

DOES THE UNITARY PRESIDENCY *REALLY* NEED A NATIONALIST JUSTIFICATION?

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This Essay critically analyzes a functional justification often given for exclusive presidential control of the bureaucracy. As put forth by proponents of the unitary presidency, this justification contends that the President has a more national constituency than Congress and thus is the only institutional actor who is consistently motivated to pursue goals that are nationwide in scope. In addition to questioning the empirical premises of this justification, I also argue that it might actually undermine otherwise reasonable arguments in support of the unitary presidency.

Given the constitutional ambiguity concerning the place of the bureaucracy in our system of separated powers,¹ scholars and courts have frequently turned to instrumental (or functional) policy arguments to justify exclusive presidential control of the administrative state. One such recurring justification is that the presidency is the only branch of government that can consistently act as a bulwark against parochial policies and capture by interest groups. This justifi-

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1 Admittedly, the book that is the focus of this symposium—Calabresi and Yoo’s magisterial enterprise on the unitary executive—attempts to establish a solid historical foundation for the unitary presidency rather than engage the various functional arguments in this debate. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 14–15 (2008). Nonetheless, functional explanations have played a key role in justifying the historical trends of presidential dominance depicted by Calabresi and Yoo. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 35 (1995) (“Representing as he does a national electoral college majority, the President at least has an incentive to steer national resources toward the 51% of the nation that last supported him (and that might support him again), thereby mitigating the bad distributional incentives faced by members of Congress.”); Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2335 (2001) (“[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 105–06 (1994) (“[B]ecause the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration.”); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. ECON. & ORG.* 81, 95 (1985) (“[I]t may make sense to imagine the delegation of political authority to administrators as a device for improving the responsiveness of government to the desires of the electorate.”).

cation has significant intuitive appeal. After all, as Calabresi has observed in some of his other work, the President is the only official elected from a nationwide constituency.²

In addition to suggesting that this oft-repeated claim about the President's superior national mandate is empirically contestable, this Essay argues that it is actually unnecessary and even harmful to the aspirations of those who support the unitary presidency. In other words, the argument for rationalizing a bureaucracy under centralized executive authority does not require that the President also answer to a broader audience than Congress. Indeed, taken to its logical conclusion, the nationalist justification would support an imperial President whose views should prevail whenever there is an inter-branch conflict over policy issues. Since even the most ardent supporters of the unitary presidency do not want to go that far, the nationalist justification is at best an unnecessary distraction in the debates over the role of the political branches in the administrative state.

The Essay proceeds as follows. Part I critically examines the empirical assumptions underpinning claims about the nationalist President. Part II suggests that the nationalist presidency assumption has no obvious analytical payoff for those who seek to defend the unitary President. Even if the incentive to be responsive to the desires of the national median voter is normatively desirable in certain contexts, it will often be problematic in the context of the administrative state where technocratic judgments often trump political ones. Part III suggests that since there are otherwise reasonable functional arguments for vesting control of the administrative state in the President, proponents of the unitary President should abandon the weak and potentially harmful nationalist justification.

I. HISTORY AND SOME EMPIRICAL PREMISES

The historical antecedents of the nationalist justification can probably be traced back to the presidency of Andrew Jackson. As Calabresi and Yoo observe, Jackson first invoked the President's unique nationalist pedigree in his battle with Congress over the Bank of the United States. The President, Jackson declared, is the "direct representative of the American people."³ But it was Woodrow Wilson, as a political scientist, who gave the nationalist justification its contempo-

² See Calabresi, *supra* note 1, at 35.

³ CALABRESI & YOO, *supra* note 1, at 114.

rary intellectual moorings. In *Constitutional Government in the United States*, Wilson opined that “[t]here is no national party choice except that of President. No one else represents the people as a whole, exercising a national choice; . . . [The President] is the representative of no constituency, but of the whole people.”⁴ Since Wilson’s declaration, this nationalist claim has been trumpeted in all kinds of separation of powers debates, including most significantly those used to justify the unitary President.⁵

At first blush, any President’s efforts to work around the purported grandees of Capitol Hill might seem not only defensible but desirable. After all, if the President is the lone representative of the national majority, one might plausibly think that his or her views should be given significant if not decisive weight whenever there is a disagreement with Congress. The Supreme Court seemed to hint at such a plebiscitary justification for broad presidential powers in *Myers v. United States*:

The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide. . . .⁶

But this nationalist assumption rests on very questionable empirical premises. That the President is the only nationally elected official does not necessarily mean that his constituency is broader than that of Congress as an institution. More simply, the relevant baseline for comparison is not between the President and any single member of Congress, but between the President and the accommodating median legislator in our bicameral legislative system. When framed this way,

⁴ WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 68 (paperback ed. 1961).

⁵ See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 875–76 (1997) (observing that the President’s plebiscitary connection to the median voter has been used to justify control over administrative agencies); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 833–34 (1996) (describing both sides of the separation of powers debate); see also Calabresi, *supra* note 1, at 35 (contrasting Congress’s parochial mindset with the President’s national outlook); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 548–50 (1994) (arguing that originalist textual and historical arguments support the unitary President’s control over the administrative arms of government); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 591 (1989) (“Some independent agencies make policy that is vitally important to our national life; hence presidential interest in its formation is both inevitable and proper.”).

⁶ 272 U.S. 52, 123 (1926).

the foundation of the nationalist President assumption starts to buckle under its own majoritarian logic. For in the United States, it is plausible that the President can maintain a minimum winning coalition in the electoral college by focusing on eleven of the most populous states and half of the voters in half of the electoral districts—i.e., twenty-five percent of the electorate.⁷ But the minimum winning coalition of the median member of Congress in our bicameral system requires that such a legislator represent policies favored not only by half of the states (the median Senator) but also by at least half of the voters in half of the electoral districts (the median member of the House of Representatives).⁸

Thus, if one resorts to the crude mechanism of determining winning coalitions by counting heads, the constituency of the median member of Congress could sometimes be both geographically broader and more numerous than that of the President. Nonetheless, in this age of the rhetorical President who is subject to constant and often withering media scrutiny,⁹ one may argue that it may be better that the responsibility for the administrative state be lodged in the most politically vulnerable figure, especially if the President often comes close to enjoying electoral mandates. If so, then relying on the nationalist President assumption to justify presidential control might simply be an expedient rule that has most traction when a President enjoys widespread electoral support. Unfortunately, however, this justification is also inadequate because it does not necessarily support the argument for a unitary President; indeed, as discussed in the next Part, it tends to support an imperial President who can unilaterally legislate whenever national policy goals are at stake.

Beyond the empirical problems discussed above, the notion of a presidential mandate may also be problematic on other grounds. Since the Constitution establishes separate elections for national officials in our tricameral system, episodes of divided government are not uncommon. And given the contemporary trends suggesting the lack of unified party control of government,¹⁰ it is less likely that Pres-

7 A more detailed version of this argument appears in Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231–46 (2006) (detailing how presidential candidates only need to persuade twenty-five percent of the electorate to establish a winning coalition).

8 *Id.* at 1231–33.

9 See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 118–32 (1987) (suggesting that the plebiscitary President has changed the original constitutional conception of the presidency).

10 See Stephen Slivinski, *Would Divided Government Be Better?*, ARIZ. REPUBLIC, Sept. 3, 2006, available at <http://www.azcentral.com/arizonarepublic/viewpoints/articles/>

idents will find the requisite political capital to push their agenda through Congress.

Thus, even when Presidents garner large electoral majorities, the significance of such mandates—from the perspective of the median voter—is unclear. For instance, in 1984, the same year that Reagan won by a landslide, Democrats also won a majority of the congressional vote. Given such a conflicting electoral picture, what does one make of Reagan’s mandate? Is there any reason to assume that the interest groups that might have benefited from Reagan’s ascendancy were imbued with a greater aura of public interest than the groups whose preferences were supported by the Democratic congressional majority? Similarly, what does one make of the stretch of divided government that characterized much of Clinton’s presidency? In all these cases, the possibility that inter-branch conflict over control of the bureaucracy might reflect competition among various interest groups is largely ignored by proponents of the nationalist President. For instance, repetitive claims as to how free trade Presidents stand up to a protectionist Congress sidestep the reality that the political demand for free trade is often itself encouraged by special interest groups, i.e., export-seeking market access to foreign markets. And such political branch preferences on trade are not a one-way street—when President Bush decided to raise tariffs on steel in 2003, he got significant push-back from members of Congress who represent export-oriented constituencies.¹¹

But there is yet another significant problem with emphasizing the President’s nationalist pedigree in a manner that is divorced from the institutional context in which voters choose their leaders. Take, for instance, the British parliamentary model. When Prime Minister Gordon Brown and his Labour Party are in power, they usually have the ability to implement their policy agenda with little or no compromise. In the American system, by contrast, the winning party in a presidential election often faces a long and tortuous path from elections to policy results, with many instances of legislative logrolling

0903slivinski0903.html (“Divided government is the norm, not the exception, in modern American politics. Over the past 42 years, for instance, there were only 13 in which united control of the legislative and executive branches of government existed at the federal level.”).

11 See Elizabeth Becker, *For Bush, A Janus-Like View of Trade*, N.Y. TIMES, Nov. 12, 2003, at C1 (observing that Senator Lamar Alexander of Tennessee was urging the end of steel tariffs on behalf of export companies); Michael E. Kanell & Matthew C. Quinn, *Democratic Prospects Alive in South*, ATLANTA J. CONST., July 6, 2003, at A1 (observing that senatorial Democratic candidate Mary Landrieu “railed against Bush for tariffs on foreign steel that moves through the state’s ports, costing Louisiana ‘thousands of jobs’”).

and bargaining with other elected officials along the way. Thus, one might assume that rational voters in both the British parliamentary and the American systems would have to factor in the institutional path to policy outcomes when they make their choices. For instance, a moderate voter in the United States might vote for a presidential candidate not because she endorses the candidate's views on most policy issues, but because the voter assumes the resultant inter-branch compromise might produce an outcome that is close to what she wants.¹² In other words, unlike a voter in the British parliamentary who has a clear incentive to vote his or her true preferences, the voter in the American system may tend to overshoot to compensate for the fact that the candidate has to make compromises to reach a policy outcome. In this institutional environment, if we think that that the median voter might anticipate that the President has to engage in bargaining and logrolling at the legislation production stage, it is also reasonable to assume that the voter might also anticipate similar bargaining and compromise at the policy implementation stage. After all, the voter has no reason to make fine-grained distinctions between agency action and legislation at the ballot box, since presumably both are institutional vehicles that elected officials might deploy to alter the policy status quo.

To summarize, the theory of the nationalist President, which assumes that a majority of voters prefer the policy vision of the President to that of Congress, is both empirically contestable and theoretically problematic. At bottom, the interaction between voter preferences and institutional context is actually too complex to support any strong inferences about the scope of the President's political support vis-à-vis Congress.

II. THE QUESTIONABLE PAYOFF OF THE NATIONALIST JUSTIFICATION

One may argue that although the nationalist justification is pervasive in discussions of the unitary presidency, it has not necessarily been embraced by pro-President scholars in absolute terms. These scholars are likely aware that modern Presidents do not routinely enjoy obvious mandates; indeed, since the advent of modern polling in the twentieth century, the cases of Presidents enjoying clear mandates are few and far between—Reagan won by a landslide in 1984, Nixon in 1972, but for the most part clear presidential mandates look more

¹² Orit Kedar has made a similar argument about voter behavior across different parliamentary systems. See Orit Kedar, *When Moderate Voters Prefer Extreme Parties: Policy Balancing in Parliamentary Elections*, 99 AM. POL. SCI. REV. 185 (2005).

like the exception than the norm. Perhaps these scholars are suggesting that although decisive mandates are not necessarily frequent, circumstances where Presidents win by bare minimum coalitions are also rare. And given the risks that influential congressional outliers—such as committee chairs—may capture agencies for parochial purposes, we may want to rely on presidential control of such agencies as the most expedient way to accomplish truly national policy goals.

But even this more modest version of the nationalist justification is unpersuasive. First, even though an appeal to majoritarian sentiments may be a desirable objective in the traditional legislative arena, it may be less relevant in presidential management of the administrative state. Second, and more importantly, the nationalist justification—at least as espoused by unitary President scholars—would also support an imperial President whose views would trumpet that of Congress whenever there are disagreements over legislative priorities. But even the most ardent unitary President scholars would not go that far.

A. *The Tension Between Administrative Oversight and Political Accountability*

Supporters of the unitary President tend to assimilate both the roles of the President as overseer of the administrative state and the most politically accountable actor.¹³ But there are often going to be obvious inconsistencies between these two roles. Presumably, as overseer of the administrative state, the President is supposed to act as a loyal steward who carries out the policy goals already dictated by the legislative process. In other words, he should dutifully limit the scope of his constitutional duties to ensure “that the Laws be faithfully executed.”¹⁴ Yet it is reasonable to assume that the political President—as the sole representative of a temporary electoral majority—will often find his political agenda in conflict with his stewardship role.

This tension is material, not only because the President’s administrative and political roles may not overlap, but because the President’s political motivations may often be antithetical to the aspirations of bureaucratic rationalization. For instance, one way to ensure efficiency and legitimacy of the administrative state is to reduce the haphazard and arbitrary effect of bureaucratic programs. But as Lisa Bressman has shown, the emphasis on the President’s political accountability in the literature has obfuscated this first-order principle

¹³ See Calabresi, *supra* note 1, at 35–37.

¹⁴ U.S. CONST. art. II, § 3.

of bureaucratic rationality.¹⁵ In other words, it is reasonable to assume that the President's desire to push his or her political agenda may lead to outcomes that undermine the twin goals of efficiency and non-arbitrariness, especially when Presidents are pushing policy agendas that differ markedly from those of their predecessors.¹⁶ Indeed, even Elena Kagan—a prominent advocate of the unitary executive—concedes that the President's political goals might sometimes conflict with administrative values.¹⁷ More importantly, the existing empirical research on the connection between administrative efficacy and political accountability does not look too promising. As one recent study suggests, White House involvement over one agency—the Environmental Protection Agency—did not enhance regulatory efficacy as defined by invigorating regulatory change, although it may have induced the agency to accommodate ongoing political priorities.¹⁸ Of course, one study or a handful of case studies do not make for a strong generalization, but it seems plausible that the President's motivations to respond to present electoral realities will often be in conflict with the executive management role.

B. The Perverse Implications of the Nationalist Justification

One of the most contentious issues in contemporary analysis of public law is the significant ambiguity and slippage between conventional agency action and traditional legislation. I do not seek, however, to engage the vast normative literature on the non-delegation doctrine and its implications.¹⁹ For the purposes of this analysis, it

15 See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 461–69, 495–96 (2003) (arguing that commentators have focused on accountability in the administrative state to the exclusion of the value of avoiding arbitrary decisions).

16 Mark Tushnet provides some support for this observation in his contribution to this symposium. See Mark Tushnet, *A Political Perspective on the Theory of the Unitary Presidency*, 12 U. PA. J. CONST. L. 313 (discussing Reagan's efforts to restructure the long-standing New Deal order during his presidency).

17 See Kagan, *supra* note 1, at 2352 (“An aggressive presidential stance toward administration nonetheless may diminish the proper influence of expertise in discrete and important cases; for this reason, some hesitation is warranted in applying (or countenancing the application of) the methods of presidential administration to a select category of administrative decisions—essentially, those most scientific or otherwise technical in nature and, as such, least connected to political judgment.”).

18 See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 51–52 (2006) (noting that the EPA often is willing to accommodate the President's desire to appease narrow interests that also serve national policy interests).

19 Compare Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (rejecting the nondelegation doctrine as a grant of power provided by

suffices to note that contemporary Presidents—and by extension agency heads—have considerable latitude to carry out policy initiatives that alter the political status quo. Given this similarity between agency action and legislation, nationalist arguments that find wisdom in giving the President exclusive control over agencies should also presumably support giving the President the power to ignore Congress whenever there is inter-branch conflict regarding the wisdom of legislative priorities.

Of course, no proponent of the unitary President wants to go that far. Actually, supporters of the unitary presidency are often keen to disassociate themselves from any open-ended claims for the expansion of executive power at Congress's expense.²⁰ More importantly, these scholars also explicitly distinguish the role of the President as administrative overseer and his role as co-participant in the legislative process. Indeed, Calabresi and Yoo make it clear that they are agnostic about the scope of presidential power and are quite critical of the Bush administration's efforts to advance an ambitious vision of inherent executive branch authority.²¹

But the selective commitment by unitary scholars to the nationalist justification—in this case, applying it to agency action and not to legislation—is quite puzzling. Suppose we have a genuine constitutional impasse between the President and Congress where the President prefers legislative proposal A because of his nationalist pedigree, whereas Congress prefers proposal B because of its parochial outlook. Why, pursuant to the nationalist justification, should courts not allow the President's preference to trump that of Congress? Indeed, the concerns about the parochial incentives of members of Congress in the administrative arena ought to apply, at an even greater level, to the actual production of legislation.

A proponent of the unitary presidency might attempt to sidestep this issue by pointing to textual provisions that explicitly give Congress a role to play in the legislative arena. But not much in the nationalist justification for the unitary President is tied explicitly to textual considerations because the Constitution is largely silent on the question of the administrative state. Thus, aside from first-order textual considerations, there is no obvious reason why the very nationalist justification that supports exclusive presidential control over the

Congress), with Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (explaining the importance and existence of the nondelegation doctrine).

²⁰ See CALABRESI & YOO, *supra* note 1, at 429–30.

²¹ See *id.*

administrative state would not also support an imperial President in the legislative realm.

To be fair, however, even the most forceful proponents of the unitary President concede that a single presidential election is a suboptimal mechanism for measuring the popular will. Indeed, as Calabresi has argued convincingly elsewhere, our tricameral system of government allows for a more accurate sampling of the popular will than a unilateral approach such as the Westminster parliamentary model.²² Moreover, such a tricameral system helps ensure that any piece of legislation enjoys the support of enduring majorities.²³ But again the key question still remains: Why would such considerations not also hold in the context of administrative agency action?

One might attempt to dilute this concern by distinguishing between Congress's motivations when it exercises oversight over administrative agencies and when it legislates. Building on the committee control literature,²⁴ one might argue that although the median member of Congress might be the key player with respect to lawmaking, such a member might not necessarily be the key player with respect to congressional oversight of executive branch agencies.²⁵ With respect to the latter role, the relevant referent point for determining congressional preferences might be the median member of the congressional committee charged with oversight of the relevant agency.²⁶ If this is true, then there is reason to be concerned that this median committee member might tend to be more parochial and subject to interest-group capture than either the median legislator or the President.

Such distinctions are unconvincing. Any concerns about the possible disproportionate influence of congressional committees at the level of agency oversight should also apply, in very much the same way, to the lawmaking process. In other words, not much in the literature that emphasizes the committee control approach is tied to

22 See Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 56–58 (2001).

23 See *id.*

24 See Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; Or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143–55 (1988) (developing model with committees as key decisionmaking body and arguing that Congress appears to function similarly).

25 See Steven G. Calabresi & Nicholas K. Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1702–03 (“There are big differences in the way Congress undertakes lawmaking and the way in which it supervises, controls, and oversees law execution. . . . The congressional role in law execution is done almost entirely through the committees and predominantly by the committee chairs.”).

26 See *id.*

differences between legislation and agency oversight; indeed, the relevant institutional mechanisms are not sufficiently fine-grained to make such distinctions.²⁷ Thus, the same committee members who tend to influence agencies will presumably be as influential in the legislative process. If what is good for the goose is good for the gander, then unitary President proponents should also advocate for severely circumscribing Congress's legislative role.

More importantly, however, the problem with this kind of argument is that it is built around highly contested empirical and theoretical premises. First, much of the literature of congressional motivation revolves around a major point of contention: whether Congress's institutional preferences are best determined by the preferences of the median floor member,²⁸ the median committee member,²⁹ or the median member of the majority party.³⁰ Despite the convictions of scholars within each camp, the relevant empirical evidence on this question is controversial although one study suggests that it is the median floor member's preferences that prevail.³¹ Furthermore, there is not much evidence to suggest that the median committee member will necessarily be more parochial or subject to agency capture than either the median floor member or the President. Indeed, in another study, Krehbiel shows that committee outliers are rare and that most committee members have preferences close to that of the median floor member.³² Nor can one argue that it is intuitively obvious that a committee control approach will have a debilitating effect. On the contrary, as some political scientists have observed, *deference* to committees might actually improve the overall level of congressional deliberation because of the informational benefits of greater specialization.³³ Admittedly, other political scientists have also speculated

27 See Weingast & Marshall, *supra* note 24, at 151 (finding that members of congressional committees play a significant role in the production of legislation).

28 See KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 263 (1991) (articulating "[t]he Median Legislator Hypothesis" that "[l]egislative choices in salient policy domains are median choices").

29 See Weingast & Marshall, *supra* note 24, at 143–55 (developing model with committees as key decisionmaking body and arguing that Congress appears to function similarly).

30 See, e.g., GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 77–125 (1993) (arguing that the party in control of the chamber is the key decision-making body).

31 KREHBIEL, *supra* note 28, at 263–65.

32 See Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149, 150, 158–61 (1990) (arguing that committee members are probably not preference outliers). *But cf.* Marshall & Weingast, *supra* note 24, at 143–48 (suggesting that committee members might tend to be outliers).

33 See Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information and Legislative Rules with a Heterogeneous Committee*, 33 AM. J. POL. SCI. 459, 485 (1989) (showing that allocating the

that the median committee member might be more prone to agency capture than the floor median,³⁴ but there does not seem to be much empirical support for this claim.

To summarize, there is no systematic evidence that suggests that the preferences of median committee members determine congressional preferences at either the legislative or agency oversight level. And even if it were true, there is no systematic evidence that suggests it would be bad from a public welfare perspective; indeed, there is some suggestive evidence that it would be benign. In any event, tailoring constitutional design to address scenarios that are either highly speculative or that lack a solid empirical foundation is not a good idea.

At bottom, by suggesting that the President is the only branch that can truly transcend parochial politics, the nationalist justification elevates the President to a role within our constitutional system that transcends being the mere head of the administrative state. Indeed, the full import of the nationalist President justification is that it suggests that whenever there is a possibility of parochial capture by narrow interests groups, the courts and the voters ought to defer to the views of the President. Thus, to the extent that unitary President supporters are averse to embracing an imperial presidency with monarchist pretensions, the nationalist justification might actually hurt their cause. Indeed, as discussed in Part III below, there are better and more narrowly construed functional arguments that might support the unitary presidency. Thus, at best, the nationalist justification is an unnecessary distraction in the debates about presidential control of the administrative state.

III. THE RESILIENCE OF OTHER FUNCTIONALIST ARGUMENTS FOR THE UNITARY PRESIDENCY

The observation that the nationalist presidency assumption might be both empirically questionable and theoretically problematic does not necessarily undermine the functional rationale for a unitary presidency. As numerous commentators have observed, the President might enjoy both collective action and resource advantages over Congress in superintending the administrative state. As Kagan argued in her seminal 2001 article:

power to propose and amend policies to committees at the expense of Congress leads to more informative decisions).

³⁴ See Weingast & Marshall, *supra* note 24, at 143–48.

[The President has] the capacity to achieve set objectives, without undue cost, in an expeditious and coherent manner. Moreover, a President, by virtue of the attributes of his office, stands in a relatively good position to achieve these operational goals. Because he is a unitary actor, he can act without the indecision and inefficiency that so often characterize the behavior of collective entities.³⁵

In other words, setting aside questions of accountability, there are plausible instrumental arguments for presidential control of the bureaucracy that are rooted in the unity of the President's office. Against the background of Roosevelt's New Deal initiatives, for instance, one can reasonably argue that the President has both the most institutional resources and capacity to manage and coordinate the proliferation of new government agencies and programs. In this picture, the appeal of rationalizing the bureaucracy under the President assumes that many aspects of the bureaucracy can be working at cross purposes and that the President—as a singular official—is better positioned to coordinate the bureaucracy than a diffuse and collective institution like Congress.

Admittedly, the observation that the President might enjoy collective action and coordination advantages over Congress in the administration of the bureaucracy could have accountability implications. If Congress is entrusted with overseeing the bureaucracy, for instance, its collective action problems might prevent necessary coalitions from forming to provide the requisite level of competent oversight. In such an institutional framework, one might plausibly argue that the members of Congress who have an incentive to be involved are going to be those who have the most intense preferences regarding the agency's mission and goals. Such members might not necessarily constitute a representative sample of Congress; indeed, in many circumstances, they might either be members of the committee with jurisdiction over the agency or those members whose constituents are most affected by the agency's policy output. As discussed earlier, however, the notion that committee members are parochial outliers is highly debatable.³⁶ Nonetheless, to the extent such an accountability deficit account is plausible, it is not necessarily one rooted in Congress's preference as an institution, but merely a peculiar artifact of its collective decision-making process. Thus, to the extent that such collective action problems can be mitigated, these accountability issues can be addressed as well.

³⁵ Kagan, *supra* note 1, at 2339.

³⁶ See *supra* notes 29–32 and accompanying text.

Notwithstanding the plausible strength of the collective action justification, not everyone accepts its core empirical premises. As Cynthia Farina notes in her contribution to this Symposium, the modern executive branch is a fairly diffuse and sprawling entity and may very well suffer from some of the same collective action problems that plague Congress.³⁷ In other words, given the sheer size of the executive branch, she observes that the transaction costs of pushing through coherent policy goals through its various layers and decision points are quite significant. But such observations are not necessarily fatal to the unitary President theory. At most, they suggest that unitary President proponents ought to be more rigorous and refined in specifying their institutional premises and how they affect policy output.

IV. CONCLUSION

This Essay has taken a critical stance towards a key justification for the unitary presidency—the assumption that the President’s national constituency makes him a counterpoise to Congress’s parochial tendencies. More specifically, it contends that this nationalist justification is not only empirically questionable, but is also an unnecessary distraction in ongoing debates about the scope of the President’s authority over the administrative state. Ultimately, even if this claim about the President’s superior nationalist pedigree is correct, its implications would cut clearly beyond the administrative state because it suggests that on other national policy issues, including legislative proposals, Congress should play second fiddle to the President. Viewed in this light, the nationalist justification could serve as a potent tool in the hands of modern plebiscitary executives who seek to curb legislative checks on their power. But not even the most forceful advocates of the unitary presidency are willing to embrace such an expansive notion of executive authority.

Of course, none of these criticisms necessarily undermine the case for the unitary presidency. On the contrary, there may be other instrumental reasons—rooted in the President’s collective action advantage over Congress—why one may still prefer exclusive presidential control over the bureaucracy.

³⁷ Cynthia Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357 (2010).