risk in his participation in government decisions. Presidential activities in the modern era may simply require more decisions to be mediated.¹⁴²

D. *Ideological or Nonstructural Methods of Presidential Conflict Mediation*

Of course, a modern president has resources for confronting these problems. His ability to appear nonpartisan and invoke national symbols is a traditional source of strength. In the past, for

¹³⁹ Law and economics scholars would refer to the president's ability to generate public benefits as a surplus. See Cooter, *supra* note 19, at 17 (describing "surplus" as the benefits obtained through bargaining and cooperation).

¹⁴⁰ If all distributional issues are up for grabs, this may explain why some conservatives are concerned about a strong president. See Calabresi, *supra* note 85, at 1507-08 (noting the conflicting distributional goals of the president and other branches such as Congress).

¹⁴¹ See Calabresi, *supra* note 31, at 41 (discussing Alexander Hamilton's view that a unitary president, while increasing "energy" in government, also promotes accountability by placing responsibility for wrong-doing in a single actor). This problem illustrates one of the advantages of a traditional political party. Because a strong party is not controlled by or identified with one person, it is thought to tolerate more difference of opinion within the tent. Similarly, this analysis suggests that officials at lower levels of government may have *less* of a problem. In general, mayors and governors have less visibility. In addition, other institutions, such as the federal government, are often viewed as more responsible for outcomes.

¹⁴² In this sense, legislative bodies have the paradoxical advantage of being subject either to cycling majority rule or universalism. This produces, in technical terms, less distributional variance or risk. See Miller, *supra* note 110, at 738-39 (discussing the consequences of "cyclical majorities"); see also James Q. Wilson, *The Newer Deal*, NEW REPUBLIC, July 2, 1990, at 32, 37 ("[T]here has been a transformation of public expectations about the scope of federal action, one that has put virtually everything on the public agenda and left nothing off.").

example, the Cold War against communism may have strengthened presidential authority by presenting the nation with a less divisive issue to which the president could respond with a single unified national standard, and for which central control, as outlined above, would have been important. Indeed, this effect led President Clinton to remark that he envied President Kennedy for "having an enemy."¹⁴³

A more important institutional source of presidential power in this regard, though, has probably been the president's ability to claim democratic legitimacy, as suggested by the theory of the unitary presidency outlined above.¹⁴⁴ To justify decisions and secure agreements, presidents have, in the past, stressed the importance of abstract party loyalty, the institutional integrity of the president as the only national democratic representative of *all* "the People," and the democratic pedigree of the president's position, supposedly vindicated by "the People" in the last presidential election.¹⁴⁵

Yet, the ability of the president to justify actions through claims of "democratic legitimacy" has diminished in many ways. While the president could rely in the past on his popular election to legitimate his current position, today, public opinion polls and instant communication can bolster virtually any opposing political leader who claims popular support on a particular issue.¹⁴⁶ A president Clinton who is elected on a pledge to

¹⁴³ Richard Reeves, *Why Clinton Wishes He Were JFK*, WASH. MONTHLY, Sept. 27, 1995, at 16. The threat of communism was a presidential foreign policy issue that required comparatively less dispute resolution. See BRACE & HINCKLEY, *supra* note 90, at 45 (describing the usefulness of foreign crises to presidential popularity). Foreign policy today does not offer such a dispute-free unifying symbol. See Alison Mitchell, *Campaign Trail or Garden Path?*, N.Y. TIMES, July 2, 1995, at E5 ("The end of the Cold War diminished the public's sense that the President is the man with his finger on the button, the nation's bulwark against a superpower confrontation.").

¹⁴⁴ See *supra* part I.B.

¹⁴⁵ These symbols are especially valuable during periods of strong party politics and during elections, when unifying symbols tend to be most salient and the public's position on issues tends to be more deliberate and consistent. See Fitts, *Ignorance*, *supra* note 47, at 943-44 (explaining that political parties "can serve as a structure that frames issues and programs in clear and simple terms for the whole public" and "promote public understanding of political events").

Symbols of authority allow the president, in effect, either to "persuade" the opposition to change positions or to overcome opposition through his publicly perceived strength and legitimacy. When these symbols are used effectively by the president, his party is more likely to control all parts of government, thus reducing the need for conflict mediation.

¹⁴⁶ See Gelderman, *supra* note 135, at 79 ("In an age vastly more complicated than

reform health care, for example, must confront polling data that shows his plan does not enjoy popular support. At the same time, the narrowness of many of the issues faced by a modern unitary president and the decline of party identification more generally reduce the president's ability to rely on a past broad electoral mandate to legitimate particular decisions.¹⁴⁷ Modern leaders do not run on the basis of a clear platform. In this environment, the president's ability to lay claim to the democratic or party mantle has declined; he must often piece together a divergent coalition, bargaining, like other politicians, with individual political actors and groups who hold positions of influence in our divided government. This process of keeping members of a coalition together and prioritizing issues depends much more on conflict mediation skills than the traditional reliance upon party loyalty and claims of democratic legitimacy.

In light of this shift, what should a unitary president do to maximize his influence? Under this analysis, his position demands a subtle balancing of roles. As the sweep of history has shown, the institutional power of the president is derived in part from his ability to rise above existing incremental relations and plot a new course for the country—that is, to solve the collective action problem of systematic change, whatever the direction.¹⁴⁸ As

FDR's, it may be that no person can serve as the national voice."); see also Giovanni Sartori, *Video-Power*, 24 GOV'T & OPPOSITION 39, 41-43 (1989) (discussing the paradoxical decentralizing effect of the media, which creates increased "localism").

¹⁴⁷ See BRACE & HINCKLEY, *supra* note 90, at 164 ("Although the polls have not supplanted elections as the democratic base for a president's actions in office, at times they can supersede them. They withdraw support from winners of landslide elections . . ."). For a discussion of the decline of parties and of realignments, see ALDRICH, *supra* note 25, at 277-96 (summarizing the historical patterns of the decline of party relevance and the regular periods of realignment); Everett C. Ladd, *Like Waiting for Godot: The Usefulness of "Realignment" for Understanding Change in Contemporary American Politics*, in THE END OF REALIGNMENT?: INTERPRETING AMERICAN ELECTORAL ERAS 24, 29 (Byron E. Shafer ed., 1991) (arguing that realignment "was always too confining a vision, and it was always guilty of over-generalizing from a unique historical circumstance"). For a discussion of the increasing polarization of issues within the electorate, see ROBERT SCHMUHL, DEMANDING DEMOCRACY 131-37 (1994) (discussing the political effects of this country's increasing ethnic diversity combined with the loss of power of the traditionally cohesive force of political parties and the growth and diversification of the media).

¹⁴⁸ See SKOWRONEK, *supra* note 33, at 17-19 (describing the differences between presidential power and presidential authority). For discussions of the relative advantages of synoptic and incremental change, see JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA 35-39 (1984).

Robert Inman and I have argued,¹⁴⁹ and as the literature describing a strong presidency suggests,¹⁵⁰ when confronted with the collective action problems of congressional and public action, the president's clarity of position and toughness in the face of adversity may be a precondition for effective leadership. The story of a president engaged in successful high visibility and high stakes politics has marked our vision of presidential leadership over the years.¹⁵¹

Unfortunately, there is another side to the story, which emerges when the president is unsuccessful, or not involved, in such high stakes politics. As this Part indicates, the president's role as a visible focal point—so dependent on his singularity and clarity—can also create a conflict that, once unleashed, hinders the modern president's ability to mediate effectively as a single individual.¹⁵² In areas such as social security or health care reform, the president may be poorly positioned to resolve conflict or to take the political heat if he does not. To paraphrase the language of law and economics, his *virtue* (in minimizing transaction costs) can be his *vice* (in mediating conflict over the public benefits or "surplus" produced by minimization).¹⁵³

¹⁴⁹ See Fitts & Inman, *supra* note 8, at 1771-73 (describing how the president can bring about significant fiscal reform by moving Congress to a new Nash equilibrium, but only if he is very clear as to his position and remains resolute).

¹⁵⁰ See Miller, *supra* note 8, at 314 (arguing that presidential influence in Congress is dependent upon mustering public support and stating that "[t]he president's most powerful weapon, then, is a public aroused on a specific issue"); Moe, *supra* note 18, at 365 (arguing that, to be strong, a president must "show the way by charting new paths for American society—even when these paths happen to be unpopular at the time" and that "[s]trong leaders have the capacity for rising above politics when necessary, for pursuing their own vision in the face of political odds").

¹⁵¹ See SKOWRONEK, *supra* note 33, at 344-45 (describing President Johnson's continued support of the Vietnam War to enhance the legitimacy of his other commitments, including, specifically, the Civil Rights Act and Medicare).

¹⁵² Clarity is a critical component of the president's ability to gain power through the media and overcome a decentralized Congress. See Fitts & Inman, *supra* note 8, at 1771-72 (showing how the president's clear commitment to one position can force Congress to make the most efficient policy choice). At the same time, the president's assertion of power may trigger value and distributional conflict, which he may be poorly positioned to resolve.

¹⁵³ To be successful as a unitary leader, therefore, the president must establish institutional mechanisms appropriate to each context. See *infra* Conclusion.

One final point: This problem is perhaps related to, but is ultimately quite different from, the claim that public choice theory ignores questions of social justice and the shaping of preferences. According to the latter claim, government should promote "good" normative goals, that is, shape citizen preferences toward attractive ends. See Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L.

III. INDIVIDUAL MORAL ASSESSMENTS

A second and related way in which the visibility and centralization of the presidency may undermine and frustrate the exercise of presidential power is by leading the public to evaluate the president according to a standard of moral assessment appropriate for individuals, rather than for institutions. A great deal has been written over the years about the significance of presidential "style." Usually, the endless proliferation of relevant variables in this literature limits the generalizability of the analyses. Every individual president has a unique style that can explain—although only in hindsight—his success or failure. My argument, however, is more generic: The presidential personality, whatever the style, can undermine the institution. In this sense, the presidential personality may produce a less valuable political "brand name."

At first, this claim might seem unusual; as noted above in the description of the modern president, the public personality of politicians is usually perceived as a political *advantage*. Politicians routinely attempt to create public personae as warm, caring, and principled individuals who will do all they can to help their constituents. This image creation is one of the benefits of constituency servicing, public posturing, and the family stories that are so frequently planted in the press. To the extent that a politician simply presents herself as a "good and responsive person," her personality is usually thought to be a win-win issue, especially as compared to her actual positions on more divisive programmatic issues.¹⁵⁴ For members of Congress, personal connections may also complement quite well their roles as advocates for specialized constituencies in their districts.¹⁵⁵

REV. 1129, 1172 (1986) (suggesting that legislatures and courts should promote welfare and autonomy, even if doing so requires the alteration of public preferences). My point is related but different: public choice theory may fail to incorporate the social costs of dispute resolution, which can have quite serious efficiency consequences.

¹⁵⁴ See, e.g., BRUCE CAIN ET AL., *THE PERSONAL VOTE* 38-40 (1987) (analyzing the keys to running a successful campaign and observing that constituency service is extremely important); FIORINA, *supra* note 124, at 42 (arguing that politicians avoid programmatic activities because they are "inherently controversial").

¹⁵⁵ Many commentators believe that constituency service is an important reason for political success. See, e.g., CAIN ET AL., *supra* note 154, at 97 (noting that "voters have high constituency service expectations, and congressmen work hard to meet those expectations"); FIORINA, *supra* note 124, at 99 (finding that "constituency service grew in electoral importance between the 1950s and 1970s").

For the president, however, this type of familiarity can create two problems. First, part of the power of the presidency is its mystique and its ability to project general *abstract* symbols. The fact that "it is not just an office of incredible power but a breeding ground of indestructible myth" strengthens the president's authority.¹⁵⁶ We seem "to look to presidents for symbolic identification."¹⁵⁷ To tap into this resource, presidents have relied on the "royalty" of their position to garner broad support.¹⁵⁸ Yet a highly visible personal presidency is less able to invoke the grandeur of the office. Who is awed by the sight of a president jogging in running shorts or commenting on each public issue?¹⁵⁹ "Just as putting too much money in circulation causes inflation and diminishes the value of a currency, too much presidential talk cheapens the value of presidential rhetoric."¹⁶⁰

Second, the focus on individual presidents and their personalities can create greater tension with the president's pursuit of normal political activities. More than individual members of Congress, the unitary president is necessarily in a position to balance *personally* the interests of groups *within* his constituency as well as to change his individual position publicly over time, especially as he moves from the primaries, to the general election, to the presidency, and to the advancement of legislation through Congress. In order to be an *effective* leader, a president must, in other words, be less than candid to different constituencies and appear confident about positions that are subject to doubt or change. But balancing interests and changing positions in different institutional contexts can be in tension with his persona as a caring

¹⁵⁶ ROSSITER, *supra* note 33, at 81; *see also* Mitchell, *supra* note 143, at 5 ("[P]eople now and always have wanted their President to be something bigger than life." (quoting Stephen Hess, Brookings Institution)).

¹⁵⁷ WILDAVSKY, *supra* note 3, at 140.

¹⁵⁸ For a description of how one modern president attempted to shape his image, *see* MICHAEL K. DEEVER & MICKEY HERSKOWITZ, *BEHIND THE SCENES* 175-76 (1987), which recounts President Reagan's use of the power and imagery of the presidency to muster popular support.

¹⁵⁹ *See* Todd S. Purdum, *Underwear and All: Dignifying the President*, N.Y. TIMES, Jan. 29, 1995, § 4 (Week in Review), at 3 ("Going on MTV, [Clinton] may pick up 5 per cent of the vote, but going on MTV and talking about [his] underwear, [he] may lose 12 per cent of the respect." (quoting Stephen Hess, Brookings Institute)). By way of comparison, Franklin Roosevelt was rarely photographed in his wheelchair. *See* Frank Van Riper, *Political Photo Ops*, WASH. POST, July 21, 1995, at N37 ("Roosevelt, . . . by unspoken agreement, was rarely photographed in his wheelchair or in any way that would call attention to his paralysis.").

¹⁶⁰ Gelderman, *supra* note 135, at 79.

and principled individual. As discussed in Part II, institutions are expected to mediate and evolve in this manner; individual politicians who are supposed to have strong moral convictions may not be offered that luxury.

The modern personal presidency thus can be caught between the different normative standards frequently applied to individual and familial relationships, on the one hand, and political institutions, on the other. Commentators have pointed out this distinction in moral approaches in other contexts as well.¹⁶¹ While we apply the personal standard to our friends, family, and extended family, whom we expect to be trustworthy, truthful, and caring, the president must often act impersonally toward individuals and the public. This detachment is often needed for public institutions and officials to balance competing interests and overcome the collective action problems that permeate government.¹⁶² As a result, a single and visible president must act not only with impunity toward many individual constituents, but also strategically in order to balance their competing interests.

What are some illustrations of this tension? On the one hand, the qualities that allow a politician to exercise power effectively in the political game have conflicted with the attitudes and normative values that will satisfy private normative standards. Reagan, for example, was constantly asked to reconcile his public concern for family values with his lack of concern for his own family.¹⁶³ Similarly, Clinton has been forced to reconcile his support for women's rights with his marital infidelity.¹⁶⁴ Carter may have had the opposite problem: a model personal life, but a seeming inability to engage in instrumental political behavior.

¹⁶¹ See, e.g., THOMAS NAGEL, *Ruthlessness in Public Life*, in MORTAL QUESTIONS 75, 75-90 (1979) (discussing the continuities and discontinuities between public and private morality); Alexander & Sherwin, *supra* note 96, at 1214 (noting that "a requirement of perfect candor conflicts with common moral institutions").

¹⁶² See, e.g., SCHAUER, *supra* note 96, at 162-66 (noting that agents who participate in cooperative enterprises must be willing to allocate power away from themselves and to the collective good); Alexander & Sherwin, *supra* note 96, at 1197, 1214-15 (arguing that various forms of beneficial deception are created by rule givers in order to overcome prisoner's dilemmas).

¹⁶³ See Judy Mann, *When It Comes to Living Out Family Values*, WASH. POST, July 27, 1988, at B3 (describing the "hypocrisy" of the "pro-family [Reagan] administration" as "breathtaking," with the "First Couple" "barely talk[ing] with their children").

¹⁶⁴ See, e.g., Michael Barone, *Paying a Price for His Shortcomings*, U.S. NEWS & WORLD REP., May 23, 1994, at 38 ("Clinton is paying a clear and measurable price for voters' concerns about his character.").

On the other hand, and more importantly, this tension can subject a president's public political behavior to private standards of morality. Clinton and Bush, for example, found that their attempts to mediate conflict on taxes and health care through evolving but inconsistent statements were not considered acceptable instrumental political methods, but rather a sign of a lack of character and moral conviction. Making "speeches that play to public opinion" tends to "creat[e] new discon[tinuities] between past proclamations and present ones,"¹⁶⁵ even though politicians may simply be attempting to keep up with evolving political forces. *Good individuals* with strong moral values are not supposed to change positions in light of changing political coalitions, although political institutions and parties can and should do so.¹⁶⁶ Caught in this predicament, politicians easily fall subject to characterizations such as "tricky Dick" (in the case of Nixon), "slick Willy" (in the case of Clinton), or someone who "r[uns] under so many identities it [is] hard to keep track of who he [is] from day to day" (in the case of Bush).¹⁶⁷ The problem is especially difficult because, as studies on leadership have found, "[t]he ultimate impact of [a] leader [often] depends most significantly on the particular story that he or she . . . embodies."¹⁶⁸ The personal story of a modern president attempting to respond to changing political forces can be in tension with that role.¹⁶⁹

¹⁶⁵ Gelderman, *supra* note 135, at 79.

¹⁶⁶ In the past, waffling on the issues took place largely among elites and in private. Today it occurs in public view.

¹⁶⁷ SKOWRONEK, *supra* note 33, at 441 (quoting Russell Baker, *The '92 Follies: A Show with Legs*, N.Y. TIMES, Nov. 1, 1992, § 6 (Magazine), at 1, 58); see also Ross K. Baker, *Let Pals Change Views*, PHILA. INQUIRER, Oct. 24, 1995, at A23 ("We have a very bad habit in this country of punishing those in public life who show themselves willing to change."); Robert Schmuhl, *Clinton: Consistently Inconsistent*, PHILA. INQUIRER, Jan. 26, 1995, at A13 (criticizing the inconsistencies in Clinton's State of the Union speech). Foreign systems that have offices such as king or prime minister may avoid some of these difficulties because they deflect separate individualized scrutiny away from any single leader and onto the party more generally.

¹⁶⁸ GARDNER, *supra* note 44, at 14 (emphasis added).

¹⁶⁹ This raises a paradox: The singularity of the presidency, which supposedly facilitates direction of the New Deal state, may be subject to an old style standard of personal evaluation akin to the common law. Yet the New Deal supposedly replaced the common law brand of regulation. See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1232-39 (1982) (arguing that administrative agencies were created in part to correct the shortcomings of the common law system, which was ill-equipped to adapt to industrial conditions).

IV. FINDINGS OF ERRORS IN JUDGMENT

A third consequence of the increased visibility and centralization of the presidency may be a corresponding increase in the perception of presidential error and incompetence, which can undermine the legitimacy and power of the person who inhabits the office. This perception may flow, I suggest, from the increasing number and complexity of the decisions for which a unitary president is necessarily held accountable, and on account of which there will necessarily be more "errors" committed. How will the public respond to this situation? As discussed below, these decisions not only resemble the types of actions that have led the torts system to find an inordinate amount of "negligence" in comparable circumstances, but they also provide an illuminating insight into the problem.

A. *Causal Responsibility in Torts*

Put simply, one of the primary effects of centralizing influence in a single individual, both formally and informally, is that the president and the president's immediate staff become explicitly responsible for more and more of the complicated decisions and *non-decisions* of government. According to traditional "transaction cost analysis," this internalization of responsibility at the top is the supposed advantage of a unitary president. Yet the president's oversight of complex liability under a theory of respondeat superior makes the president politically liable for a wide variety of different decisions for which he clearly has little or no information and for which he cannot rationally even attempt to gather information. With a truly unitary presidency, it is literally impossible to perceive the interconnections between issues or to anticipate the future significance of the president's or a subordinate's actions for which the president will implicitly bear responsibility.

The most comparable circumstance in torts occurs when we attempt to evaluate the "inattention" of tortfeasors, such as when an actor must undertake repeated precautions in a complex environment, a common problem in today's technologically complex world. The classic example is a driver's inadvertent failure to watch the road at all times.¹⁷⁰ In this situation, as the torts treatment has

¹⁷⁰ In the political sphere, this case corresponds to officials who operate in complex regulatory environments and face unavoidable stochastic error.

shown, courts face a serious factual difficulty in determining the actor's responsibility for error. If a pure negligence standard is applied, the defendant needs to show that she exercised a policy of due diligence *over the long run* and that, in the particular case, she simply did not pay attention. In other words, she needs to prove that she adopted the appropriate overall standard of care and that the injury is an unavoidable stochastic event. Unfortunately, if this standard applied, as Professor Mark Grady has pointed out, the issue turns entirely on two highly uncertain, if not impossible, factual determinations: whether a duly diligent defendant might nevertheless make such an error because of the extra costs of paying attention *and whether the defendant in fact followed that level of care*.¹⁷¹

Because of the impossibility of gathering and assimilating information about the overall level of *attention*, courts and juries have not attempted to determine whether the defendant exercised an appropriate level of care. According to Grady, in such situations courts and juries "count [such results] as negligence," in effect applying a strict liability standard.¹⁷² They presume that the defendant erred. As a result, Grady observes, "there will be more negligence [found] in places where the rate of compliance is greatest."¹⁷³ Grady not only discovered this pocket of strict liability within our general torts system, but also suggested why we ignored it previously. When faced with such high information demands, we apply a standard of strict liability, which economists argue is informationally rational.¹⁷⁴

¹⁷¹ See Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887, 894-912 (1994) [hereinafter Grady, *Res Ipsa*] (discussing compliance error, which is the inadvertent departure from a required standard of care in relation to traditional negligence analysis); Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293, 321-22 (1988) (discussing the stochastic element of precaution in relation to compliance costs).

¹⁷² Grady, *Res Ipsa*, *supra* note 171, at 907. Unlike a durable precaution, which a court is capable of directly observing, it is impossible to examine directly the overall level of attention a defendant actually exercised when only a momentary inattention resulted in an accident. Ordinarily, one can inspect directly the mechanisms that have been adopted to avoid accidents, such as air bags, and weigh their costs in comparison to the lives potentially saved. See *Motor Vehicle Mfr. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 32-38 (1983) (discussing automobile safety and legislation that mandated the installation of passive restraints such as airbags). In the case of mental or individual systems of oversight, however, the level of care cannot be observed directly.

¹⁷³ Grady, *Res Ipsa*, *supra* note 171, at 907.

¹⁷⁴ Indeed, Grady argues that this phenomenon explains the increases in findings

B. *Effect of This Process on Perceptions
of Presidential Error*

A unitary visible president, I suggest, often finds himself in an analogous situation to the torts defendant facing stochastic error: he cannot possibly avoid legal or political mistake, at least as judged *ex post*. As noted above, the president is formally and informally responsible for a broad array of decisions for which he has little information—the list covers minor decisions involving environmental regulations all the way to document decisions on Whitewater. At the same time, the lack of information about these judgments often makes it difficult for the public to determine *ex post* whether or not the president was literally “negligent”—in a political sense—when he made a particular decision that led to a mistake. To frame the issue in torts terminology, it is difficult for the public to determine whether the president was following “the appropriate level of care,” and whether the failure was simply a matter of inadvertence or reasonable time demands. The factual demands of assessing the president’s position in these cases make such evaluations extraordinarily difficult.¹⁷⁵ Indeed, our inability to judge the balancing of multiple policy factors has led the courts to apply the committed-to-agency-discretion-by-law exception to analogous decisions on resource allocation by government officials.¹⁷⁶ Here, as in the presidential context, as the number of factors to be weighed in decisionmaking increases, the inability *ex post* to review the decisionmaking increases.

This effect may be especially salient in the many factually complex areas of criminal and ethical liability, where the line between proper and improper behavior is inherently ambiguous.¹⁷⁷ Although the examples in this context are necessarily

of tort liability associated with technological progress. *See id.* at 911-12. As the complexity of our technological systems has increased, the importance of human observation and attention, which cannot be easily monitored, has increased as well. *See id.* at 946 (“The more advanced the safety technology present in the relevant activity, the more loudly an accident speaks of negligence.”).

¹⁷⁵ One of the traditional rationales for presidential legal immunity is the court’s inability to evaluate *ex post* such synoptic type decisions. *See Nixon v. Fitzgerald*, 457 U.S. 731, 744-48 (1982). Because of the increased visibility of presidential activities, the public may now be in the same situation when it evaluates individual decisions of the president.

¹⁷⁶ *See Lincoln v. Vigil*, 113 S. Ct. 2024, 2030-31 (1993).

¹⁷⁷ *See Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 788 (1985) (discussing the difficulty of elucidating the “descriptive” aspects of bribery, including the elements of the crime).

charged politically, they are apparent on all sides. Were Carter, Reagan, Bush, or Clinton "negligent" when they failed to take preventive action in the various scandals that enveloped their presidencies or in the foreign policy crises, such as Iran, Lebanon, Iraq, and Bosnia, that occurred during their administrations? Often, all the public really knows *ex post* is that a mistake was made and that the president seems to be the most obvious person to assume responsibility.¹⁷⁸ Because the public cannot put itself in the position of the president facing all of these different time demands and issues, it frequently cannot say whether the mistake was unforeseeable *ex ante*.¹⁷⁹

C. *Complicating Factors*

Three other factors may complicate and exacerbate this effect. First, the public's perception of presidential error may increase if the president faces unique issues and a highly changing environment. To the extent that we live in a world of increased presidential responsibilities, changing conditions, and unique problems, the number of presidential "bad outcomes" *necessarily* increases, at least when viewed in hindsight, simply as a result of the better information we invariably have. This is true even if there is no reason to believe that actual mistakes in judgment, as viewed *ex ante*, have increased or that the world has become a worse place. Needless to say, a president who must deal with problems like Bosnia or Kuwait proceeds upon uncharted waters, and the public may be in a poor position to evaluate his efforts.¹⁸⁰

In the torts context, changes in new sectors of the economy often lead to strict liability as a result of our inability to foresee the nature of change.¹⁸¹ Courts make the producers of a new product

¹⁷⁸ Yet the public is unlikely to identify such mistakes as inadvertent, just as the tort system has not been able to identify torts inadvertent errors.

¹⁷⁹ Even if only 10% of bad results are attributed by the public to presidential error, the reputation of the president can be undermined. Because the president acts alone, moreover, the issues that he faces are necessarily unique, unlike those presented to members of Congress. There are no presidential counterparts and therefore no common standard of care to which he can easily refer.

¹⁸⁰ Paradoxically, a president who forces synoptic change may face the greatest amount of uncertainty under this analysis.

¹⁸¹ While any standard of accountability assumes an ability to predict on the basis of past events, change makes it more difficult to predict whether in fact one can extrapolate from past events—that is, whether one can exercise judgment. If the world is changing over time, or even if one simply does not know whether or not the world is changing, the value of predictive judgments, or judgments based on a high

strictly liable because the producers are in the best position to determine whether it is cost-justified.¹⁸² As philosophers of science have pointed out, in situations of rapid change, there may be no rational way to judge whether or not a person has been negligent because one never knows how the future will differ from the past. This is one explanation for why the legal system sometimes makes those in the best position to judge mistakes and predict the future strictly liable. Unfortunately, if the public assumes that the president occupies this position in the political context, he may be subject, as the instigator of broad social changes, to an analogous overassessment of "error."

A second factor that may exacerbate this effect is the incentive structure of the special counsel law.¹⁸³ Under the current standard, the mere *possibility* of a violation of a legal norm provides the basis for extraordinary legal and political scrutiny: a public preliminary investigation in the Department of Justice and later the appointment of a special counsel.¹⁸⁴ Thus, the president's proximity to a potential error with legal ramifications provides the basis for extra investigation and scrutiny.¹⁸⁵ In this environment, it

number of injuries, is more limited. This explains why technological changes make it difficult to tell whether or not someone was negligent *ex ante*. The problem is both factual and philosophical: What should the standard of foreseeability be when one does not know how the future will differ from the past? See generally NELSON GOODMAN, *FACT, FICTION AND FORECAST* (Bobbs-Merrill Co., 2d ed. 1965) (1955) (discussing how predictions are related to past experiences and possible theories of projection); GRUE, *THE NEW RIDDLE OF INDUCTION* (Douglas Stalker ed., 1994) (compiling works that discuss theories for interpreting the future). There simply may be no way to judge whether or not it was reasonable to take certain precautions *ex ante*, although the work on bounded rationality may provide one way to understand this problem. See generally HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* 19-23 (1983) (defining the behavioral model of bounded rationality and exploring its consequences).

¹⁸² See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962) ("The purpose of [strict] liability is to ensure that costs of injuries resulting from defective products are borne by the manufacturers . . . rather than by the injured persons who are powerless to protect themselves."); *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring) ("[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards . . . inherent in defective products It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.").

¹⁸³ See *Ethics in Government Act of 1978*, 28 U.S.C. §§ 591-599 (1988).

¹⁸⁴ See 28 U.S.C. § 592(c)(1)(A) ("The Attorney General shall apply to the division of the court for the appointment of an independent counsel if . . . the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted . . .").

¹⁸⁵ The structural and competitive incentives that encourage political and media

can be quite difficult for a president to demonstrate his competence.

Finally, and perhaps most importantly, these structural incentives may also intensify to the extent that a "culture of distrust" exists in the United States—that is, a social/psychological tendency to believe that failures are avoidable, and thus explainable, in terms of improper behavior. Long ago, Richard Hofstadter identified a "paranoid style" in American politics.¹⁸⁶ In recent years, a broad spectrum of commentators has gone on to suggest that a pervasive cynicism exists in American society that creates a presumption that bad events must have a malevolent or negligent cause.¹⁸⁷ Many commentators blame the press for this development.¹⁸⁸ While any conclusions regarding the significance of a "culture of distrust" are beyond the scope of this Article,¹⁸⁹ such skepticism, to the extent that it exists, would undermine presidential decisions more than

organizations to expend extraordinary resources to investigate a problem, such as executive impropriety, where there are fixed rewards for the winner, contributes to this effect. See *supra* notes 175-82 and accompanying text.

¹⁸⁶ See RICHARD HOFSTADTER, *The Paranoid Style in American Politics*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS*, *supra* note 95, at 3, 3 (discussing the "heated exaggeration, suspiciousness, and conspiratorial fantasy" prevalent in American politics).

¹⁸⁷ See E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 334 (1991) (noting that "Americans hate politics because . . . trust and commitment have eroded, and with them the ideals of democratic citizenship"); JEFFREY C. GOLDFARB, *THE CYNICAL SOCIETY: THE CULTURE OF POLITICS AND THE POLITICS OF CULTURE IN AMERICAN LIFE* 1 (1991) (stating that cynicism is the "single most pressing challenge facing American democracy today"); JAMES Q. WILSON, *THE MORAL SENSE* at viii (1993) (stating that "[o]ur public discourse has been shaped . . . by the teachings, or the popular corruptions of the teachings, of the great thinkers of the modern age," and that "the spirit of the age will shape how any message is understood," that spirit being "one of skepticism").

¹⁸⁸ See LARRY J. SABATO, *FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS* 66 (1991) (noting that too often "the press defines [the] character [of political candidates] . . . 'in a totally negative sense'" (quoting Gary Hart) (footnote omitted)); PAUL H. WEAVER, *NEWS AND THE CULTURE OF LYING* 164 (1994) (explaining that reporters deal with the contradictions of journalism by "rejecting ideals, . . . expecting the worst, . . . perversely resisting good news," and engaging in other cynical tactics); Paul Starobin, *Generation of Vipers: Journalists and the New Cynicism*, COLUM. JOURNALISM REV., Mar.-Apr. 1995, at 25, 26 (arguing that a "pervasive cynicism" exists in the press—"a prejudice against the face value explanations bordering on disbelief, accompanied by a ready willingness to ascribe base motives").

¹⁸⁹ For alternative explanations as to why the public might find greater "culpability" based on greater causal effects *alone*, see generally Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237 (1994). Criminal laws often punish morally identical acts differently simply because some acts result in more severe consequences.

other federal institutions. A skeptical public might disproportionately assume that bad government outcomes are the result of mistakes in judgment, given that the president makes decisions in an uncertain factual environment that too often cannot be assessed directly.¹⁹⁰

D. *Application of Political Strict Liability to Executive and Judicial Nominations*

One final example identifies the problem of individual assessment of error in a somewhat different context. The public's tendency to magnify individual error may also explain some of the difficulties recently experienced by executive and judicial nominees. A great deal has been written about our national preoccupation with the personal background of nominees and the fact that nominees appear to be disqualified for a minor error in their life or a statement made at an inopportune time. A number of scholars have suggested that we should not evaluate individual candidates based on individual statements or personal history,¹⁹¹ while others have argued that such indiscretions are a valid predictor of future job performance.¹⁹²

¹⁹⁰ It should be noted that these negative judgments are not spread across society as in other general systems of strict liability. Rather, they focus disproportionately on the most visible political actor—the president.

¹⁹¹ See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 20-22 (1994) (arguing that scrutiny during confirmation hearings should focus on the candidate's qualifications, rather than disqualifications); Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 672 (1989) (arguing that under the Framers' design, the Senate should look only to professional qualifications, not to ideology or politics); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1491-93 (1992) (arguing that the current process produces too much publicity and information about nominees, thereby giving opponents ammunition); see also JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 103 (1953) (describing Attorney General Thomas W. Gregory's decision to hold open hearings on the Brandeis nomination in order to bring to "public attention the fact that there was not sufficient factual evidence to substantiate the various accusations" that had been made against Brandeis).

¹⁹² See LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 93 (1985) (stating that the screening of judicial nominees requires "critical assessment of the nominee's character and intellect"); Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 627-37 (1993) (arguing that the Senate's examination of a nominee's character is necessary because "[p]ublic confidence in the Court depends greatly, perhaps more than anything else, on a sense that the Justices are individuals of the highest personal integrity"); Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213 (1988) (noting that "confirmation screening means digging, probing,

Whatever the merits of these contrasting positions, it is important to recognize that the problem is spawned in part by the same social forces described above. When the domain of conduct subject to scrutiny was quite limited, "good" candidates could reasonably conceal their inadvertent errors, while those who did not meet that standard could legitimately be considered unfit for the job. Today, however, a "reasonably led life" could easily include inadvertent errors that could disqualify an otherwise qualified nominee. As we learn more about the life and personal background of potential candidates, we necessarily find more errors—which include, almost by definition, at least *some* inadvertent errors. But how can we distinguish "reasonable" inadvertent errors from those character flaws that justify rejection? As in the torts context, it is increasingly difficult to make this distinction for informational reasons. We simply lack the data about the personal lives of the vast majority of Americans who never come within Washington media scrutiny to know what the reasonably led life would look like.

In light of this analysis, President Bush's attempt to find a "stealth nominee," such as Justice Souter,¹⁹³ is understandable politically, whatever one's assessment of the substantive merits of the choice. Rather than submit his nominee to a system of strict liability, implicitly (or perhaps explicitly) Bush chose to impose the opposite default rule. By proposing a candidate with a minimal record, he avoided liability for Souter's personal behavior or inadvertent statements.¹⁹⁴

learning about a nominee"); cf. Michael S. Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 446-70 (1995) (book review) ("[T]o the extent that the appointments process is, by the Constitution's design, a public and political process, litmus test substantive democratic review of judicial candidates is a logical, constitutional, and appropriate consequence.").

¹⁹³ See Richard Cohen, *No Paper Trail*, WASH. POST, July 26, 1990, at A27 ("Caught between opposing forces on abortion—caught, indeed, between his own contradictory statements on the issue—Bush pulled Souter from his hat. As usual, his intention was to get over the next political hurdle. He has given us the stealth nominee.").

¹⁹⁴ As described above, individual appointments may also create difficulties because of conflict mediation problems that occur whenever policies must be captured and symbolized in *one* candidate. See *supra* part II.C. The nomination of Dr. Henry Foster to the position of Surgeon General, in which he became a focal point in the abortion debate, see John F. Harris, *President Assails Foes of Abortion*, WASH. POST, June 25, 1995, at A4 ("[I]n the Foster [nomination] debate, Republican critics . . . said that abortion is such a controversial procedure that a physician who has performed them would be too divisive a figure to be the nation's most visible public health advocate."), may fall into that category.

V. OVERASSESSMENT OF PRESIDENTIAL RESPONSIBILITY

A final and related way that the visibility and centralization of the presidency may affect the power of the office is by leading to an overassessment of presidential *causal* responsibility for government policy. Numerous scholars and public opinion polls have shown that the public views the president as *the* most responsible actor in government.¹⁹⁵ This Part explores how the visibility and centralization of the presidency may not only influence this perception of the institution, but, at the same time, undermine the legitimacy of the person who holds the office.

A. *The Problems of Determining Responsibility in Government*

Determining political responsibility in American government is not easy. The government structure established by the founders divides power in order to avoid tyranny and promote deliberation.¹⁹⁶ At the same time, this system seriously complicates the public's assessment of the exercise of that power.¹⁹⁷ As a consequence of the diffusion of responsibility in government, as well as the costs of monitoring, the public has serious difficulty in assessing the specifics of policy decisions, the marginal contribution of all the different actors in government, and the quality of the judgment exercised.

To fill this void during earlier electoral regimes, the public may have relied more on retrospective evaluations of the government as *a whole*. Because political parties were stronger and a single party was more likely to "control" all of government, the members of the public often only had to ask themselves whether or not they approved of the government's policies. They assigned responsibility to the *party* in power.¹⁹⁸ Parties thus served as brand names that reduced the need for scrutinizing the marginal contribution of

¹⁹⁵ See BRACE & HINCKLEY, *supra* note 90, at 44-47.

¹⁹⁶ See Sunstein, *supra* note 138, at 1548-51 ("The requirement of deliberation is designed to ensure that political outcomes will be supported by reference to a consensus (or at least broad assessment) among political equals.").

¹⁹⁷ Indeed the inability to assess causal responsibility may be one source of the exercise of civic virtue. See Fitts, *Vices*, *supra* note 47, at 1585.

¹⁹⁸ See MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 83 (1981) (stating that "citizens monitor party promises and performances over time . . . and rely on this core of previous experience when they assign responsibility for current societal conditions"); V.O. KEY, JR., THE RESPONSIBLE ELECTORATE: RATIONALITY IN PRESIDENTIAL VOTING 1936-1960, at 76-77 (1966) (finding that "a political party cannot avoid accountability for its past performance").

individual actors in government.¹⁹⁹

Unfortunately, as parties have broken down as collective entities, branches become divided, and the day-to-day visibility of individual actors in government increased,²⁰⁰ the public has been more clearly faced with evaluating the responsibility of individual politicians who are part of the government. This has been especially true for the president and members of Congress, who exist in a world of complicated and visible multicausality. Who is "responsible," for example, for the recent developments in health care reform: Bob Dole, Bill Clinton, Ted Kennedy, or the American Medical Association?²⁰¹

B. *Presidential Visibility and the Presumption of Causal Responsibility*

In this situation, one can easily understand the perceived value of a modern, more unitary presidency. As noted above, there is merit to an institution that has greater power to take action and, at the same time, to be held more systemically responsible—that is, to serve in somewhat the same role as strong parties.²⁰² Modern

¹⁹⁹ See ALDRICH, *supra* note 25, at 3 ("The political party as a collective enterprise, organizing competition for the full range of offices, provides the *only* means for holding elected officials responsible for what they do collectively." (emphasis added)).

²⁰⁰ There has been an extensive debate on the extent of party decline in the United States. On the one hand, party identification in the public has decreased significantly. See generally WATTENBERG, *supra* note 36 (noting the trend toward split-ticket voting and the decline in party identification, and positing as causes both the perceived lack of party relevance and the mass media's influence); WATTENBERG, *supra* note 37, at 31-46 (using the term "dealignment" to describe the change in party identification and contending that the public views parties as neither meaningful nor necessary). At the same time, however, party organizations have become stronger, providing services and funds to those who choose to use the party name. See ALDRICH, *supra* note 25, at 15.

²⁰¹ The most difficult case in which responsibility must be apportioned occurs when action truly is collective; in such situations, no single individual alone can have any effect on the outcome. See *infra* notes 210-13 and accompanying text. The one exception may be in times of "high politics," when every actor in government tends to be held responsible for overall government activity.

²⁰² The theory of a modern unitary presidency presumes that the internalization of the political costs and benefits of action in one person should *reduce* the political mismatches that facilitate strategic behavior and government inefficiencies. See OLSON, *supra* note 49, at 18 (noting that individuals within an organization have little incentive to act for the collective good because each individual will reap only a minute share of the gains achieved, despite considerable personal sacrifice); Moe, *supra* note 18, at 367-68 (recognizing that "[i]n determining his own preferences and making his own decisions, the president does not suffer from the severe collective action problems plaguing Congress, and he need not resort to complex structural

presidents, however, still operate in a complicated political environment in which numerous actors within all branches contribute to policy outcomes. Even with a unitary president, the public's ability to determine who is responsible for what policy outcome, and the extent of any mistakes, remains limited. In this context, the centralization and visibility of the unitary president, which is viewed as an advantage under theories of collective action, can also contribute to the public's *overestimation* of presidential responsibility and power.

First, the greater visibility of the unitary president can make the presidency *seem* more powerful to the public than other institutions that work their will more informally, such as Congress. This is partially a result of psychological factors. As a number of political scientists and psychologists have documented, the public often manifests a heuristic bias toward overestimating the causal significance of readily accessible factors.²⁰³ In this case, the public's easy access to information about a unitary and visible president's exercise of power can make him *seem* more influential. There may be pure instrumental reasons as well. When multiple actors exist, the public has a rational tendency in evaluating governmental responsibility to converge on a focal point—the most visible actor.²⁰⁴ From the perspective of individual voters and the press, who attempt to understand and respond to government activity, focusing on the most visible participant—the president—simply reduces search costs.²⁰⁵

arrangements for mitigating them").

²⁰³ This bias is technically called an "availability heuristic." See ALAN GARNHAM & JANE OAKHILL, *THINKING AND REASONING* 160-64 (1994) (defining the "availability heuristic" as the tendency for people to estimate the frequency and probability of an event, or of an item having a property, based on the ease with which instances can be brought to mind); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 122-27 (1980) (arguing that the degree of availability influences the acceptability of causal candidates); Paul Slovic et al., *Fact Versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 463, 465-72 (Daniel Kahneman et al. eds., 1982) (examining misperceptions about the frequency of specified causes of death based upon whether the particular causes of death had been discussed in the media and were therefore easier to imagine or recall).

²⁰⁴ See SCHELLING, *supra* note 43, at 60 (noting that when many interests or players are involved, one of them tends to become the "focal point").

²⁰⁵ One consequence of strict liability for the president may be the lack of institutional accountability for individual members of Congress. It is very difficult to hold individual members of Congress responsible for the actions of the institution. See FIORINA, *supra* note 124, at 47 (noting that, while congressional bureaucracy serves as a "lightning rod" for public frustration, individual members are able to maximize

Second, the perception of greater presidential influence may also have a normative explanation: the public may simply *wish* to believe that there is a "flesh and blood" actor responsible for government policies. As commentators on the mass media have frequently observed, it may be simpler for the press to focus on a single individual as the embodiment of government action and for the public to conceptualize and accept public events on those terms. Conflict and causal responsibility thereby become much more politically understandable, and perhaps even morally acceptable.²⁰⁶

Third, the president may contribute to this effect, at least over the short run, by overstating his causal significance. As noted above, part of the power of a unitary president is his ability to focus attention on problems and galvanize action—that is, to serve as a focal point of change.²⁰⁷ Indeed, this has occurred at significant moments of the modern presidency, such as the passage of the New Deal, the Civil Rights Act, and major tax and budget reforms.²⁰⁸ Yet the president's ability to serve as a focal point is often dependent on overstating the importance of a problem and of his role in bringing about change. This is what galvanizes public attention and action, helping to overcome the rational ignorance that often impedes government action.²⁰⁹

the bureaucracy so as to prevent electoral defeat).

²⁰⁶ The press in particular has a strong visual and cognitive incentive to simplify the administration in the person of the president and to describe political conflict on personality grounds. See MICHAEL B. GROSSMAN & MARTHA J. KUMAR, *PORTRAYING THE PRESIDENT: THE WHITE HOUSE AND THE NEWS MEDIA* 263-64 (1981) (discussing the great number of White House stories reported by the major media in recent years); STEPHEN HESS, *THE GOVERNMENT PRESS CONNECTION: PRESS OFFICERS AND THEIR OFFICES* 5 (1984) (arguing that exploration of the government-press connection has been limited by the fact that journalists and scholars tend to focus on the White House and on election campaigns); see also GODFREY HODGSON, *ALL THINGS TO ALL MEN: THE FALSE PROMISE OF THE MODERN AMERICAN PRESIDENCY* 15-16 (1980) ("[P]eople confuse the power of the United States with the power of the President, failing to realize that he has only limited possibilities of harnessing and commanding the nation's resources.").

²⁰⁷ See MICHAEL NOVAK, *CHOOSING OUR KING: POWERFUL SYMBOLS IN PRESIDENTIAL POLITICS* 24 (1974) (noting that symbolic power is a precondition to pragmatic power); *supra* part I.A-B.

²⁰⁸ See SKOWRONEK, *supra* note 33, at 288-324 (describing Roosevelt as an "extraordinarily skillful politician successfully garnering new leadership resources from modernity and methodically forging from them the foundations of presidential government"); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 16-26, 77-79 (1985) (describing the efforts of Presidents Kennedy and Johnson to arouse national support for civil rights legislation); Fitts & Inman, *supra* note 8, at 1737-38 (describing tax reform).

²⁰⁹ As Theodore Lowi concludes, "The more the president holds to the initiative

Finally, the public may hold the president more responsible simply *because* individual members of Congress are less likely to be held responsible. As many political scientists have observed, public perceptions of members of Congress seem to present a classic collective action problem, in which no one individual member appears to have a significant effect on collective government action. In this context, it can be quite easy to avoid individual responsibility for collective decisions because each representative faces a prisoner's dilemma in effecting change.²¹⁰ No one is a "but for" cause of an event. Even if the result is not literally collective, moreover, the information problems faced by the public in assessing the individual contribution of a representative in a body such as Congress can be overwhelming.²¹¹ Where constituents do not surmount this prisoner's dilemma, individual members of Congress who avoid responsibility enjoy a structural advantage.²¹² This is one explanation for the well-known "incumbency effect" that members of Congress enjoy, in which they avoid responsibility for nationally contentious issues and claim it for locally favorable results.²¹³

A modern, more unitary president, on the other hand, seems to come out on the other end in this process, due to the increased authority and visibility he has within the modern government structure. The assessment of *joint* causal responsibility can present

and keeps it personal, the more he reinforces the mythology that there actually exists in the White House a 'capacity to govern.'" LOWI, *supra* note 2, at 151; *see also* BRACE & HINCKLEY, *supra* note 90, at 46 ("Saying that presidents have power gives them more power . . ."); BARBARA HINCKLEY, *THE SYMBOLIC PRESIDENCY* 2 (1990) ("[I]t is part of the symbolism of the office that [presidents] are singularly responsible for the nation's well-being.").

²¹⁰ Simply holding an individual member responsible would be individually and collectively irrational. The member faces a prisoner's dilemma in effecting collective results: her acting *alone* will make no difference. *See* MUELLER, *supra* note 123, at 14.

²¹¹ The clearest case is one of those rare moments when the public as a whole seems to hold all members responsible for collective results. In effect, individual members are held strictly responsible for joint outcomes. The recent election may fall into this category.

²¹² Other structural mechanisms, such as parties, might also serve this role. *See* Fitts, *Ignorance*, *supra* note 47, at 941 (explaining how strong political parties reduce public communication about individual political actors by focusing public attention on party identification, with the result that party affiliation "overshadow[s] and dwarf[s] the static of individual political communications").

²¹³ *See* GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 38 (1992) (explaining that the congressional system allows incumbents to gain reelection by "insulating members from blame for the general failures and inadequacies of the institution").

intractable moral and game theoretic problems.²¹⁴ Yet, to the extent that power is viewed as a zero-sum game, avoidance of responsibility by individual members of Congress can lead naturally to a public *overassessment* of presidential responsibility; the president may be the only person who can reasonably be assessed responsibility for collective decisions. While a number of scholars have explored the legislative effect described above,²¹⁵ few have analyzed the executive contrapositive: overassessment of presidential responsibility.

C. *Effect on Presidential Influence*

What are the long term effects of this perception on the president's legitimacy and power? While the consequences are obviously quite complex, there is reason to believe it can undermine the support for and influence of the president in some contexts.

First, the perception of presidential influence may simply exacerbate the problems of presidential visibility described above. The perception of presidential power increases public scrutiny. This makes the president even more central to the resolution of symbolic and moral disputes in government, ranging from the placement of his children in private schools to affirmative action.

Second, at the same time, the asymmetry in visibility creates an environment that is conducive to strategic behavior by *other* actors in government, for which the president may be forced to take responsibility. To the extent that a system exists that holds one actor responsible for the actions of others, free-riding members have a clear incentive to act strategically.²¹⁶ This may explain why individual members of Congress are often accused of being less concerned with collective results. Opportunities for strategic behavior can arise in a variety of situations, including international affairs, such as Haiti, the Mexican bailout, Kuwait and Bosnia, as

²¹⁴ See generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994) (outlining game theoretic problems in the law). For a more philosophical analysis of some of the same problems in assigning responsibility in collective action situations, see generally Jeremy Waldron, *Just Punishment for Trivial Harms* (1995) (unpublished manuscript, on file with author).

²¹⁵ See FIORINA, *supra* note 124, at 48-49; JACOBSON, *supra* note 213, at 38.

²¹⁶ This situation corresponds to the activity level problem first identified in strict liability, except that here it applies to the presidency. See Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 3 (1980) (stating that under strict liability, the injurer "will be induced to consider the effect on accident losses of both his level of care and his level of activity").

well as in domestic areas, such as the budget deficit. As a result, it may be difficult for a president to elicit cooperative behavior from members of Congress.

Third, the president may have a perverse incentive to exacerbate this process by overstating public problems and the need for action. As noted above, one of the most important devices of a modern president is his ability to mobilize support through the bully pulpit—to take advantage of his unitary and visible position as a “focal point.”²¹⁷ Unfortunately, this device has its costs. The president may need to overstate the problem in order to generate an appropriate level of attention and thereby to garner influence.²¹⁸ The president thus may *gain* strength over the short run, but when he subsequently fails to meet heightened expectations, he can pay a price in unrealized goals.

Finally, viewing the president—especially a strong unitary president—as *the* responsible actor can add a great deal of uncertainty and variation to assessments of “the government,” which can also undermine the presidency. When government actions are attributed to a party or administration, positive and negative information about particular party members are more likely to be evened out over a series of policies. It is the party or government, in all its complexity, that is being evaluated, not the individual member. One negative event or action taken by an individual member does not undermine the party’s “brand name,” especially over time. In the case of a president held generally responsible for a broad range of policy outcomes, the ups and downs can be less equalized. One scandal or mistake, such as a Whitewater or Iran-Contra misstep, can infect *all* government decisions and perceptions of governmental activity. To the extent the public considers predictability and

²¹⁷ See DENISE M. BOSTDORFF, *THE PRESIDENCY AND THE RHETORIC OF FOREIGN CRISIS* 231-36 (1994) (noting how presidents use crises for self-promotion); JAMES PFIFFNER, *THE STRATEGIC PRESIDENCY* 7-8 (1988) (describing the president’s need to act at the beginning of the term).

²¹⁸ See LOWI, *supra* note 2, at 170 (“Such are the president’s channels of mass communication that he must simplify and dramatize his appeals . . .”); *id.* at 11 (“Given the exalted rhetoric and high expectations surrounding the presidency, a partial success is defined by the mass public as a failure.”). A similar phenomenon may be at work in the primaries, as the candidate with the most inflated claims rises to the top, but then slips in the polls when faced with delivering after election day. See E. Donald Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORGANIZATION 313, 327-28 (1985) (describing how a presidential aspirant could further his own goals by overemphasizing and mischaracterizing the need for his proposed legislation).

stability to be positive values in politics and institutions, focusing on the vacillations of presidential behavior may, over time, thereby undermine confidence in and the power of the holder of the office.²¹⁹

This is not to suggest that the public perception of presidential influence necessarily undermines the president's exercise of power. As Robert Inman and I have argued, the perception of power can be an important ingredient of power, especially when threatening to discipline opponents and even supporters.²²⁰ Yet any assumption that visibility will necessarily increase the president's influence and legitimacy is unwarranted. Over time, increased visibility can undermine various aspects of the president's power.²²¹

CONCLUSION

While the thesis developed in this Article has been subdivided into a variety of separate analytical and factual claims, the general argument can be summarized straightforwardly. Many of the presidency's weaknesses flow from what most people—even its critics—see as its chief strength: the singularity of the institution. Scholars writing in the public choice and unitary executive tradition in particular emphasize that the singularity of the presidency is a source of its power, its political accountability, and its moral legitimacy. Indeed, taken to a logical (and perhaps extreme) conclusion, the principles behind a unitary presidency would seem to favor a totally centralized and intensely visible office of the chief executive, although proponents of a strong president recognize the

²¹⁹ Technically, this is simply a claim about variance; as an individual, the president's accountability is subject to more variance.

²²⁰ See Fitts & Inman, *supra* note 8, at 1772-73. The president's ability to appear powerful can be a critical component of his ability to overcome political collective action problems—that is, it enables him to protect a position from incremental attack. Where this is true, the president might prefer to appear more powerful in order to instill fear in potential adversaries, even though this may lead him to look more responsible for adverse results in retrospect.

²²¹ Moreover, the presence of any "culture of distrust" would reinforce this tendency, as would the incentive structure of the press and special counsel law. See *supra* notes 183-90 and accompanying text.

The large payoff that a particular news organization receives from being the first to break a story may create extraordinary and perverse incentives for news organizations to dig up the "big stories" and to focus disproportionately on the president. From a social perspective, competitors in pursuit of fixed or comparative rewards rationally tend to overextend and overinvest. For a general overview of this process, see ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 125-46 (1995) (exploring incentives to overinvest in certain fixed or relative rewards).

pluralistic and anti-tyrannical purposes served by legislative institutions.

Centralized and visible power, however, becomes a double-edged sword, once one explores the different ways in which unitariness and visibility can undermine an institution's informal influence, especially its ability to mediate conflict and appear competent. In this context, the visibility and centralization of the presidency can have mixed effects. As a single visible actor in an increasingly complex world, the unitary president can be prone to an overassessment of responsibility and error. He also may be exposed to a normative standard of personal assessment that may conflict with his institutional duties. At the same time, the modern president often does not have at his disposal those bureaucratic institutions that can help mediate or deflect many conflicts. Unlike members of Congress or the agencies, he often must be clear about the tradeoffs he makes. Furthermore, a president who will be held personally accountable for government policy cannot pursue or hold inconsistent positions and values over a long period of time without suffering political repercussions. In short, the centralization and individualization of the presidency can be a source of its power, as its chief proponents *and* critics accurately have suggested, as well as its political illegitimacy and ultimate weakness.

Of course, the complex problems of presidential legitimacy and power also implicate many influences not explored here. On the one hand, there can be no question that presidents make numerous mistakes for which they are and should be held politically and legally accountable. On the other hand, as the single most powerful actors in government, they may be subject to excessive scrutiny, overestimation of causal responsibility, and criticism, regardless of what they do or say²²² or any structural changes in the system. Political structure (and any analysis attempting to make sense of that structure) may also take a back seat to underlying political forces, as the recent off-year elections may exemplify.²²³

²²² Important cultural factors influence these assignments of error. See Moore, *supra* note 189, at 267-71 (describing the types of experiences that justify attaching increased moral blameworthiness to those whose actions actually cause harm).

²²³ At least some of the problems associated with a unitary presidency are also related to the declining influence of organized political parties in the United States, a trend that will probably continue. As noted above, party structures afford the president some advantages in meeting these concerns. For example, the traditional party system offers an extralegal mediation device that can diffuse or prevent conflict. The party is also strictly accountable for the consequences of government, but not

Despite these caveats, the factors outlined in this Article clearly impact on the success of the presidency. Absent structural change, the president can often face a Hobson's choice. His unitariness and visibility support his unique ability to facilitate democratic synoptic change, but at the same time they also can undermine his ability to avoid or resolve disputes. This undoubtedly explains the recommendation of presidential pundits that modern presidents should generally refrain from taking action. "Active presidents are not rewarded in the polls; popular presidents win more but generally ask less."²²⁴

The primary purpose of the foregoing analysis has been analytical and descriptive: to critique some of the common theoretical assumptions of the political science and unitary presidency literatures and, at the same time, to explicate the complex effects of a more centralized and visible presidency. This inquiry should also help explain our unease over presidential performance and raise concerns about any wholesale attempts to create a systematically unitary, centralized presidency. But are there legal, policy, or strategic changes that might alleviate some of these concerns? In other words, are there ways that the president can confront these problems without undermining the useful influence that he derives from his unitariness and centrality?

To explore some of these questions, Subpart A discusses legal, structural, and political changes that might be seen as enabling the president to confront these issues.²²⁵ This analysis must be more tentative, as the impact of legal changes may be quite different from the effect of pure political approaches. Any solution will necessarily involve a balancing of the president's roles. Subpart B then offers some general observations about the significance of this analysis to current scholarly work on the presidency.

scrutinized with respect to individual decisions, simply because it is a collective entity, not an individual institution. Thus, unlike the presidency, a political party is less likely to be subject to microassessment of individual decisions. In this sense, the party depersonalizes the presidency. Finally, parties minimize the swings in evaluation (that is, reduce the "variance") inherent in public assessments of government. Thus, when the public evaluates a party, the mistakes or indiscretions of a particular member only occupy a small component of its overall judgment. See WATTENBERG, *supra* note 36, at 10 (explaining how political partisanship "function[s] as a . . . stabilizing influence on public opinion, and consequently on the political system as well").

²²⁴ BRACE & HINCKLEY, *supra* note 90, at 81.

²²⁵ While these proposals are ambitious, I have sought to avoid any illusions of policy fine-tuning, which usually can be achieved only in the abstract minds of ivory tower academics.

A. Policy and Legal Recommendations

What legal and structural changes would alleviate the deleterious effects of the president's unitariness and centrality? Any recommendations must be sensitive to the president's political circumstances and the imperfections in the public's perception of legal and structural change, which may limit the public's ability to appreciate structural differences. How often does the public, for example, actually understand distinctions between presidential power over the Federal Reserve, the FCC, and the Department of Justice? With these caveats in mind, several approaches seem worthy of evaluation.

First, one relatively straightforward way to improve the president's mediation resources might be through the creation of ad hoc commissions. As I described above, one of the advantages of institutions such as Congress or the bureaucracy is that they establish "neutral" procedures *ex ante* to which they are then committed for dispute resolution. Over the past few years, presidents have successfully established analogous entities, such as the Defense Base Closure and Realignment Commission²²⁶ and the National Commission on Social Security Reform.²²⁷ Justice Breyer has proposed the permanent establishment of a similar structure in the executive branch—a risk assessment agency, which would make risk assessment decisions for government by default.²²⁸ In these and other cases, commissions can be used to avoid confronting problems, as well as to distribute responsibility between political branches and actors in order to resolve conflict and reach agreement. If a president faced with a problem such as health care were to appoint an independent commission drawn from all branches to generate a proposal, his personal capital might not be dissipated so easily—whether or not the group came to agreement.²²⁹ More

²²⁶ See *supra* note 7.

²²⁷ Exec. Order No. 12,335, 3 C.F.R. 217 (1981), *revoked* by Exec. Order No. 12,534, 50 Fed. Reg. 40,319 (1985); see also PAUL LIGHT, *ARTFUL WORK: THE POLITICS OF SOCIAL SECURITY REFORM* 232 (1985) ("Commissions cannot supply the leadership that others lack, [however] . . . if Congress and the President do decide to move, commissions can provide cover. . . . They can provide the needed hiding place.").

²²⁸ See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 59-68 (1993).

²²⁹ The relationships developed over time between the members of such commissions can facilitate the development of communal norms, such as those created by the Social Security Commission, thereby facilitating agreement. Thus, by

broadly, the creation of risk assessment agencies can insulate the president from political conflict.

Needless to say, under this analysis, the critical question for the president is to choose correctly when to assign contentious issues to commissions for mediation and when, in exercising strong leadership, to retain complete control in the White House. The importance of the choice was starkly revealed by President Clinton's health care initiative, which relied on a secretive executive bureaucracy firmly under presidential control.²³⁰ Had it succeeded, the political benefits of this approach would have been great; the success of the initiative would have been *Clinton's* success. But it is not surprising, in light of the problems outlined above, that health care reform failed—and that the costs of the failure were so great. Once Clinton put forward the broad outlines of the plan, he could neither mediate conflict between groups as an individual nor change his position as an institutional actor without undermining his moral legitimacy. By doing so, he would be changing *his* individual moral commitments. Errors in the program also became *his* errors, undermining his moral capital.²³¹ Clinton's greatest problem, as

creating such commissions the president does not "pass the buck" or hide policy choices, but rather establishes a new mechanism for resolving conflict.

Of course, some might fear that creating such commissions would resurrect the independent agencies under a different name, and thus *dissipate* the president's power insofar as they formally exist outside the president's control. Yet if my analysis is correct, these entities could, contrary to popular wisdom, increase the president's overall strength by giving him the ability to remove issues from the political agenda. In this sense, my claim is consistent with those who have suggested that independent agencies do *not* undermine the power of the president, because they are not really independent; the president has informal influence over them through the budget and appointments process. See Devins, *supra* note 127, at 275 (describing presidential influence over independent agencies through the Attorney General and the litigation process); Strauss, *supra* note 74, at 590-91 (describing presidential influence over independent agencies through the selection of the chairman of the commissioners, who tends to dominate both the commissions' policies and administrative decisions).

There are also important differences between independent commissions and the independent agencies, which increase the likelihood that these commissions could strengthen presidential power. These commissions would be set up on an ad hoc basis, and their members would be appointed by the president. As a result, they would be created only when there were strong arguments in favor of a mediation device and would be less likely to come under the long-term control of Congress, as is often the case with the independent agencies.

²³⁰ This initiative was a quintessential unitary presidential solution. For an example of the problems plaguing this initiative, see *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 879 F. Supp. 103, 104-05 (D.D.C.) (requiring the president's National Health Care Reform Task Force to produce documents for public release), *dismissed as moot*, 879 F. Supp. 106 (D.D.C. 1994).

²³¹ These difficulties were exacerbated by the fact that Clinton could not distance

a result, was his inability to forge a consensus, leading to a general perception that he personally failed on the issue.²³²

This phenomenon also illuminates why the line-item veto, applauded by proponents of the unitary presidency,²³³ may have mixed consequences for presidential power. Under the unitary presidency view, the line-item veto would seem unquestionably to afford the president more power—the ability to invalidate part but not all of legislation. Under the analysis put forward here, however, the current veto structure allows the president to avoid having to take a position and make clear choices on many portions of the budget—the veto is too blunt an instrument to force his hand. Thus, while material or symbolic interest groups seldom pressure the president today to veto an entire budget package because of individual narrow components, with a line-item veto the White House could become the object of intense and widespread lobbying efforts and media attention to influence action on numerous provisions in the budget. The line-item veto might even produce an incentive for Congress to increase this pressure by passing bills that create conflict for the president to resolve.²³⁴

The recent budget confrontation illustrates this effect: Clinton

his policies from the administrative official he chose to develop these policies—his wife, Hillary Rodham Clinton.

²³² Congress followed a similar proceduralist approach with the Entitlement Commission, chaired by Senator Kerry. The Commission failed to reach an agreement, but Clinton did not pay any of the political price for this result, as he did during the health care debate (partly because the President neither placed a representative on the Commission nor put his weight behind its efforts).

²³³ See Stephen Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied*, in CHARLES J. COOPER ET AL., *PORK BARREL POLITICS AND PRINCIPLE: THE POLITICS OF THE PRESIDENTIAL VETO* 9, 15 (1988) (stating that “Ronald Reagan and [other supporters of the unitary presidency] have called for a constitutional amendment giving the President the line-item veto power”); Calabresi, *supra* note 31, at 79 (“A line-item veto for appropriations matters could help . . . by enhancing the President’s national, anti-factional voice and reducing the costs of a veto.”); L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending “Bill” a Year*, 18 PEPP. L. REV. 43, 55 (1990) (arguing that the use of the line-item veto is an appropriate presidential response to congressional attempts to usurp his presentment clause veto power by passing one all-inclusive spending bill per year); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 467-74 (1990) (arguing that the line-item veto is necessary because otherwise Congress could pack an entire term’s legislation into a single bill, leaving the president effectively powerless to veto the entire bill).

²³⁴ This process has been observed in delegation to administrative agencies. See, e.g., Mashaw, *supra* note 18, at 82-83 (evaluating the argument that Congress should resolve policy conflicts instead of delegating that authority to agencies through vague legislation).

was able to avoid internal conflict within his party and increase his bargaining position by vetoing the Republican plan without putting forward his own proposal or explaining precisely what he would not accept. If he had had a line-item veto, he would have been forced to make much clearer tradeoffs. Paradoxically, the line-item veto could make the president politically responsible for the resolution of most value conflicts and perceived waste in the federal budget.

The experience of vetoes in other contexts underscores this concern. For example, at the state level the line-item veto has not augmented the influence of governors in any systematic way;²³⁵ it seems to increase their formal power but delegitimizes its exercise. Similarly, the motivation behind Congress's establishment of the Defense Base Closure and Realignment Commission and passage of omnibus budget bills has been to eliminate Congress's own ability to line-item veto individual bases or other budget items. In these cases, members of Congress report that they value their ability to "tell constituent groups whose programs are being cut that the omnibus measure was considered under procedures that permitted only an up-or-down vote and that amendments to any part could undermine the integrity of the whole bill."²³⁶ This is precisely what the president would lose with a line-item veto.

Another way to improve the president's influence might be to increase the number of presidential appointees in the agencies, while relying less on White House review of agency decisions under presidential executive orders. If the number of presidential appointees in the executive branch were greatly increased, in theory the president might be able to influence general policy more informally through the appointment process without visibly participating in individual decisions.²³⁷ The assumption behind this approach is that decreasing the personal and visible involvement of the president and the White House in specific decisions will reduce

²³⁵ See Douglas Holtz-Eakin, *The Line Item Veto and Public Sector Budgets*, 36 J. PUB. ECON. 269, 289-90 (1988) (presenting an analysis of state budget data that indicates that the gubernatorial line-item veto does not alter long-term budgetary behavior). There are other possible explanations, of course, including the legislatures' ability to bargain around any veto.

²³⁶ WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 76 (3d ed. 1989).

²³⁷ One of the purposes of Executive Order 12,291, see *supra* note 6, was to increase presidential and political influence over the lower bureaucracy by requiring agencies to submit regulatory impact analyses for all major rules. If the bureaucracy were filled with more direct presidential appointees, the same objective could be achieved less obtrusively.

the number of identifiable stochastic errors for which the president will be held personally responsible. These changes parallel the previous proposed reforms in the political primary process, which sought to make the candidates less central and exposed to public visibility through the addition of superdelegates and closed juries.²³⁸ Likewise, by increasing presidential influence through the appointment process, the president would be ultimately responsible for the policy results of his actions, but would not be personally and publicly involved in each individual judgment.²³⁹

Needless to say, there are risks to this approach. As noted above, the public perceives such formal connections only imperfectly and probably only in the context of major changes. As a result the president might be held accountable regardless of his actual relationship to agency officials. In this sense, the legal and political science effects may diverge, at least when legal changes are incremental.

At the same time, this analysis may suggest that the independence of independent agencies—the *bête noire* of proponents of the unitary presidency—may have complicated effects on presidential power. Independent agencies that are truly independent remove issues from the presidential agenda. This is undoubtedly harmful to the president in many cases, but under the analysis developed here, it may be valuable in other circumstances. For example, when contentious issues such as affirmative action and abortion are taken off the president's political agenda by the Supreme Court, the president can reap political advantage.²⁴⁰ While no one would

²³⁸ See JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* 81-104 (1991) (discussing the conflict in America's political process between political equality and deliberation and suggesting the use of a "deliberative opinion poll" to reconcile these goals in presidential primaries); POLSBY, *supra* note 37, at 174-80 (discussing proposals that would enable convention delegates to vote for a candidate chosen deliberatively by the convention instead of binding them to vote for the candidate they represented in the primary election).

²³⁹ From this perspective, one can understand better the complications that flow from the recent centralization of formal power in the hands of the president or his direct personal appointees. In this regard, a parliamentary system, whereby cabinet officials are elected independently and have autonomous legal and political status, can diffuse at least some conflict more effectively. See generally PETER HENNESSY, *CABINET* (1986) (describing the development and function of the cabinet system in Great Britain).

²⁴⁰ Cf. HOLMES, *supra* note 113, at 227 (discussing the argument that "the success of the American legislative process depends on 'its ability to exclude issues . . . on which there can only be one winner and one loser'" (quoting Walter Berns, *Taking Rights Frivolously*, in *LIBERALISM RECONSIDERED* 51, 62 (Douglas MacLean & Claudia

suggest that the existence of independent agencies increases presidential influence *overall*, insulating particular types of activities such as the social security reform, from strong presidential direction, may be valuable. In light of this effect, a blanket constitutional invalidation of independent agencies might have complicated effects on public perceptions of presidential competence.²⁴¹

A third way to strengthen the president's influence might be to change the nature of the media's access to day-to-day information about the White House under GSA, FOIA, and FACA. It is clear that access to quotidian information must continue for the agencies, in which ultimate political accountability is less clear. But micro-analysis of presidential or staff involvement might push the balance in the other direction. At a minimum, application of FACA to presidential commissions can ultimately undermine the president's ability to mediate disputes in government.²⁴² The Social Security Commission, for example, was exempt from such scrutiny, and it may be no accident that the Commission was highly successful. Similarly, proposals that would subject presidential decisions to greater judicial review—and more importantly discovery—might incur high political costs and thus should be viewed with care.²⁴³

Finally, this analysis illuminates some of the problems with the special counsel law, although there is no easy solution. The law has two significant effects on presidential authority. First, and most importantly, it subjects the president and his staff to independent investigation and prosecution for criminal transgressions. In this respect, the law serves a useful—probably necessary—function, given potential conflicts of interest within the Department of Justice.

Mills eds., 1983))). The Supreme Court, however, is often unwilling to take on highly political issues. For the classic analysis of the advantages of the Supreme Court's avoidance of issues, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115-16, 133, 183-84 (1962) (describing the political question and ripeness doctrines and the case and controversy requirement as "devices for deciding not to decide").

²⁴¹ Some commentators recommend constitutional invalidation of independent agencies as a valid means of enhancing presidential power. See, e.g., Miller, *supra* note 18, at 47-49 (describing the position taken by members of the Justice Department during the Reagan Administration that independent agencies unconstitutionally impair the power of the executive branch).

²⁴² See Bybee, *supra* note 16, at 125 (discussing how FACA impedes the president's ability to "receive the full and frank views of the committee").

²⁴³ See Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 50-61 (1982) (defining a standard for judicial review of the president's statutory decisions).

Second, in light of the fact that we have seen almost a permanent special counsel, the position has important implications regarding the disclosure of information about the intricate activities of the president. A special counsel has investigated each administration since the special counsel law was enacted.²⁴⁴ Scholars writing in the congressional dominance literature have shown how Congress uses administrative procedures to identify and control administrative discretion.²⁴⁵ The special counsel law may serve as a similar instrument with respect to the presidency. Whatever the other advantages of the law, the special counsel statute can open a president to unlimited revelations regarding virtually any personal action related to an investigated event. In situations where inadvertent errors are likely to occur, it can be very difficult, if not impossible, for any president or high official, regardless of the propriety of the activity when viewed *ex ante*, to appear competent or ethical *ex post*.²⁴⁶ If this effect of the law becomes as significant in the coming years as it has been in the past, the law should probably be repealed, or at least cut back in its coverage. Its effect on presidential influence is too great, despite its overall value.²⁴⁷

Of course, the analysis outlined here suggests that legal and structural changes are only part of the problem (or of any potential solution). A more visible president may be subject to strict political liability because of cultural and social forces. The public may also

²⁴⁴ See EASTLAND, *supra* note 3, at 79-95 (presenting an overview of the special counsel law, its creation, application, and destabilizing effects). The fact that a special prosecutor investigates only one case, and does so under close public scrutiny, may exacerbate the problem because she is poorly positioned to exercise prosecutorial discretion. See *Morrison v. Olson*, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting) (arguing that the independent counsel may abuse its discretion and lose its perspective due to its singular focus).

²⁴⁵ See McCubbins et al., *supra* note 76, at 273 (discussing how "[a]dministrative procedures constitute an additional mechanism for achieving greater compliance"); see also McCubbins & Schwartz, *supra* note 76, at 166 (discussing congressional preference for "fire-alarm oversight" of administrative agencies that relies upon "rules, procedures, and informal practices that enable . . . examin[ation of] administrative decisions").

²⁴⁶ The ambiguity of determining criminal behavior in the political context, such as in cases of bribery, only exacerbates this effect. See Lowenstein, *supra* note 177, at 801 (noting that "the law of bribery is neither 'precise,' 'consistent,' nor 'clear-cut'").

²⁴⁷ A requirement that the special counsel law apply to both branches might alleviate some problems by reducing the incentive for political actors to use it for institutional combat. See BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS* 26-31 (1990) (suggesting that the special counsel law has developed into a powerful weapon in "political competition").

ignore incremental structural and legal changes and hold the president accountable no matter what his legal powers. To this extent, his success may depend not only on political and legal changes, but on his political skill in deflecting strict scrutiny or forcing it upon other institutions. Indeed, his formal legal ability to create such institutions, for example intergovernmental commissions, may be consistent with strong presidential powers, although in tension with some of the theoretical arguments put forward for a centralized unitary office. That is why this Article has focused on the *theory* of a visible and unitary president, which is related to legal structures as well as presidential tactics.

B. General Policy Implications

Apart from the general policy analysis developed above, several broad academic purposes also motivate this inquiry. One is simply to identify and explain an important source of our frustration with presidents so that we will be more sensitive to their position and behavior. Even if one believes that increased visibility and centralization in the person of the president is on balance positive, as I do in many cases, it is important to recognize the negatives. Under the analysis developed here, at least some of the public and academic frustration with presidents can be seen as a consequence of the office, not the person who inhabits it. As we increasingly invest power and visibility in presidents to move the country forward, we are more likely to overestimate the power they have and overstate the errors they make.

A second purpose of this Article is to contextualize the received wisdom that a strong president will necessarily further democratic and efficiency interests by virtue of the structure of the office. Based on this presumption, legal scholars argue that "democratic" agency decisions, as opposed to "technical" decisions, are more appropriate for presidential review.²⁴⁸ At the same time, they suggest that the president should have stronger control over agencies and that judges should grant stronger deference to agencies subject to formal presidential oversight.²⁴⁹ Yet the

²⁴⁸ See, e.g., Rodriguez, *supra* note 51, at 1195 ("If anyone is positioned to coordinate diffuse regulatory policy, it is the President, as leader of the executive branch.").

²⁴⁹ See, e.g., Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1244 (1988) (arguing for a contextual deference to administrative decisions in

analysis outlined above suggests that, even with structural changes, a president with formal unitary powers may have an incentive not to intervene in political disputes or, if he does, to avoid pursuing high visibility democratic interests. If he should weigh in, moreover, he may be quite ineffective. In short, the analytic and empirical connection frequently drawn between the unitary presidency, on the one hand, and democratic and efficiency goals, on the other, is imperfect, and at some points in actual tension.

Finally, this Article has sought to illuminate the importance of informal political factors to the power of the presidency and to our conception about how it should be organized structurally. In an era of instant communication and international visibility, the most significant strength of the presidency is the chief executive's capacity to lead, that is, "the power to persuade."²⁵⁰ To understand the presidency in this environment requires an appreciation of the president's ability to create focal points, mediate conflict, and wield power legitimately. Legal academics who study the presidency, therefore, cannot limit their analysis to the immediate formal effect of a presidential veto or an appointment, but rather must explore how these and other legal structures affect political perceptions and influence. Over time, such informal perceptions may have as much to say about the effectiveness of the presidency and how it should be structured as the formal impact of the legal rules.

response to increased presidential control over agency policy); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 521 (1985) (arguing that the president's greater political accountability makes him ideal for exercising political oversight of agencies).

²⁵⁰ See NEUSTADT, *supra* note 1, at 29-49.