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WAYS TO THINK ABOUT THE UNITARY EXECUTIVE: A COMMENT ON APPROACHES TO GOVERNMENT STRUCTURE

Michael Fitts*

Over the past few years public law debates have invariably focused on the relative significance of legal institutions as expressed in formal legislative and administrative structures versus everyday politics in the resolution of policy questions. This emphasis has been particularly evident in the examination of the appropriate structure and distribution of responsibility for administrative decision making, in general, and presidential authority versus agency autonomy, in particular.

In part, this increased focus on government structure has occurred as a response to new issues: the past few years have seen a proliferation of new forms of agency structures and novel assertions of executive power. Just as scientific breakthroughs may result from our confrontation with unexpected problems, so too the study of administrative institutions may be aided by the resolution of unique administrative dilemmas, which test the standard paradigms.

This focus has also been facilitated, no doubt, by the perception, if not the reality, of increased identification of government and legal institutions with particular ideologies. Because different political parties have dominated each branch of government for such a long period, the stakes for allocation of institutional power have been unusually high. Strengthening a particular institution may not only improve its effectiveness but also the relative influence of a particular political party or ideology. This effect can only have been enhanced, moreover, by the increased ideological polarization of the debate be-

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2 For the most part, stronger executive powers meant stronger Republican influence; enhanced legislative influence meant greater Democratic control. See Michael Fitts, Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions, 88 MICH. L. REV. 917 (1990). Judicial responsibility fell in between, perhaps depending on whether one was speaking about the Supreme Court or the lower courts. See Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 COLUM. L. REV. 1093 (1987).
tween the parties during the Reagan period and the strength of the assertions of executive powers during this era.\(^3\)

Of course, the recent return to one party domination of both branches might lead one to expect a diminution in the temperature of this debate. However, one activist President, Ronald Reagan, appears ultimately to have been succeeded by another activist President, Bill Clinton. Strong presidents by their force of personality and visibility may test the limits of institutional powers.\(^4\) Moreover, the change in institutional control brings the meaning and significance of institutional design into even sharper focus. Many conservatives and liberals may be forced to revisit their prior statements about executive, judicial, and legislative powers.\(^5\)

In this politicized environment, how do or should we attempt to resolve questions of institutional responsibility and power? How can we achieve a system of structural design which receives broad support and legitimacy? The purpose of this Comment is to explore how each of the papers in this group reflects on these questions, namely, how they approach structural issues. This leads me away somewhat from their substantive topic—the interpretative powers of the presidency and agencies—and focuses instead on the general institutional principles at stake in the debate. My underlying point is that, while the papers reach similar conclusions on the interpretative role of the President, they are quite different in their underlying approach. In this sense, they reveal something about the different literatures that seek to explain and justify different institutional designs. My comments seek to elucidate the techniques we use to justify institutional design and the underlying goals and tradeoffs at issue.

What are these generic approaches? As lawyers, the first place to which we look in resolving such questions is ordinarily the decisions of the past, as captured in the text of the Constitution and constitutional history, however broadly defined. Unfortunately, this obvious first stop invariably becomes complicated by the ambiguity inherent

\(^3\) Any discussion of institutional powers in an academic setting, let alone a political setting, has been vastly complicated and sharpened by the substantive ends to which these powers would be applied.

\(^4\) Just as a Ronald Reagan may wish to assert authority over agencies previously viewed as independent or politically neutral, so a Bill Clinton may wish to rework much of the military or the healthcare system through executive control.

\(^5\) One recent example is the statement of Senator George Mitchell, historically a firm believer in strong legislative powers, that a legislative limitation on homosexuals and lesbians in the military would be unconstitutional as an intrusion on presidential power over the military.
in historical interpretation whenever hard questions are raised.\textsuperscript{6} Our roots are frequently understood only in light of current perceptions, interests, and theories.

For some academics, one important theory for evaluating administrative design has been the new economics of institutions, which shows how legislative and administrative structures can serve through their formal and informal design to minimize transaction costs. Paralleling the economic analysis of private corporate design,\textsuperscript{7} so-called public choice theory offers an economic model of political and administrative institutions. Of particular interest of late has been the attempt to understand and explain the design of administrative agencies as a means for facilitating ongoing legislative control and oversight.\textsuperscript{8} For the most part, this so-called “congressional dominance literature” is positively oriented, seeking to explain how administrative structures can be understood instrumentally as an outgrowth of the political forces in Congress, which originally secured passage of the legislation and sought to extend its influence into the future. At the same time, it has been used by legal academics to better understand the problems of democratic accountability and inefficiency in agency performance.\textsuperscript{9} It thus can begin to offer affirmative prescriptions for reforming the political economy of government performance.

From a quite different perspective, the design of political institutions has been evaluated according to the extent to which they further distinct normative goals. Those who believe in a particular moral philosophy might be thought to focus less on questions of administrative procedure. Yet, normative approaches that emphasize dialogue—especially civic republicanism—are more easily focused on the question of procedural design. Thus, civic republican scholars have offered a moral defense for a variety of administrative procedures that might be thought to further deliberation and reflection within the executive branch. If the congressional dominance view seeks to understand leg-

\begin{itemize}
\item \textsuperscript{6} For a good summary, see Cass Sunstein, \textit{Interpreting Statutes in the Regulatory State}, 103 \textit{Harv. L. Rev.} 405 (1989).
\item \textsuperscript{7} See \textit{Oliver Williamson}, \textit{The Economic Institutions of Capitalism} (1985).
\end{itemize}
Legislative delegation as a response to democratic or interest group control, civic republican views it as a means of furthering normative accountability.\textsuperscript{10}

From a more traditional perspective, legal structures can also further a variety of normative ends simply by establishing a precommitment to certain goals and procedures at a time when the application to individuals or groups on the future is unclear. To varying degrees such precommitments can be reflected in constitutions, substantive legislation, administrative structure, regulations, or simply judicial common law. In addition to norms of consistency and openness, this is ordinarily what we mean by rule of law.

While the substantive focus of the papers contained in this group varies, they each reflect distinct approaches to these structural questions. Of course, two of the papers (those of Professors Herz and Devins) are primarily case studies that describe how conflicts over unitary control have resolved themselves in particular cases; the other two (Miller and Lessig) are more comprehensive, seeking to develop a general theory of executive power derived from the Constitution. But in the end, their conclusions tend to be similar: presidents should be strong in a specific range of cases, except where there is an administrative argument for agency autonomy.\textsuperscript{11} Even Geoffrey Miller, who probably falls more on the unitary executive side, concludes that “in practice, of course, neither the unitary nor the splintered version of the executive prevails.”\textsuperscript{12}

In light of this, what I find most interesting about the papers is the different ways they approach these issues.\textsuperscript{13} Each of the articles can be seen as relying on different legal institutions and conventions in the resolution of policy and institutional allocation questions. To what extent do formal administrative and legislative structures matter, and toward what ends should they be directed—minimization of

\textsuperscript{10} Of course, administrative law is vitally concerned with the pursuit of the rule of law within administrative agencies. Rule making (establishing broad principles that are later applied in individual cases) and adherence to norms of administrative consistency have been two of the traditional means for furthering these goals. Civic republicanism has sought to rely on administrative structures that further debate and discussion—presuming the existence of an underlying moral community—as a principle goal of administrative agencies. See Mark Seidenfeld, \textit{A Civic Republican Justification for the Bureaucratic State}, 105 HARV. L. REV. 1512 (1991); Cass Sunstein, \textit{Factions, Self-Interest and the APA: Four Lessons Since 1946}, 72 VA. L. REV. 271 (1986).

\textsuperscript{11} Neal Devins’s paper, which is primarily factual, is the exception.


\textsuperscript{13} On this level, each of them directly contributes to this more general question of how we should understand the operation of administrative institutions and how we should attempt to improve them.
transaction costs, promotion of civic dialogue, and/or furtherance of a rule of law? And how can we reach an agreement on such goals—through comprehensive precommitment strategies (as found, ordinarily, in a constitution or metaconstitution), by structural legislation, or by more ad hoc political bargaining? These issues are similar to the substantive constitutional debate over abstract versus clause based textual analysis in constitutional law, except here the discussion focuses on alternative institutional mechanisms for resolving conflict. It is such issues, more than the articles' specific conclusions about the appropriate strength of the presidency—about which a great deal has already been said in this symposium—on which I will focus. By examining the mode of argument of each paper, I hope to situate them within this general discussion about how administrative structures should be created and evaluated.

Let me begin with the two pieces that seem to call for a more comprehensive and formal resolution of these questions. Lawrence Lessig's paper sets forth to determine what the Framers actually intended with respect to presidential powers and allocation of responsibility. From a purely legal point of view, it is a quite interesting—and important—thesis. Proponents of a unitary executive have often tended to be adherents of constitutional originalism. Lessig argues that these are largely incompatible positions. After raising questions about the meaning of the Take Care Clause and its history, Lessig shows persuasively that the practice both before and after the framing of the Constitution was quite varied and complicated, and thus cannot be held to sustain a unitary position. Instead, Lessig relies on the general distinction made between the executive and administrative functions, which he argues should be applied today—presumably by Congress—under the general banner of what is a "proper" allocation of power.

As we all know, and as Lessig recognizes, legal scholars have hotly debated the significance of language and history to the resolution of such questions. This is not the place to summarize, let alone...
enter, this extended debate. Wherever one comes out in this discussion, it is clear that language and history have inherent ambiguities based on conceptual assumptions regarding group and multi-institutional intent. The passage of time further complicates the analysis, as the application of understandings reached in what was clearly a different society becomes increasingly confusing. Subsequent constitutional amendments—and “constitutional moments”—may further complicate that reasoning.

In light of these issues, it is worth noting that Lessig’s particular approach—looking in detail at the varied practice across government at the moment of the framing—may tend to limit his ability to generalize concerning any conclusions he may draw. Lessig is clearly correct that the Framers were not of one mind about the proper organizational structure for the different departments. In light of this varied practice, he shows that an originalist cannot believe in a clear unitary view of constitutional powers; only an application of a general principle of “propriety” will work.

While this is certainly a reasonable conclusion, it is not unexpected given his approach. Once the complexity of the real world is confronted, it is frequently more difficult to generate clear general principles. In this sense, the more rigorous an originalist one becomes, and the better one understands the rich complexity of the world in which the Framers existed, the less one may be able to say about general but comprehensive principles. It is thus not surprising that his approach would lead to the application of a somewhat vague principle—“propriety”—by future congresses. Ultimately, Lessig seems to believe that only an incremental nonrule bound system can capture this complexity.

This is certainly not to suggest Lessig is “wrong,” but only that a different type of interpretative approach could come out differently. Lessig offers evidence that there was a distinction drawn between execution and administration in the constitutional history body and in later legislative practice. But, as with all historical claims, he makes implicit assumptions about who were the Framers and what counts in determining intent. While Lessig does make important arguments against some types of originalists, he surely has not ended the de-
bate—as I am sure he would recognize—for those who would balance arguments about original intent with other structural approaches.

That is one of the differences between Lessig's paper and that of Geoffrey Miller, who also seeks to interpret the President's constitutional authority, but ultimately argues for a comprehensive commitment to substantive institutional principles. In comparison to Lessig, Miller's article more directly confronts the question of what level of generality should we evaluate the Constitution on and its historical meaning—namely, what metaprinciple should be used to resolve the inherent ambiguities in structural design? Though he gives a classical lawyer's response—look to the whole of the Constitution—he uses a far broader brush than Lessig by looking both at provisions on individual liberties and the underlying purpose of the Constitution. In his view, "a unified theory should seek to identify concepts that organize both structures within a single model." In particular, he claims that the structural and individual rights sections of the Constitution should be reconciled into a more general principle of government which seeks to protect individual liberties from intrusion by other individuals as well as the government. From this perspective "[t]he fundamental problem of government design, according to the authors of the Federalist Papers, is to minimize the sum of two costs: (1) the costs of private expropriation and violence on the one hand, and (2) the costs of governmental expropriation and violence on the other."26

This approach is distinctive in two respects. First, Miller expressly attempts to answer broad questions of structural design in terms of basic substantive normative principles. Rather than viewing structure as a means for generating evolving principles over time, he starts with a broad normative principle against which the structure of government, and its evolving policy decisions, must be weighed. While this places supreme importance on the general acceptance and inclusiveness of the normative principle, it also asks an important but often ignored question: toward what ultimate ends should the structure of government be directed. To the extent procedure is an instrumental means to a substantive end, there is a place for resolving the appropriate ends of structural design first and moving then to ques-

24 Miller, supra note 12, at 209.
25 Economists would probably view the latter as rent-seeking.
26 Miller, supra note 12, at 210.
tions of specific design of the Constitution, and the resolution of its necessarily ambiguous clauses. 27 This clearly is a "top down" nonanalogy approach to interpretation of structural design. 28 While Lessig might argue that this "picture" holds Miller "captive," 29 Miller presumably believes this stands as a better resolution of the full body of the Constitution and articulation of its underlying moral tradeoffs.

The resort to general principles may also serve to foster a degree of abstraction and generality among decision-makers which can be useful in illuminating debates about institutional structure. Of course, the focus on the structure and procedures of agencies—as opposed to substantive outcomes—can itself abstract away from the particular interests of individuals at a particular moment in time. Yet placing that structural debate in terms of abstract principles can go one step further. 30 You can't generalize much more than by conceiving the role of government as a balancing of two interests.

Yet, there is a downside to this approach, as there is with any comprehensive analysis, the problem of underinclusion and evolution. For example, for many, the role of government would seem to be broader than the protection of private property interests. Even from a traditional law and economics perspective, government intervention is ordinarily justified on the grounds of market externalities and high transaction costs, which can be subsumed under the broad goal of "promoting the general welfare." Indeed, several of the specific functions of government agencies discussed by Miller, such as the Federal Reserve Board and the Environmental Protection Agency, seem to be justifiable on these grounds, but probably not as easily under a protection of private property and liberty theory alone.

A limitation on redistribution raises similar questions of underinclusion. One goal of government may simply be to redistribute re-

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27 While Miller certainly does not go as far as to require a resolution of first principles, his style and mode of argument certainly seeks to abstract to general principles of government more than any of the other papers.


29 Lessig, supra note 17, at 176.

30 At first blush this may seem odd. Reference to substantive principles often exacerbates conflict as participants—be they academics or real world political participants—come to understand and focus on the implications of allocations of institutional authority in terms of the particular substantive interests and goals that immediately matter. The veil of ignorance is pierced, as it were. Yet Miller's description of substantive goals is itself of such a high level of generality that it seems in most respects to avoid this problem. It serves as a metacostitutional principle. A host of different groups from both the traditional "Right" and "Left" can be seen as having their interests protected by such broad principles.
sources from one group to another. While the Framers may have wanted to make certain types of redistribution more institutionally difficult, to what extent should they be held to make redistribution institutionally impossible? If not, one probably needs a theory about when permissible redistribution ends and rent-seeking begins.\footnote{See Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 YALE L.J. 31 (1991), for an argument that such a position is untenable.}

Finally, a reliance on comprehensive first principles also tends not to incorporate a civic republican role for government. To the extent that one views the structure of government as seeking to establish a process by which values will evolve over time, a flight to substantive principle could be viewed as cutting off debate and dialogue. Needless to say, a top down approach is different from a “bottom up,” evolutionary approach in this regard.\footnote{See supra note 27.} Whatever one’s ultimate position, a variety of administrative law principles seem to have been justified on such grounds.\footnote{Indeed, a great deal of administrative law can probably be understood, if not explained, on such civic republican grounds. The obvious examples are rule making and open government laws. The allocation of institutional responsibility can also be understood on such terms. In many cases, defenses of agency autonomy, especially by neo-Weberians, rely on such grounds.}

All of these issues arise in a variety of different contexts. For example, Miller draws a distinction between the avoidance of “faction,” which is presumably bad, and protection of an agency’s “specialized mandate,” which is presumably good. Also, he would restrict presidential powers in the case of the money supply due to concerns of “manipulation” or “short term political gain.”\footnote{Miller, supra note 12, at 216.} Such distinctions seem better understood on motivational or civic republican grounds. Similarly, redistributional choice probably cannot be avoided once we begin to confront intergenerational or temporal conflict, where government decisions having long term impact implicate the relative interests of future versus current generations. This problem is raised by many of the most recent structural changes intended to reduce the deficit, such as Gramm Rudman or balanced budget amendments, or by environmental laws. As a logical matter, it is difficult to say which group or generation—the present or the future—should have the distributional property right.

All of these considerations complicate one’s ability to resolve certain institutional allocation questions using a comprehensive approach. Once a question of institutional power is understood to implicate distributional as well as dialogic goals, it becomes more diff-
difficult to give directed answers. It might be possible, making certain strong assumptions, to apply Miller's decision rule for minimizing the intrusion on individual property interests and get reasonably determinate answers; it seems more difficult to add to such calculations certain distributional and dialogic goals and converge on specific conclusions. This is not to detract from the power of Miller's insight, which is intended only to clarify ambiguities in the Constitution. Yet as he recognizes, and as Lessig argues, generality clarifies some issues and obscures others.

If Miller seeks to pursue a constitutional resolution of such issues through comprehensive rationality, Neal Devins focuses on the opposite approach—incremental decision making. He wishes to understand how political actors, faced with the broad institutional constraints of the Constitution and legislative structural design, resolve questions of authority in particular controversies. His conclusion: structure matters less than we think.

Of course, Devins's paper is largely positive, not normative. Devins believes that administrative law scholars place too much causal significance on the formal structure of administrative agencies in explaining their decisions. Under the standard textbook paradigm, independent agencies are viewed as independent of presidential will and control, while nonindependent agencies are firmly under central governmental direction. Devins suggests otherwise, arguing for "the centrality of politics."35 Based on an illuminating review of three disputes over the control of both independent and nonindependent agencies, he argues that the influence of the President turns less on the formal independence of the agency and more on the political configuration of forces in Congress, the White House, and the agency. While others have de-emphasized the significance of the formal distinction between independent and nonindependent agencies,36 Devins does a good job of showing how independent agencies can be brought under presidential will, as well as how nonindependent agencies can resist that pressure.37

This rich history raises obvious questions about any highly predictive theory of institutional design, whether based on public choice or rule of law principles. Adherents of the congressional dominance view, for example, presume that there is a great deal of importance

37 Devins, supra note 35, at 311. Needless to say, I have a great deal of sympathy with this view.
and predictability to agency structure. Congressional coalitions are able not only to predict their future interests over time but to write in institutional allocation devices which will effectively further their future will. The history Devins relates raises questions about this. As Devins shows, congressional framers often seem not to have thought about institutional questions, to have guessed wrong, or to have positively decided to ignore the issue. Indeed, the highly quixotic allocation of litigation authority across the federal government described by Devins underscores this point.38

Along similar lines, Devins reminds us that presidents may be ambivalent about the need for coherent strong presidential leadership. In his account of the Bush, Nixon, and Clinton presidencies, Devins reminds us that the administrations were and are quite amenable to appointment of different people with inconsistent views to different agencies, principally as a means of avoiding the conflict inherent in making comprehensive decisions. Strong presidential powers and institutions do not necessarily lead to clear centralized leadership without a political incentive structure that offers benefits to such actions. In this sense what may look like a centralized comprehensive legal structure can produce incremental diverse results if the political incentives strongly run in that direction.

At the same time, one should be wary about reading too much into these case studies. Devins's thesis—that politics counts—is clearly unassailable, as political scientists have been telling us lawyers for years. Indeed, in my own work, I have sought to model and test formally the relative significance of political resources in strengthening the presidency vis-à-vis divided and centralized congresses.39 The political preferences of the actors in the White House, Congress, and the agency clearly effect the outcomes of decisions. But legal scholars of institutional design as well as adherents of congressional dominance, really only suggest that structure can stimulate and organize political coalitions and debate, not determine outcomes.40 Even if one thinks that the structure of an agency is important, the goals of those within that structure count. How much they count is the relevant issue, and it is not clear that the case studies resolve that question. For example, while the Equal Employment Opportunity Commission

38 Devins, supra note 35. See also Neal Devins, Unitariness and Independence in Solicitor General Control of Independent Agencies (unpublished manuscript, on file with the author).
40 Put another way, the Coase theorem can be used to analyze the structure of agencies as well as other legal allocations of property rights.
(“EEOC”) did capitulate in the Williams case, it is unclear how much Chairperson Thomas really cared about the issue, especially in light of the political resources of a popular President and an Office of Legal Council (“OLC”) opinion that may have served as an independent structural constraint. Only if one were able to measure preferences of all the different parties could one say anything definitive about how important structure is. Power is the ability to impose one’s will on others; one needs a prior specification of will of all the parties to measure power.

Indeed, as Devins recognizes, there is some evidence in the case studies that structure does count. For example, Devins’s review of the legislative history of the EEOC also reveals that legislative framers intended to put the agency into a no-man’s land, under some but not complete presidential control. This decision was made, according to Devins, precisely because the Framers were trading off questions of enforcement and congressional control. “Congress’s inability or unwillingness to create a truly executive or independent EEOC,” he observes, “set the stage for the Williams controversy.”41 Such cross pressures ultimately led the EEOC to change positions. In this sense, the legislative creators of the agency may have intended to produce precisely the compromise that resulted. If true, the absence of political support in Congress at the time of the Williams controversy was to be expected in light of Congress’s earlier views about the agency and what its place should be. Structure counted, though indirectly, through its effect on fashioning current “political will.”

From the opposite perspective, the case of the postal service could be interpreted as demonstrating structure was important in allowing the commissioners to resist pressures.42 Despite a furious assault by the Bush administration, albeit at a time when its lame-duck status minimized its political resources, the commissioners appointed by the Reagan and Bush administrations did not capitulate.

There is another limitation on the “political will” explanation which is suggested by both the Devins and the Herz case studies. In several cases Devins refers to the understanding of Congress that the EEOC was one of “its” agencies.43 This understanding was not a result of formal institutional design, but rather of informal understandings and expectations. This appears to be evidence of a common law of institutional powers—a type of rule of law that practitioners of institutional combat recognize but which is not written into legislation

41 Devins, supra note 35, at 292.
42 See id. at 298.
43 See id. at 293.
or the Constitution. In effect it shows how prior decisions and agency
or congressional interactions can serve informally to bind future polit­
cical behavior, even though they are not formalized into positive law.
Certainly those of us who have practiced this type of law are familiar
with the phenomenon.44 To put it in Devins's terms, it is a common
law type limitation on current political will.45

Of course, in the end, Devins does not express an opinion on the
appropriate design of administrative institutions. Yet the distinction
he draws between politics and law is fundamentally a distinction be­
tween comprehensive analysis and incrementalism. Agency struc­
tures are a consequence of longer term political arrangements under
each of the models described above. Politics, as Devins describes it, is
much more the application of political will in the particular context.
By arguing for the importance of the latter, Devins reminds us that
structure is not determinative, and that incrementalism is both an im­
portant, and sometimes a valuable means of resolving disputes.

Michael Herz's paper offers another case study of institutional
combat between the President and agencies, which in some ways is
quite similar to Devins's view. Politics mattered here as well. Like
Devins, Herz shows that the formal dependence of agency—in this
case the Environmental Protection Agency ("EPA")—did not stop it
from challenging centralized leadership. While ultimately the White
House did impose its will, a nonindependent agency like the EPA was
quite willing and able to defy White House views for an extended
period. By bringing in supportive oversight committees and the pub­
lic, the agency was able to make the White House pay a high price for
the imposition of its will. The formalistic distinction between in­
dependent and nonindependent agencies was obviously important, but
the agency enjoyed some leeway.

At the same time, the independence of the agency may itself have
been the result of political structure, though of a different kind. Agencies are often closely aligned with supportive oversight commit­
tees, which help protect them against presidential directives. As the
legislative dominance literature has shown formally, this relationship
may be an intended consequence of legislative organization and
agency administrative structure. The importance of structure thus
needs to be analyzed horizontally, as well as vertically.

Indeed, as Herz shows quite well, the intersection between law

44 See Strauss, supra note 36, at 592.
45 On one level one could simply define this as politics and its impact another sign of the
significance of politics on the outcomes. I am suggesting, however, that it represent something
a little bit different—a common law type constraint on agency behavior.