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## Article

# The Fatally Flawed Theory of the Unbundled Executive

Steven G. Calabresi<sup>†</sup> and Nicholas Terrell\*

### INTRODUCTION

One of the most famous and celebrated decisions of the Framers of the U.S. Constitution was their decision to create a single unitary executive<sup>1</sup> headed up by one President of the United States. The Framers considered creating a plural executive council, but they deliberately chose not to do so.<sup>2</sup> The Framers' decision to create a unitary executive is all the more startling when we realize that the American states almost all had executive councils in the eighteenth century, and the federal government itself had an executive council under the Articles of Confederation to the extent it had any executive at all.<sup>3</sup> The

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1. See U.S. CONST. art. II, § 1, cl. 1; AKHIL REED AMAR, AMERICA'S CONSTITUTION 131–32 (2005); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 30–38 (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 610–11 (1994); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995) [hereinafter Calabresi, *Some Normative Arguments*]; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1179 (1992); 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, 52–53 (2001) [hereinafter Calabresi, *The Virtues of Presidential Government*].

2. See THE FEDERALIST NO. 70, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he executive power is more easily confined when it is one: that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the executive is rather dangerous than friendly to liberty.”).

3. See CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775–1789, at 28–29, 57, 62–65 (1923).

Framers of the Constitution thus broke decisively and sharply with past American practice when they opted for a unitary executive.<sup>4</sup>

This Article is about whether or not the Framers were right to create a unitary rather than a plural executive. For better or worse, the Framers' unitary executive model has been followed by all fifty states in the sense that all the states elect only one governor, and not an executive council whose members jointly exercise the executive power.<sup>5</sup> Many states, however, have diverged from the federal model by having other elected statewide officials, particularly an independently elected state attorney general.

Which model is better: the federal or the state? We have been inspired to write about this question by a recently published paper by Professors Christopher R. Berry and Jacob E. Gersen of the University of Chicago, who argue that the Framers got it wrong when they opted for a unitary rather than a plural executive.<sup>6</sup> Who is right as between Professors Berry and Gersen and Alexander Hamilton? Is a unitary executive optimal in a democracy like ours, or would an unbundled plural executive be better? That is the question this Article will address.

It is critical at the outset to be clear that the idea of the unitary executive which we are defending does not concern the scope of the executive powers. It concerns who controls whatever power the executive has. We are thus not defending a claim of inherent presidential power to act contrary to statutes with respect to foreign policy or wiretapping.<sup>7</sup> We are defending presidential power to remove all subordinates in the executive branch for policy reasons. Part I fleshes out Professor Berry and Gersen's argument against the unitary executive. Part II discusses ten arguments as to why we think Berry and Gersen are wrong.

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4. *See id.* at 76–139.

5. Even those states with executive councils elect one clear governor as head of the executive branch. *See* MASS. CONST. pt. 2, ch. II, § 1, arts. I, IV; N.H. CONST. pt. 2, arts. 41, 60; N.C. CONST. art III, §§ 1, 8; Frederick Liu, *The Constitutional Evolution of the State Executive* 11 (May 19, 2008) (unpublished manuscript, on file with author).

6. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008).

7. We are skeptical of the claims of inherent executive power put forth by the Bush administration, but think that much, although not all of what it did in waging the war on terror was authorized by Congress when it passed the post 9/11 Authorization for the Use of Military Force. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001).

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I. THE BERRY-GERSEN PROPOSAL OF THE  
UNBUNDLED EXECUTIVE

Professors Berry and Gersen defend an “unbundling” of the executive power with clear, distinct, and differing policy dimensions vested in independently elected and equal coexecutives.<sup>8</sup> Their model is the plural executive, which they say exists in state governments in this country where governors, state attorneys general, state secretaries of state, and comptrollers are all elected separately.<sup>9</sup> Berry and Gersen claim that their proposed partitioning of executive power solves the traditional weaknesses of executive councils—weaknesses which they concede Alexander Hamilton exposed in *The Federalist Papers*.<sup>10</sup>

Berry and Gersen argue that allowing voters to elect directly coexecutives for different policy dimensions will enhance accountability by allowing voters more choices.<sup>11</sup> This will lead to a closer match between voter preferences and executive policies.<sup>12</sup> They further claim that an increase in the number of elected officials in the executive branch will also increase the quality of administration as coexecutives focus on narrower areas of policy.<sup>13</sup> A triumvirate of three presidents can do three times as much work as can only one. Berry and Gersen argue that the danger executive power inherently poses to the freedom of citizens by concentrating power is diminished with a plural executive.<sup>14</sup> This enhances democratic control.<sup>15</sup> They even argue that an unbundled plural executive might resist encroachments on executive power more vigorously in their own policy domains whereas a bundled executive might be tempted to acquiesce in legislative usurpation in one area to gain power in another.<sup>16</sup> Finally, Berry and Gersen discuss the issue of presentment, or who should have the veto power. They imply that each coexecutive should hold the veto power over legislation that arises in his own policy dimension.<sup>17</sup>

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8. Berry & Gersen, *supra* note 6, at 1403.

9. *Id.* at 1399–401.

10. *Id.* at 1403–04.

11. *Id.* at 1405.

12. *Id.* at 1396 (“Some unbundling of executive authority should reduce slack, making policy more democratic.”).

13. *Id.* at 1409–10.

14. *Id.* at 1415–16.

15. *Id.* at 1414.

16. *Id.* at 1408–09.

17. *Id.* at 1423.

Berry and Gersen concede that at some point, a multiplication in executive offices would become too costly to bear because of increased monitoring, coordination, and agency costs.<sup>18</sup> A hundred-person executive would, they admit, be unwieldy.<sup>19</sup> In a prior study, Berry and Gersen estimate that based on expenditures, the optimal number of elected executive and judicial offices for local governments is approximately three.<sup>20</sup> We disagree with Berry and Gersen's normative argument for a plural executive in the abstract. Consider the following ten arguments against a Berry-Gersen style divided executive power in our federal government today.

## II. TEN REASONS WHY BERRY AND GERSEN ARE WRONG

### A. THE UNITARY EXECUTIVE VERSUS THE CONGRESSIONAL COMMITTEES

The first reason why Berry and Gersen's paper fails as a critique of the unitary executive is that their proposal is not relevant to the normative debate over whether the U.S. Constitution's strongly unitary executive structure is a good or bad thing.<sup>21</sup> Berry and Gersen repeatedly wink and nod in their paper toward the claim that their thesis is relevant to the unitary executive debate.<sup>22</sup> To see why this is wrong, consider the following point.

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18. *Id.* at 1395.

19. *Id.*

20. Christopher R. Berry & Jacob E. Gersen, *The Fiscal Consequences of Electoral Institutions* 24–25 (Univ. of Chi. Law & Econ., Olin Working Paper No. 344, 2007), available at <http://ssrn.com/abstract=996445>.

21. For arguments in favor of the unitary executive, see Professor Calabresi's prior writings cited *supra* note 1. For arguments against, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

22. Berry & Gersen, *supra* note 6, at 1386 (“Unfortunately, this early confusion has been replicated over and over in more recent debates about the unitary executive and the scope of executive authority.”); *id.* at 1409 (“Serving the interests of uniformity is sometimes said to require a single executive, a unitary executive, or both.”); *id.* at 1413 (“[T]here is much overlap between the justification for a unitary executive and justifications for a single executive.”); *id.* at 1429 (“And to the extent the current constitutional structure would allow for modest adjustments toward the unbundled executive ideal, our work suggests such reforms would produce a government structure more in keeping with the democratic ideals most commonly said to justify the single unitary

The normative argument for a unitary executive in the Federal Constitution rests on a key point that Berry and Gersen never address. The unitary executive debate has not been about whether three nationally elected co-presidents are better than one, but has focused instead on whether bureaucrats and agencies should be controlled by the nationally elected President or by the representatives of small, interest-group-captured committee chairs accountable only to the voters of one state or congressional district.<sup>23</sup> There are two potential leaders who compete for the allegiance in law execution of every subordinate official in the executive branch, from the Secretary of State on down to the lowest level policy-making bureaucrats. On the one hand, there is the President, elected by a national majority, filtered through the electoral college, and always accountable to that majority as reflected in his approval ratings in national public opinion polls. On the other hand, there are the congressional oversight and appropriations committees and their chairs who represent particular, small, idiosyncratic congressional districts and states and who tend to be captured by special-interest groups.<sup>24</sup> The unitary executive debate is not about whether in theory three nationally elected co-presidents are better than one: instead, it is a debate over whether bureaucrats and agencies ought to be controlled by the nationally elected President or by the representatives of small, interest-group-captured committee chairs accountable only to the voters of one state or congressional district.

Presidents and their aides compete with congressional committee chairs and their aides on a day to day basis for control of subordinates in the executive branch.<sup>25</sup> Congressional committees have powerful weapons at hand because they have the power of the purse, the ability to attach appropriations rid-

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executive.”).

23. See Calabresi, *Some Normative Arguments*, *supra* note 1, at 81–86.

24. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 172 (1984) (stating that the “fire alarm” approach to agency oversight taken by congressional committees advantages special-interest groups); 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, 151 (1988) (finding that members of congressional committees have special-interest-group ratings statistically distinct from those of Congress as a whole).

25. See Rod Hague, *The United States*, in POWER AND POLICY IN LIBERAL DEMOCRACIES 95, 102 (Martin Harrop ed., 1992) (“Though nominally subordinate to the President, the federal administration has permanent interests of its own.”).

ers to bills, the ability to hold embarrassing and career-ending oversight hearings, and the ability in the Senate's case to block a bureaucrat's confirmation should he be promoted.<sup>26</sup> The situation is even worse because while presidents are effectively term-limited to eight years, members of congressional committees can serve for as long as forty or fifty years. If rational bureaucrats are given a choice between pleasing a President who is here today and gone tomorrow and pleasing a long-serving congressional committee member, they will always choose to please the committee member.

The President's only countervailing weapons in the fight for control over the bureaucracy are his possession of the executive power, which the theory of the unitary executive defends,<sup>27</sup> and his ability to reward loyalists by offering a promotion to a higher executive branch or judicial office. But even this presidential carrot can only be deployed with the advice and consent of the Senate.<sup>28</sup> The bottom line is that the congressional committees have more sway over the executive branch and the bureaucracy than the President.

This is a bad thing because members self-select what committees they serve on, subject to the constraints of the congressional seniority system, which also exacerbates the capture problem.<sup>29</sup> Thus, members of Congress from farm states tend to serve on the agriculture-related committees; members from financial centers like New York serve on the Finance or Ways and Means Committees; and members from states like Massachusetts and Utah, with a strong view on national Bill of Rights policy, tend to serve on the Judiciary Committees.<sup>30</sup> Self selection, the seniority system, and the lack of term limits for service on a congressional committee make it really easy and

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26. See JEAN REITH SCHROEDEL, *CONGRESS, THE PRESIDENT, AND POLICYMAKING* 85–86 (1994) (analyzing the extent of congressional committee power).

27. See Calabresi & Prakash, *supra* note 1, at 579–81.

28. See Malcolm L. Cross, *Washington, Hamilton, and the Establishment of the Dignified and Efficient Presidency*, in GEORGE WASHINGTON AND THE AMERICAN PRESIDENCY 95, 102 (Mark J. Rozell et al. eds., 2000) (noting that the Constitution does not allow the President to appoint officials, but only to nominate them with the advice and consent of the Senate).

29. See THOMAS P. MURPHY, *THE POLITICS OF CONGRESSIONAL COMMITTEES* 13 (1978).

30. See SCOTT A. FRISCH & SEAN Q. KELLY, *COMMITTEE ASSIGNMENT POLITICS IN THE U.S. HOUSE OF REPRESENTATIVES* 114 (2006) (“When district interests are narrow and the policy jurisdiction of the committee neatly maps onto those interests, members will be drawn to those committees.”).

likely that special interests will capture the committee chairs.<sup>31</sup> The presidency can be captured by special-interest groups too, but such capture is a lot more expensive and is harder to maintain over time. This is because the President has a national perspective while the congressional committee chairs and majorities have a parochial perspective.<sup>32</sup> The President is responsive only to a shifting national coalition of special interests that is large enough to keep his approval rating above fifty-one percent. As a result, the existence of a unitary executive weakens factions and special-interest groups.

Professor Jide Nzelibe has responded by claiming that presidents ought to be compared not with committee chairs but with the median member of Congress.<sup>33</sup> Professor Nzelibe contends that median members of Congress are actually more representative of national majority opinion than is the President, and so we should empower median members of Congress more than we do the President.<sup>34</sup> While Professor Nzelibe may be right when it comes to Congress's role in lawmaking, he is surely wrong regarding Congress's role in law execution.<sup>35</sup> Congress is better at lawmaking than is the President,<sup>36</sup> but it does not follow that Congress is also better at law execution.

There are big differences in the way Congress undertakes lawmaking and the way in which it supervises, controls, and oversees law execution. Congress almost never holds floor votes where median members are decisive on questions of law execution. The congressional role in law execution is done almost entirely through the committees and predominantly by the com-

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31. See Weingast & Marshall, *supra* note 24, at 149–51.

32. As previously noted by Professor Calabresi, the electorate has clearly demonstrated its understanding of the unparalleled importance of the President in our system—with voter turnout substantially higher in presidential elections than in midterm elections. Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2619 (2006). Twenty-first-century-Americans think and act as if the presidential choice is of central importance, but we doubt that more than a handful of voters know who is on the membership of the various oversight committees or how to lobby them. This greater public scrutiny ensures the President a more national perspective, which would be diluted by adding coexecutives.

33. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1221–23 (2006).

34. *Id.*

35. Professor Calabresi is currently working with Alejandro Aizala on a paper responding to Professor Nzelibe, which greatly elaborates on this point.

36. See Calabresi, *Some Normative Arguments*, *supra* note 1, at 96.



mittee chairs.<sup>37</sup> In asking who should control subordinate bureaucrats as between the President and Congress, the tradeoff in reality is between presidentially accountable bureaucrats in the Office of Management and Budget and entrenched committee chairs and their aides, who are almost impervious to the opinions of the median member of Congress.<sup>38</sup>

For a long time in the twentieth century, followers of the Progressive Movement believed that empowering independent experts represented a third way between unitary executiveism and congressional committee government.<sup>39</sup> Progressives developed and championed the establishment of independent regulatory commissions and later of independent agencies.<sup>40</sup> They believed expert entities in government would truly do what was best for the citizenry and would not act at either the President's or a congressional committee chair's behest.<sup>41</sup>

As we have learned more about the capture of independent regulatory commissions and as public choice scholarship has come to prevail,<sup>42</sup> belief in "independent" government entities has come to seem like what Professor Nzelibe has called a "fable."<sup>43</sup> Today, we realize how easy it is for special-interest groups and factions to capture the so-called independent regulatory agencies just as it is easy for them to capture the oversight committees.<sup>44</sup> The unitary executive is a backstop against

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37. Some control by median members of Congress may occur in debates on appropriations bills and riders, but this is the exception, not the rule. Most of the control that Congress exercises over the bureaucracy is exercised by the committee chairs, not the median members. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 790 (1983).

38. For a description of the constitutional origins of the congressional committees and the role of the Incompatibility Clause in creating them, see Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1090 (1994).

39. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422–23 (1987).

40. See *id.* at 424, 429; see also *Morrison v. Olson*, 487 U.S. 654, 687 (1988) (explaining that the Federal Trade Commission acts independently of executive control).

41. See Sunstein, *supra* note 39, at 422.

42. See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* (1965); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984).

43. Nzelibe, *supra* note 33, at 1260.

44. See STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS* 48–49 (2007).

such capture because it is more expensive and harder to capture and maintain control over the presidency than it is to capture a small commission or congressional committee.<sup>45</sup> Berry and Gersen's system would tend toward governance by unaccountable congressional committees, and that would be a bad thing.

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45. Two more points about the current debate over the unitary executive bear mentioning in light of Professor Kitrosser's paper for this panel. See Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009). First, Congress seems to have delegated a lot of broad rule-making power that is almost lawmaking power to executive branch subordinates. Kitrosser worries rightly about the unitary executive in this context. *Id.* at 1761–69. We think some of the delegations Congress has made run afoul of the nondelegation doctrine and ought to be struck down by the courts on that ground. The courts should force Congress to make decisions and not pass the buck to executive entities, which it then tries to control through the back door via the committee chairs. When Congress does this, it effectually delegates power to its own members—the committee chairs—which is highly problematic on separation of powers grounds. Right now, Congress has an incentive to delegate broad power to nominally executive branch or independent agencies which it can then control behind the scenes.

Under the theory of the unitary executive, Congress would lose its current incentive to delegate and would acquire an incentive to write laws more precisely so the courts could hold the unitary executive to the words of statutes. It is fair to say the theory of the unitary executive would create a better incentive structure for Congress than does the current constitutional structure.

Second, Professor Kitrosser makes much of the fact that the unitary executive is built on the idea that the President can act secretly, and thus energetically, and that this secrecy undermines unitarian claims to foster accountability. *Id.* at 1741–42. This is a fair point, and we do not have or purport to have a theory of how far secrecy in the form of executive privilege or otherwise ought to prevail. It is simply a question we have not yet worked through. It may well be the case, as Kitrosser argues, that we should have a lot less secrecy and a lot more transparency in the executive branch than we have had under President George W. Bush. *Id.* at 1743–45. We do not claim to have a position on that question, and as originalist interpreters of the Constitution, we are not at all sure of the constitutional foundations for any claims of executive privilege. It is arguable that the explicit provision of a Speech and Debate Clause, providing protection and sometimes secrecy for congressional deliberations, implies that the absence of a similar executive privilege clause in Article II is telling. See U.S. CONST. art. 1, § 6.

One should not think that to the extent secrecy in government is a concern, there is almost total secrecy about the communications made in the oversight process from the committee chairs and their staffs to the bureaucracy. It is at least as important that those communications be on the record and public as that communications from the Office of Management and Budget be public and on the record. All those who denounce the unitary executive for being secretive might want to look at the veil of total secrecy in which congressional committee communications to the bureaucracy are made.

## B. RATIONAL IGNORANCE AND THE COST OF OBTAINING INFORMATION

A second flaw with Berry and Gersen's proposal for nationally elected plural executives is that it overlooks rational ignorance and the cost of obtaining information. Information is expensive to obtain in both time and money, and the Berry and Gersen proposal would reduce the amount of voter information by raising the costs of gathering information and by lowering the value of the information gathered. Under the Berry-Gersen proposal, voters would face more choices and so they would, of necessity, be less informed on each and all of them. Voters have a finite amount of time to invest in learning about candidates for executive office, and if they must learn about three candidates instead of one, they will learn less than one-third as much about each of the three.

Nothing is free. Even information must be acquired through the expenditure of scarce resources, particularly time and effort.<sup>46</sup> Once the marginal cost of acquiring additional information becomes greater than its marginal value, the voter has no incentive to learn more.<sup>47</sup> This simple concept is typically termed "rational ignorance" because the voter makes a rational decision to remain ignorant of the additional information.<sup>48</sup>

Two big factors cause voters to exhibit high degrees of rational ignorance: the high cost of acquiring *reliable* information<sup>49</sup> and the low value of such information.<sup>50</sup> First, the cost of acquiring reliable information about a candidate for office is high because candidates are expert in presenting only favorable information and have every incentive to skate the edges of the truth.<sup>51</sup> Second, the value of even reliable information to the voter is exceptionally low.<sup>52</sup> In fact, the mere act of voting is far more costly in time and energy spent than is the expected value of the vote in presidential elections,<sup>53</sup> which is why we see low

46. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 265 (1957) ("[T]ime is the principal cost of voting: time to register, to discover what parties are running, to deliberate, to go to the polls, and to mark the ballot.")

47. *Id.* at 266.

48. ANDREW HINDMOOR, *RATIONAL CHOICE* 170 (2006).

49. *See* DOWNS, *supra* note 46, at 218.

50. *Id.* at 244, 265.

51. *Id.* at 226–27, 262.

52. *Id.* at 258–59, 265–66.

53. DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 305 (2003) ("Several people have noted that the probability of being run over by a car going to or

observed voter turnout in presidential and other elections.<sup>54</sup> Since a voter's vote itself is of so little value, the gathering of information that might influence a voter's vote is a costly and unlikely endeavor.<sup>55</sup> As a result, voters use proxies like the labels "Democrat" or "Republican" to give them a very rough sense of where the candidates stand on the issues.<sup>56</sup>

The Berry-Gersen coexecutive proposal would reduce the amount of voter information from both ends by increasing the cost of gathering information and reducing the value of such information. First, Berry and Gersen increase the cost of gathering information on both position issues and valence issues.<sup>57</sup> Position issues involve the policy positions taken by a candidate.<sup>58</sup> Valence characteristics involve the personal characteristics of the candidates—whether candidates are honest, energetic, or decisive.<sup>59</sup>

The cost of gathering information on position issues under a (perfectly) unbundled system would not necessarily be a lot higher than under a bundled unitary executive system. The voter would face the same costs in gathering information on policy positions if there were two candidates for one office or six candidates for three executive offices. But the cost of information would rapidly increase as overlap among the powers of the coexecutives grows, as it inevitably would in the real world.<sup>60</sup>

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returning from the polls is similar to the probability of casting the decisive vote.”).

54. See DOWNS, *supra* note 46, at 260.

55. Thus, the low value of votes and the high cost of getting accurate information about candidates lead to high levels of voter ignorance. This is offset to some extent by the entertainment value some voters receive by following politics or watching debates, but relatively few Americans invest much time in really learning about candidates for public office because it would not be rational for them to do so. See *id.* at 274.

56. *Id.*

57. See Donald E. Stokes, *Spatial Models of Party Competition*, 57 AM. POL. SCI. REV. 368, 373 (1963) (describing position issues and valence issues).

58. *Id.*

59. MUELLER, *supra* note 53, at 240.

60. If the policy dimensions of coexecutives are perfectly distinct among the, say, three coexecutives, the additional information costs of the coexecutive structure over the unitary executive structure are trivial. But, if the three coexecutives each possess the whole of the executive power as in an executive council, the information costs of learning about policy positions of candidates would be a multiple of the presidential system costs. Thus, if there were seven members of an executive council, for example, all with an equal policy dimension, the costs of gathering information about policy positions for any equivalent level of information would be roughly seven times those incurred in electing just one executive. The additional cost of gathering information about

The cost of gathering information on valence issues is quite another story since the personal qualities of the candidates for executive office are independent of the bundling or unbundling of policy dimensions. The costs of gathering personal information about the candidates for executive office will necessarily always increase in proportion as the number of candidates increases.<sup>61</sup> Overall, then, the cost of gathering information will be higher with coexecutives than with a unitary executive.

Consider now the value of the acquired information to the voter. Each unit of information gathered has less value to the voter under a coexecutive structure as compared to a unitary executive structure. The value of information to the voter is the product of: first, its influence on his vote;<sup>62</sup> second, the expected value of his vote on the election;<sup>63</sup> and third, the difference in his personal valuation of the candidates and assessment of the benefit he expects to receive if his preferred candidate wins.<sup>64</sup>

First, in elections for a plural executive of co-presidents, the likelihood that additional policy position information will influence a voter's vote should be higher than in a presidential election for a unitary executive. This is because fewer issues are bundled together in one vote, so an unbundled vote will be more likely to be affected by additional information than a bundled vote. The likelihood that additional valence-issue information pertaining to the character and ability of the candidate will influence a voter's vote in a Berry-Gersen system of coexecutives should go down, however, because the power of the

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policy positions in any real-world coexecutive system would thus depend critically on how airtight the division of authority turns out in reality among the various coexecutives.

61. The cost of forming an opinion on the character and abilities of four candidates is thus approximately double the cost of similarly evaluating two. Alternatively, a voter could, and probably would, spend the same amount of time and effort judging four candidates half as well as judging two candidates.

62. If more information is likely to have little influence on a voter's vote, it naturally has little value to him. A dyed-in-the-wool partisan gets no value from candidate information in the general election because it will not change his vote. See DOWNS, *supra* note 46, at 243.

63. MUELLER, *supra* note 53, at 305. Similarly, the value of information to a voter goes up as the probability increases that the voter in question can have an effect on the outcome of the election. In national elections, the probability that any given individual voter will decide the election is staggeringly low because of the millions of votes cast. *Id.*

64. *Id.* at 240–41. To this might be added, as we mentioned above, the entertainment value that comes from knowing more about current events or watching campaign speeches, debates, and commercials, which will be unaffected by the structure of the executive branch.

winning candidate will be less than in our unitary executive system.<sup>65</sup>

Second, the expected value to voters of information, which is the probability of its being decisive in whether or not a candidate wins, is unlikely to change at all based on the number of executive officials elected. Assuming that each election has approximately the same number of votes cast, the probability of any individual vote being decisive is equivalent. There is no reason to expect politicians to be better able to run close races when the policy dimensions are reduced.<sup>66</sup>

Third, what about the value of information to the voter? By dividing the executive power into several parts, the unbundled executive proposal would reduce the value to the voter of any given candidate winning an election.<sup>67</sup> Unlike the presidential system, the coexecutive system vests only a portion of the executive power in each official.<sup>68</sup> When the preferred candidate of a voter wins a coexecutive election, the value to the voter is thus limited to the value of winning on the policy within the control of the respective co-president.<sup>69</sup>

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65. Stokes, *supra* note 57, at 373 (noting the tendency of political analysis to attempt rationalization of valence-issue effects as position-issue effects). A reduction in value of character information might even be said to be an advantage of the Berry-Gersen unbundled executive, as voters substitute relatively higher-value position-issue information for character-issue information.

66. *Id.* (discussing the importance of valence issues in presidential elections); see also WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 239–41 (1988) (examining historical election results to show that adding or shifting salient policy dimensions simply results in a change in the winning party).

67. See *supra* note 64 and accompanying text.

68. Berry & Gersen, *supra* note 6, at 1404.

69. First, assume as Berry and Gersen do that the policy dimensions are distinct with no overlap of authority between coexecutives. See *id.* at 1409. Each election deals with distinct policy issues. If this is the case, the candidates are competing in an environment where only one policy choice is at stake. The Hotelling-Downs model of candidate competition suggests that in such situations, both candidates will move toward the median voter. MUELLER, *supra* note 53, at 231–32. As the positions of the candidates become more alike, the expected value to the voter of either candidate winning the election goes down because the differences between their platforms are less striking. The election becomes a choice between Tweedle Dum and Tweedle Dee. Therefore, the expected value of information about that election to the voter will be far lower than it would be with two candidates competing across all policy issues in a unitary executive presidential election because there will be virtually no difference between the coexecutive candidates.

Second, assume the policy dimensions do overlap to some degree. In that case, the candidates will be offering policy positions in multiple dimensions that may conflict with the policy positions of other coexecutives. Even the victorious candidate cannot guarantee a policy will be enacted, as it will depend

The value of acquired information to the voter, then, depends on three factors: the likelihood of information changing the voter's vote, which goes up with unbundling for position information but not for valence information; the probability of the vote being decisive, which stays the same; and the value to the voter of his preferred candidate winning an election, which goes down. Which effect will dominate? While the answer in the abstract and hypothetical world of Berry and Gersen may be unclear, our observation of coexecutives at the state level indicates that the value to the voter of information would almost certainly go down where there are elections of plural coexecutives.

Consider three statewide offices: governor, attorney general, and comptroller. Gubernatorial elections are focal points in state elections; they receive more attention and result in more spending than elections for the offices of attorney general and comptroller.<sup>70</sup> This is because these three coexecutive offices are not equal in power and prestige. Voters focus on the elections where the most power is at stake or where the candidates' positions differ the most because it is the outcome of those elections that will most affect voters.<sup>71</sup> For these reasons, we can safely say that the value of acquired information to the voter will be lower overall in a Berry-Gersen style unbundled coexecutive system than with a bundled unitary executive.

Voters in a Berry-Gersen world of unbundled coexecutives then would face both: (1) higher costs in gathering information; and (2) lower value from the information they have gathered. Voters would respond by spending less time and effort in gathering information. This would be particularly true with respect to character-issue information, which inheres in the individual candidate. As the number of candidates grows and the power of each shrinks, voters would have every incentive to cut back on the amount of information they gather on each candi-

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upon the results of other elections. This is a version of the stalemate that often occurs between the President and Congress. The net result is a lower value to the voter of his preferred candidate winning any particular coexecutive election, both in absolute terms and relative to the coexecutive's share of executive power.

70. See, e.g., Rick Pearson & Ray Gibson, *Blagojevich, Ryan Spent Record Sum*, CHI. TRIB., Feb. 3, 2003, § 2, at 1 (explaining how the winning gubernatorial candidate spent more than twice as much as the winning candidate for attorney general).

71. See MARY MARGARET CONWAY, *POLITICAL PARTICIPATION IN THE UNITED STATES* 123–34 (1985).

date and overall. Since the electoral check on executive power works by monitoring and voting, accountability would end up being undermined by moving from a unitary to a plural executive system. A voter who knows a little about many officials is not as well positioned to hold any or all of them accountable as a voter who knows much about just one.

This theory is borne out by voter behavior at the state level where voters appear to invest little energy in many separate elections beyond the gubernatorial election. This is because—contrary to what Berry and Gersen may think<sup>72</sup>—the form of unbundling in the states is not properly described as a coexecutive system. Rather than opting for weak governors coequal to the other executive officers, forty-four of the states have instead given their governors a line-item veto, which makes those executive officers stronger relative to the state legislature than the President is to Congress.<sup>73</sup> Separate election of coexecutives in the states has a long history with roots in the populism of the Jacksonians.<sup>74</sup> Not everyone has agreed over the course of American history with this populism, and indeed, in the late nineteenth and early twentieth centuries, the Progressives, led in part by Woodrow Wilson and Theodore Roosevelt, helped to give rise to a short ballot movement in the states.<sup>75</sup> Advocates of a short ballot thought that long ballots for scores of officials led voters not to want to learn anything about most of the candidates for office, thus reducing accountability and energy.<sup>76</sup> Ironically, the advocates of a short ballot pointed to the federal unitary executive as a model in arguing against unbundled coexecutives in the states.<sup>77</sup> Rational ignorance, the cost of gathering information, and the small likelihood that one's vote for

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72. Berry & Gersen, *supra* note 6, at 1399.

73. See Liu, *supra* note 5, at 21–22. The remaining states are Indiana, Nevada, New Hampshire, North Carolina, Rhode Island, and Vermont.

74. See Richard S. Childs, *Politics Without Politicians*, in *SHORT BALLOT* 11, 12–13 (Edna D. Bullock ed., 1915); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2452 (2006). Unbundling in the states was part of a larger trend toward populism and against elitism in government. See Stephen C. Erickson, *The Entrenching of Incumbency: Reelections in the U.S. House of Representatives, 1790–1994*, 14 *CATO J.* 397, 404–06 (1995).

75. THE NAT'L SHORT BALLOT ORG., *THE SHORT BALLOT: A MOVEMENT TO SIMPLIFY POLITICS* 1–7, 29 (1916); *Short Ballot—What It Is—Its Progress to Date*, in *SHORT BALLOT*, *supra* note 74, at 54, 61.

76. *The Short Ballot Principle*, *KY. L.J.*, Apr. 1913, at 16, 16.

77. RICHARD S. CHILDS, *SHORT-BALLOT PRINCIPLES* 115–16 (1911). See generally Liu, *supra* note 5.



any office in a system of separated powers will make a difference all suggest that multiplying the number of executive offices is a bad idea.<sup>78</sup>

This is especially the case because Berry and Gersen are arguing for a plural over a unitary executive in a separation of powers system where we already have a separate ballot for elections to the Senate and the House of Representatives. Moreover, because this is a federal system, there are separate ballots beyond the ones in federal elections for state governors, attorneys general, comptrollers, and for state senates and houses of representatives. The American voter already has a dizzyingly large number of offices to vote for. This is a hard-wired feature of having a separation of powers federal system instead of a British parliamentary system. To that vast array of choices, Berry and Gersen would now add the confusion of additional choices for unbundled coexecutives.

American voters already respond to a system characterized by the separation of powers, federalism, and the fact that any one election victory counts for less, with some of the lowest voter turnout rates in the industrial democratic world. This is rational behavior. In a system of checks and balances, the costs of gathering information on all the candidates in an election are outweighed by the negligible ability of election victors to implement their election promises once they win office. These costs of the separation of powers are in our view more than offset by the value of the amount of unbundling that the Madisonian system gives us.<sup>79</sup> But even Berry and Gersen concede that at some point too much unbundling is unwise as a matter of cost-benefit analysis.<sup>80</sup> We think the American polity is close

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78. The same point applies to Professor Kitrosser's endorsement of independent regulatory agencies subject to congressional committee oversight. See Kitrosser, *supra* note 45, at 1752–54. The public has no clue what these agencies are, what their jurisdiction is, who sits on the commissions that run them, or which members of Congress provide oversight through which congressional committees. Professor Kitrosser argues that “accountability is best furthered not by occasional, winner-take-all elections, but by the complex chains of authority and expertise that characterize bureaucracies.” *Id.* at 1750. We disagree, given that in reality, the complex chain is being pulled by a congressional committee chair who is accountable only to the voters of one congressional district out of 435 or to the voters of just one state.

79. See Calabresi, *The Virtues of Presidential Government*, *supra* note 1, at 58–59 (highlighting the ways in which unbundled electoral choice at the district, state, and national level empowers voters to express nuanced policy preferences).

80. See Berry & Gersen, *supra* note 6, at 1387 (noting the costs associated with unbundling).

to that point now. Adding even more unbundling to the U.S. system, as Berry and Gersen propose, would lead to even lower voter turnout and higher levels of voter dissatisfaction because rational voters will opt for ignorance over a flood of additional information that is of low value to them.

### C. ACCOUNTABILITY

Third, a plural executive will actually reduce accountability (the opposite of what Berry and Gersen predict) not only in the hypothetical world Berry and Gersen have created, but even more so in our own real world. This is because, as Alexander Hamilton argued so long ago in the *Federalist Papers*, coexecutives will have powerful incentives to blur accountability by blurring the distinctions between their own power and the power of their coexecutive colleagues. Thus, even if power could be neatly and accurately apportioned in advance among coexecutive officials, it would not remain so apportioned over time. Each coexecutive would have powerful incentives to blur accountability so that he could claim credit for policy successes and avoid blame for policy failures. As Alexander Hamilton said, a plural executive will “conceal faults and destroy responsibility.”<sup>81</sup>

The reason for this is that accountability depends on information.<sup>82</sup> Before voters can hold an official responsible for his actions in office, they must learn what actions he has taken or failed to take. When voters have less information, they are less able to hold officials accountable. The unbundling of the executive will not only reduce the amount of information voters have on each coexecutive, as discussed above, but it will also reduce accountability. In order for voters to be able to hold coexecutives accountable for what they do in particular policy dimensions, the voters must first learn what the officials in question have done.<sup>83</sup> Yet the average voter will be less informed in an unbundled system with respect to each election and to all elections as a whole. As a result of higher information costs and lower value of information acquired, the information the average voter has about any one of three coexecutives will

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81. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 395.

82. *See id.* (noting that public accountability depends on the ability of voters to easily and clearly discover political misconduct).

83. Berry & Gersen, *supra* note 6, at 1403 (acknowledging the need for clarity as to which officials are responsible for particular policies).

be less than one-third of the information the voter would have about a President.

The reduced information each voter would have about coexecutives might be offset by the greater ease with which voters can hold coexecutives accountable for actions in specific policy dimensions. If you do not like the way the economy is being handled, being able to blame one coexecutive for economic policy might seem to enhance accountability as Berry and Gersen claim. But for this to have any chance of working, the policy dimensions must remain sharp and distinct. In fact, however, the coexecutives would have every incentive to blur the boundaries of their power to escape accountability, and they would succeed in doing so.

It has long been recognized that division of power leads to a diffusion of responsibility.<sup>84</sup> Executive councils veil responsibility in the same way legislative bodies do. Since every action must be approved by too many actors to make the vote of any one actor decisive, a particular official can rarely be held to answer for the actions of the group. This is why although Congress as an institution enjoys a dismal approval rating, individual members are usually quite popular in their states or districts. Berry and Gersen's coexecutive system deftly avoids the defect of a division of power leading to a diffusion of responsibility by assigning power to coexecutives for distinct policy dimensions.<sup>85</sup> Power is not shared among the foreign, economic, and social policy co-presidents, so each is fully accountable for successes or failures in his own area.

The problem is that even if such a partition could ever be effected initially, it is abundantly clear it would not last. At every opportunity, each coexecutive would have strong incentives to blur the distinctions between his own power and that of the other coexecutives. There are two reasons for this: the expansion of power and the ability to shift and insure against blame.

Coexecutives will have an incentive to try to expand the scope of their power as much as possible. Aside from any psychological utility derived from feeling more powerful, increased power and rents provide direct benefits in politics. Expanded

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84. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 395–98.

85. See Berry & Gersen, *supra* note 6, at 1406 (suggesting a scenario wherein the electorate could vote to remove a Secretary of Defense from office without voting out the President).

power leads to more patronage. The more workers or funds a coexecutive controls, the more he can deploy those resources to improve his image and increase his chances of reelection.<sup>86</sup> A second benefit of power is the ability to use it to extract support or rents from interested groups.<sup>87</sup> Special-interest groups will spend more time and resources courting coexecutives in their area of policy interest since those coexecutives will have more power to implement the special interest's preferred policies.<sup>88</sup> A third advantage of power in politics is prominence. Prominence allows the coexecutive to offer endorsements and claim a position of leadership within his party.<sup>89</sup> It also enhances the value of opportunities for the candidate on leaving office, such as speaking honoraria, managerial positions of various organizations, or book deals.<sup>90</sup> Finally, more power in politics is helpful in implementing policies about which a coexecutive may have strong preferences. Some politicians desire power as a means to self-advancement, but some also derive value from seeing their favored policies implemented.<sup>91</sup>

In short, politicians have many reasons to seek more power. In trying to expand their power, coexecutives may encroach on each other or lay claim to powers not expressly provided for in the original partition. Either outcome will blur the bounda-

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86. See Kenneth N. Bickers & Robert M. Stein, *The Electoral Dynamics of the Federal Pork Barrel*, 40 AM. J. POL. SCI. 1300, 1323 (1996) (concluding that the provision of benefits increases chances of reelection to Congress); Erickson, *supra* note 74, at 412 (discussing the advantage of resources for congressional incumbents).

87. Fred S. McChesney, *Rent Seeking and Rent Extraction*, in THE ELGAR COMPANION TO PUBLIC CHOICE 382–86 (William F. Shughart II & Laura Razolini eds., 2001) (noting the use of “milker bills,” which are submitted for the sole purpose of “milking” payments from interest groups).

88. Unlike the patronage advantage, in which coexecutives must compete against each other, the special-interest advantage benefits all coexecutives. Once a special interest has invested in securing some benefit, it falls into a trap from which it cannot escape. A second coexecutive can extract much of the remaining value to the special-interest group by threatening to block the policy. This is essentially the transitional gains trap argument developed by Gordon Tullock. See Gordon Tullock, *The Transitional Gains Trap*, 6 BELL J. ECON. 671 (1975).

89. See Nzelibe, *supra* note 33, at 1242–43 (noting the incentives for politicians to exploit political capital in the private sphere).

90. See Timothy Groseclose & Keith Krehbiel, *Golden Parachutes, Rubber Checks, and Strategic Retirements from the 102d House*, 38 AM. J. POL. SCI. 75, 94–95 (1994) (finding that financial incentives had a strong effect on retirement decisions of politicians); Nzelibe, *supra* note 33, at 1242–43.

91. See MELVIN J. HINICH & MICHAEL C. MUNGER, *ANALYTICAL POLITICS* 127–28 (1997).

ries of coexecutive power, even if the executive power had been perfectly partitioned at the start. A perfect apportionment of executive power is itself highly unlikely because just as contracts cannot be perfectly clear in all their terms, constitutions must be broadly framed, so an airtight division of power among coexecutives at the start is itself utterly implausible.<sup>92</sup> Those who disagree need only ask themselves how airtight the Framers' divisions of legislative, executive, and judicial power turned out to be in the Constitution of 1787.<sup>93</sup>

But there is yet another reason to think coexecutives will blur the boundaries of their power. No matter how sharp and clear the original partition of executive power, coexecutives can avoid and insure against accountability and blame by blurring the boundaries of power. This is possible because such blurring helps all the coexecutives involved. While the blurring may step on the domain of one coexecutive, a reciprocal incursion into the domain of the second coexecutive could be collusively agreed upon. Even if the net result is less power for the coexecutive, the ability to shift or insure against blame could easily compensate for the loss. This is particularly true where the boundary blurred involves issues particularly nettlesome to the coexecutive. If a politician had the opportunity to share control of a potentially contentious issue, like the decision whether or not to invade Iraq, he would be a fool to refuse. Partial control allows the politician to take credit for the successes, while disowning and spreading the risks that go with the failures. Each coexecutive could plausibly claim the other had prevented successful policy implementation, and claim that his own actions were instrumental in whatever success was achieved.<sup>94</sup> The voters could not separate truth from falsehood without a large investment in information, which as discussed above, is likely not worth the return.<sup>95</sup>

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92. See THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 2 (discussing the inherency of the powers expressly stated in the Necessary and Proper Clause); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 237 (1979) (noting that transaction costs limit the degree to which contracts can be fully specified).

93. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–39 (1952) (Jackson, J., concurring).

94. See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 396 (“It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall.”).

95. *Id.* (“And who is there that will either take the trouble or incur the

This, of course, is exactly why the Framers rejected an executive council.<sup>96</sup> It conceals responsibility and fault. In fact, a public record of votes in an executive council might actually be better than the Berry and Gersen coexecutive system. The Berry and Gersen system makes possible the shifting of blame for policy decisions without there being any public record of votes in executive council deliberations. Without knowing which coexecutive to blame, the voters would have to punish all or none of them. Even an engaged electorate would be unable to hold coexecutives accountable in this situation. Hamilton's warning about the ability of plural executives "to conceal faults, and destroy responsibility" rings no less true for Berry and Gersen's plural executive than it does for traditional executive councils.<sup>97</sup>

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odium of a strict scrutiny into the secret springs of the transaction?").

96. *Id.* at 398.

97. *Id.* at 395. Professor Kitrosser raises a provocative challenge to the unitary executive by arguing that it would lead to less accountability than does the current system with its headless fourth branch. *See* Kitrosser, *supra* note 45, at 1743–44. She rightly points out that the Bush administration invoked executive privilege so often that it was impossible to hold it fully accountable for its actions. *See id.* at 1764–68. Secrecy, she argues, destroys the whole argument that a unitary executive will be a more accountable executive. *See id.* at 1742–43.

We substantially agree with this and would add that the doctrine of executive privilege is not spelled out in the Constitution and must be derived as a matter of structural inference. We would recognize executive privilege in core contexts where foreign policy and orders to the military are at issue. We would also recognize a privilege of prosecutors to keep information they have gathered secret. We would not, however, recognize a claim of privilege by former President Bush or former Attorney General Gonzales that would immunize them from answering the question: "Did you fire a U.S. Attorney for the purpose of helping Republicans win elections?" To that extent, we agree with Kitrosser. We should add that we see no reason why secrecy was needed when the White House intervened with the EPA to deny California's fuel mileage standards or with NASA over scientific research on global warming. The proper test for a claim of executive privilege ought to be the *Morrison v. Olson* test of whether Congress went too far in restricting effective presidential control. *See Morrison v. Olson*, 487 U.S. 654, 691–94 (1988). That test is woefully wrong in the removal context where the President clearly has the removal power, but balancing is necessary and proper with a judge-created, implied structural doctrine like executive privilege.

At times, Kitrosser suggests that accountability requires not only transparency, with which we agree, but also procedural regularity. *See* Kitrosser, *supra* note 45, at 1755–57. This point may often be right as well, especially as to presidential directives and executive orders. However, we would have to hear more about the specific procedures Kitrosser would require to know if we would agree with her. In general, the critical point is that the President must be able to fire any subordinate without further process for a policy disagreement.

## D. COORDINATION

Fourth, Berry and Gersen's proposed system of coexecutives is a bad idea because it would lead to higher coordination costs. Separately electing coexecutives for separate policy areas creates costs and incentives that hinder coordinated action. This is a big problem in the executive branch because it is that branch which must enforce the laws, conduct foreign relations, and provide for the national defense.<sup>98</sup> Coordination is essential to efficiency and energy in the executive. Without coordination, coexecutive policies may run at cross purposes, leading to waste, increases in taxes, and a decrease in services.

Failures of this kind are especially likely where coexecutives are all elected, which suggests that the successes of the current independent agencies<sup>99</sup> ought not to be very reassuring for us. A nationally elected Federal Reserve Board, for example, might well choose to manipulate interest rates to enhance its own reelection chances, and other currently independent entities might act similarly if their heads were nationally elected.

One person rarely has difficulty sharing information with himself. As the number of coexecutives increases, however, the cost of providing and receiving such information rises exponentially.<sup>100</sup> This reflects the additional time and effort required to exchange information among all of the concerned parties. In a unitary-executive presidential system, information flows to the President from the cabinet in a fairly efficient manner. Without this central point in the network of information, however, each coexecutive must coordinate directly with all the other coexecutives. This is highly inefficient for two primary reasons: information costs and bargaining costs.

The rise in information costs created by a Berry-Gersen plural executive is a product of its structure as a diffuse point-to-point network, rather than a centralized hub-and-spoke network. Information is more easily collected and distributed when it travels through the President than when it must pass

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98. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 391–92.

99. See generally Marshall J. Berger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000).

100. If each coexecutive must directly gather information from every other coexecutive, there will be a substantive rise in information costs, creating inefficiency. See *infra*, note 101.

directly from each coexecutive to every other coexecutive.<sup>101</sup> These information costs alone discourage coordination at the outset. The incentives of coexecutives to withhold information in order to get a more favorable agreement may increase the information costs even more.<sup>102</sup>

The second major cost of coordination imposed by a coexecutive structure is the increased cost of bargaining that will have to go on among coexecutives. Such costs are exclusively a feature of the Berry and Gersen coexecutive model because there are no such costs to having a unitary executive. A unitary executive simply gets information and policy proposals from appointees, and he decides on a course of action. Berry and Gersen's coexecutives, however, cannot force changes in policies outside their own jurisdictions, so they must bargain to some agreement. The cost of such bargaining will vary greatly depending on the issues involved and the degree of ideological agreement among the coexecutives. Bargaining will generally be expensive because of the divergent interests of the parties and the incentives to selectively withhold information.<sup>103</sup>

Why not simply elect a coordination executive? Such an executive would either: (1) have the power to force coordination; or (2) rely on persuasion and information to get his way. First, it is obvious that an executive with the power to force coordination would be simply a President by another name. The quasi-president would have the power to control the affairs of state, but with a cabinet comprised of independently elected secretaries hobbling the administration. Such an arrangement would be a special disaster as it would have all the costs of both systems. On the other hand, if the coordination coexecutive is dependent on persuasion alone to get his way, he has no real power, so adding a coordination executive adds nothing but the cost of an additional layer of bureaucracy.<sup>104</sup>

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101. Mathematically, if there are  $N$  cabinet secretaries, the total number of information exchanges in a presidential system is  $N$ . In an unbundled system, there are  $N(N-1)/2$ , which is simply the finite summation over  $k=1\dots N$  of  $(k-1)$ , which represents the situation where every coexecutive directly deals with every other coexecutive.

102. See John Kennan & Robert Wilson, *Bargaining with Private Information*, 31 J. ECON. LITERATURE 45 (1993) (discussing the various costs of bargaining with private information).

103. See *id.*

104. The persuasive efforts of the coordination coexecutive would merely add an extra step to the bargaining system described above. In the case of a coordination coexecutive, that person's task would be to convince other coexecutives to act against the narrow interests they were elected to advance. The



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Even if coexecutives could coordinate without any additional transaction costs, strong incentives would encourage them to compete rather than cooperate. The limited scope of the policy dimension of each coexecutive would give that person a narrow focus on policy results falling particularly in his bailiwick. The impact one coexecutive's policies would have on the policies of another coexecutive would be of no direct concern. In theory, the coexecutives could of course bargain around such harmful results, but there would be substantial costs to doing so. If such bargaining failed, each coexecutive would choose a policy that maximized his policy goals, even as his coexecutive colleagues did the same.

This is a classic case of a choice with reasonably well-known payoffs and without coordination between the parties—an ideal situation to analyze with a simple game-theoretic model. In fact, this situation matches fairly closely the famous Prisoner's Dilemma.<sup>105</sup> Imagine that given any policy choice by the second coexecutive, the first coexecutive would always be better off choosing his favored policy. Imagine the same is true for the second coexecutive, given any policy choice of the first coexecutive. Now, imagine that they would both be better off if both chose their less-preferred accommodating strategy than if both chose their most-preferred strategy. In other words, imagine a situation where coordinated action is better for all the coexecutives than is uncoordinated action. Of course, the best possible outcome for each coexecutive is not coordinating while the other does coordinate because that gives all the benefits of the other party's accommodation without any of the costs of reciprocation. In such a situation, each coexecutive has an incentive to choose a selfish strategy, regardless of what the other coexecutives do. Hence the dilemma. The prisoner's dilemma problem can be solved by repeated interaction, but there is a

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trade coexecutive thus might be asked by the coordination coexecutive to implement a trade policy that substantially benefits the environmental coexecutive, but which is not optimal from a trade perspective. It is unclear in such a case which policy even a true statesman should implement. Either the policy will be inefficient for the nation, or the coexecutive must act contrary to the very reason for which he was elected. In short, a coordination coexecutive with only persuasive powers would be like a host nation for international treaty negotiations. The time and energy involved would be a terrible drain on government efficiency, yet it would still not reach the same level of coordination as that currently enjoyed under a bundled executive system.

105. See Omar Azfar, *The Logic of Collective Action*, in THE ELGAR COMPANION TO PUBLIC CHOICE, *supra* note 87, at 59, 67.

cost to those solutions.<sup>106</sup> Additionally, the game will be subject to end-period unraveling as coexecutives anticipate the ends of their terms and of their coexecutives' terms as an election year approaches.<sup>107</sup>

The above argument can likewise be explained as follows: coexecutives will not find it possible to coordinate on all issues because bargaining has costs. When they cannot coordinate, each coexecutive will follow the policies that maximize his own chance of reelection. These policies may have secondary effects in other policy dimensions that hinder policies already in place in those dimensions. If all coexecutives are so behaving, they may all be acting rationally given their narrow personal interests, but their actions will nonetheless reduce the efficiency of the entire system of government.<sup>108</sup> As a result, there will be waste, higher taxes, and a decrease in services provided. Coexecutives might, and indeed often would rationally choose policies that are inefficient.<sup>109</sup> They have incentives not to coordinate.

Suppose further that some politicians are occasionally motivated by partisanship and other such base goals. Is it not possible to imagine that in such cases, coexecutives might even pursue policies that selectively harm the political reputations of their coexecutive colleagues? Such partisan coexecutives might for example engage in "turf wars" over policy dimensions where the jurisdiction of the coexecutives was sufficiently unclear. While turf wars are hardly unknown even under our current unitary executive system,<sup>110</sup> such infighting under the unitary executive is limited by the willingness of the President to tolerate division and infighting. In a Berry-Gersen system of coexecutives, the top dog in every chain of command would have every incentive to engage in infighting or to fight turf wars.

Beyond the problem of turf wars, the coexecutive system raises the possibility of the threat of outright sabotage. One could imagine that coexecutives might well have both the opportunity and the incentive on some occasions to implement a policy specifically designed simply to harm a coexecutive colleague who is a rival or who is from another political party. A

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106. *See id.* at 67–69.

107. *See id.* at 68.

108. *See id.* at 67–68.

109. *See id.*

110. *See* Herbert Kaufman, *Major Players: Bureaucracies in American Government*, 61 PUB. ADMIN. REV. 18, 31 (2001).

war coexecutive thus might engage in saber rattling to scuttle key trade-normalization plans just before the trade coexecutive has to stand for reelection. Such schizophrenic policies would waste resources and could cripple the government, especially in its ability to manage foreign affairs.<sup>111</sup>

#### E. ENERGY

Fifth, Berry and Gersen's plural-executive proposal would fatally sap what Alexander Hamilton called "energy in the executive," which is essential to good government.<sup>112</sup> The President must be vigorous in enforcing the laws, defending the nation, and directing the affairs of state.<sup>113</sup> The ability to act effectively and decisively is as essential to the executive as the ability to deliberate is essential to the Legislature.<sup>114</sup> Good government requires an energetic President who can both enforce acts of Congress and also the judgments of the judicial branch.<sup>115</sup> Thus, it is the President who swears an oath "to preserve, protect, and defend" the Constitution.<sup>116</sup> Defending the Constitution was a key concern in 1789, when our young nation was highly vulnerable to threats from within and abroad.<sup>117</sup> It would strain credibility to claim that the intervening centuries—with the advances they have brought in the speed of communication and transportation—have reduced the need for an energetic President. Energy itself requires fortitude and discretion. As Alexander Hamilton long ago argued, fortitude comes from the President having an independent, popular electoral mandate from Congress<sup>118</sup> and from a sufficiently long term in office.<sup>119</sup> Discretion comes from the personal quality of

111. See THE FEDERALIST NO. 62 (James Madison), *supra* note 2, at 348–50 (discussing the harm to international reputation and to domestic industry from instability in the government).

112. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 391.

113. *Id.*

114. See *id.* at 392.

115. See *id.* ("Energy in the Executive is a leading character in the definition of good government.")

116. U.S. CONST. art. II, § 1 (directing the President to "preserve, protect, and defend the Constitution of the United States").

117. See THE FEDERALIST NOS. 2–6 (John Jay) (regarding the threat of foreign wars), NOS. 7–8 (Alexander Hamilton) (regarding the threat of internal wars), *supra* note 2.

118. See THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 2, at 381.

119. See THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 2, at 402–03.

the individual holding the presidential office<sup>120</sup> and an encompassing view of the national interest.<sup>121</sup>

The exercise of good judgment in using power is essential in the executive branch. Unbundling of the kind Berry and Gersen advocate would reduce good judgment in the executive branch by forcing coexecutives to focus narrowly on only part of the impact of their policy decisions. Coexecutives might act optimally with respect to one policy dimension but in a way that would still be detrimental overall because of its impact on the efficacy of other policies controlled by other coexecutives. Unbundling also saps the strength of the executive branch by eliminating its ability to act as one cohesive unit.

Accountability provides both the stick and the carrot for energy in the Executive. The stick is the threat that is always present of ouster from office, and the carrot is the benefit that is always desired of reelection or the election of one's chosen successor. These two come together in motivating the President to be energetic. A bundled unitary executive focuses voter attention and accountability whereas, as we have just shown, coexecutives are less accountable to voters. Lack of accountability reduces the incentive for coexecutives to be aggressive in pursuing their policies. When accountability declines, the cost of shirking also declines because the probability of being voted

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120. THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 2, at 376–77. As Berry and Gersen agree, it is unlikely that coexecutives would be of much lower quality than a single President, since the difference in power and prestige would be so minor and few close substitutes would exist for coexecutive offices. It is also unlikely that the creation of coexecutives would increase the overall quality of decision making in the executive branch. Coexecutives would be political experts, just as presidents are political experts. Since individuals have finite skills and talents, there is no reason why we should expect that an expert politician would have a lot of expertise in substantive policy fields. Our appointment process for picking cabinet secretaries, together with the Incompatibility Clause, has combined to produce exactly the result predicted by Hamilton: the appointment and confirmation of qualified specialists adept in managing large organizations and sharing common policy goals. See THE FEDERALIST NO. 76 (ALEXANDER HAMILTON), *supra* note 2, at 423–24. Replacing some of the substantive expertise and management ability of the current cabinet with the additional specialized expertise that is needed to win popular elections would be a mistake.

121. See THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 2, at 411 (predicting that the national perspective of the President will serve to check the factional interests in Congress, protecting the nation from improper or hastily enacted laws).

out of office for shirking drops.<sup>122</sup> In other words, the price of leisure for coexecutives is lower than it is for a more accountable unitary executive while the cost of working remains the same.<sup>123</sup> In relation to this, the value of work to one of many coexecutives as compared to the value of work to a unitary executive is likely lower as well, since coexecutives will control only a portion of the total executive power. This means the same individual would find it optimal to spend more time on leisure or shirking when serving as a coexecutive than when serving as a President.

This incentive to shirk that the Berry-Gersen model creates may set a bad example for a co-president's subordinates in the bureaucracy who may thus shirk themselves.<sup>124</sup> Berry and Gersen might respond by arguing that simply having more executives rather than only one would actually increase energy in the executive branch. But it is not the number of executives that are the key to energy in the executive; it is instead the incentives those executives face that are the key to energy. Less accountable Berry-Gersen coexecutives will have more of an incentive to shirk than does the President under our current unitary executive.

The incentives that Berry-Gersen coexecutives would face are akin to those faced by bureaucrats.<sup>125</sup> One particular incentive of bureaucrats comes from their knowledge that it is easier to get blamed for a policy action that fails than it is to get blamed for failing to act.<sup>126</sup> Taking any action creates potential liability for Berry-Gersen coexecutives. Some actions might clearly improve the image of a coexecutive; others might be harmful. The key point is that in all of the close cases, coexecutives will have little incentive to act since the result could be

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122. See HINDMOOR, *supra* note 48, at 134–35 (discussing principal-agent problems); MUELLER, *supra* note 53, at 367 (examining the effects of monitoring on the behavior of bureaucracies).

123. See generally HAL R. VARIAN, INTERMEDIATE MICROECONOMICS 172–76 (presenting the basic labor-leisure decision).

124. Just as monitoring by voters reduces the potential for shirking by elected officials, monitoring by an energetic President reduces the potential for shirking by subordinate officials. See HINDMOOR, *supra* note 48, at 134–35.

125. See generally WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 53–55, 120–23 (1971) (providing a general overview of some of the costs and incentives that guide bureaucratic decision making).

126. See HENRY I. MILLER, TO AMERICA'S HEALTH 42–43 (2000) (discussing the incentives in the FDA favoring excessive caution to avoid negative publicity); Russell S. Sobel & Peter T. Leeson, *Government's Response to Hurricane Katrina: A Public Choice Analysis*, 127 PUB. CHOICE 55, 58–59 (2006).

negative, in which case the coexecutive would lose crucial voter support. Coexecutives who fail to act will be able to blame their coexecutive colleagues for any resulting harm. As anyone who has followed the inaction of the Food and Drug Administration over the years will know,<sup>127</sup> this is precisely the incentive problem faced by bureaucrats. Inaction should lead to blame, not the avoidance of responsibility.

Unitary executives may be, and are blamed both for acting or failing to act because they are more accountable. The fact that the President is responsible for all executive policies means that he cannot “pass the buck” for a failure to act.<sup>128</sup> The President thus has an incentive to be energetic, which incentive Berry-Gersen coexecutives lack. Nothing would be more harmful to energy in the executive branch than having a bunch of coexecutives with a bureaucratic incentive structure, but this is precisely what would result if we moved to Berry-Gersen style unbundling.

A President has the unique ability to set priorities among competing demands. Because government has limited resources, a key component of energy in the executive is not simply taking action but also directing resources toward their most efficient uses.<sup>129</sup> An energetic executive has to maximize the use of the resources at hand given budgetary and other constraints. This process of maximizing resources will occur differently under a constitution with one President rather than several, especially where coexecutives disagree. Coordination is integral to energy in the executive because an efficient executive branch will also effectively be a more energetic executive branch. Even if Berry-Gersen style coexecutives were individually as energetic as one unitary executive, coexecutives would lack the incentive to consider the external effects of their actions on their coexecutive colleagues.

Coexecutives cannot prioritize executive resources and focus their combined energy on the biggest problems of the nation. They must instead focus on their own policy dimensions. A natural resources coexecutive would thus focus on the growing demand for resources; an environmental coexecutive would fo-

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127. See MILLER, *supra* note 126.

128. See Calabresi & Lindgren, *supra* note 32 (discussing the unique position of the President as a lightning rod for criticism).

129. See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 391 (“[A] government ill executed, whatever it may be in theory, must be, in practice, a bad government.”).

cus on the problems of pollution; and a war coexecutive would focus on national security. It is easy to see how taking such a narrow approach to problems might impair an energetic executive by creating incentives to behave inefficiently. This is an inevitable result of the institutional incentives created by having coexecutives, which prevents the balancing of competing demands. A unitary executive fares far better in dealing with such coordination problems, and as a result, it is a unitary executive, not unbundled coexecutives, that will maximize energy in the executive branch.

#### F. THE UNITARY EXECUTIVE AND PREFERENCE INTENSITY

Sixth, Berry and Gersen's system of coexecutives would ignore the intensity of voter preferences across policy dimensions as compared with a unitary-executive system. By requiring a single vote on the entire executive agenda, unitary-executive systems actually work quite well in weighing individual preference intensity, which is important because we ought not only care about what viewpoints get majority support but also how intensely those viewpoints are held.<sup>130</sup> It may seem somewhat heretical even to question whether the policy preferences of a simple majority of voters ought always to prevail, but scholars have long raised such doubts.<sup>131</sup> We do not leave all issues in our polity to be resolved by majority vote but require supermajorities for constitutional amendments.<sup>132</sup> Indeed, at the level of constitutional design, we deliberately choose institutional structures and voting processes that we think will best translate individual preferences into social preferences.<sup>133</sup>

One problem any constitution-writer must face is how to deal with the fact that individual preferences<sup>134</sup> may vary in in-

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130. Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998) (arguing that referenda and other single-issue plebiscitary voting mechanisms are contrary to populism because they eliminate the intrapersonal weighing of issues that occur in multi-issue elections). See generally VARIAN, *supra* note 123, at 54–58 (discussing the difference between cardinal and ordinal utility).

131. See generally MUELLER, *supra* note 53, chs. 7–8 (presenting simple and complex alternatives to majority voting).

132. See U.S. CONST. art. V.

133. See Geoffrey Brennan & Alan Hamlin, *Constitutional Choice*, in THE ELGAR COMPANION TO PUBLIC CHOICE, *supra* note 87, at 117, 117.

134. Michael J.G. Cain, *Social Choice Theory*, in THE ELGAR COMPANION TO PUBLIC CHOICE, *supra* note 87, at 83, 83.

tensity.<sup>135</sup> It is inherently quite hard to address the question of varying degrees of individual preference intensity because there is no common basis or metric on which interpersonal comparisons of utility can be made.<sup>136</sup> The utility person *A* may get from watching a baseball game can be compared with the utility person *A* gets from going to a movie because Person *A* can choose between the two. But the utility Person *A* gets from watching a baseball game cannot be compared with the utility Person *B* derives from watching a baseball game as is explained in the well-developed literature on the interpersonal incomparability of utility.<sup>137</sup> The impossibility of interpersonal comparisons of utility makes it impossible to aggregate individual preferences into a social welfare function.

Strikingly, however, an election for a bundled unitary executive can help take into account preference intensities in a way that elections for multiple unbundled executives might not. While it is true that preference intensities cannot be compared between individuals, they can be compared between policy choices faced by each individual. As all politicians know, voters care more about some issues than others.<sup>138</sup> Consider the response of a voter in a presidential election to a choice between two candidates, each of whom represents a bundle of policies. Each voter is compelled to weigh and then vote on his overall preference for either the various policies in the bundle represented by Candidate *A* or the different policy bundle represented by Candidate *B*. This requires each person to make an *intrapersonal* utility calculus. While *interpersonal* utility comparisons cannot be made, *intrapersonal* utility comparison is the basis of modern economics and of public choice scholarship itself.<sup>139</sup>

Weak preferences on some policies will yield in every individual's *intrapersonal* utility calculus to stronger preferences in other policy dimensions. Far from creating a democratic distortion, this *intrapersonal* weighing of utility in unitary executive

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135. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 125–26 (1962).

136. RIKER, *supra* note 66, at 111.

137. *See id.* at 111–13.

138. *See* BUCHANAN & TULLOCK, *supra* note 135, at 125–26; HINICH & MUNGER, *supra* note 91, at 26.

139. *See* MUELLER, *supra* note 53, at 1–2 (“The basic behavioral postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximizer.”). This is nothing more nor less than the assumption of rational utility maximization.



elections forces voters to make a single decision based on the strength of their preferences across policy dimensions. A voter who disagrees with most policies of his favored candidate is thus a voter with a strong preference for that candidate's positions on the remaining issues or issue—think abortion. In this way, a single election for a unitary executive incorporates into the election process the internal utility function of the individual to the greatest degree possible. Some intensity preferences may be lost because they are in the losing bundle of the two bundles. But preference intensity is better accounted for than if all issue positions were perfectly unbundled—in which case even very weak majority preferences would always trump strongly held slight-minority positions.

To see why this is so, consider what happens when there are multiple elections for Berry-Gersen style coexecutives. The first and primary difference between bundled and unbundled executive elections is quite obvious: there are more coexecutives and thus more elections and choices on the ballot. The voter must choose among candidates for each policy dimension, rather than selecting one candidate for all policy areas. Coexecutive elections allow voters to choose their preferred policies in multiple dimensions. This is the great advantage claimed by Berry and Gersen.<sup>140</sup> However, it is not clear that this is indeed an advantage. As described below, the ability to partially weigh voter preference intensity is important in comparing systems of elected government.<sup>141</sup> The coexecutive system greatly reduces *intrapersonal* internal weighing of policy preferences. In its purest form, where there is a separate election for every single policy issue, the information is simply discarded because voters will be able to vote their weakest, as well as their most strongly held policy preferences.<sup>142</sup>

Unbundling these policy preferences is a bad thing because it eliminates the need for individuals to weigh, vote, and reveal their preference intensities across policies. We think preference intensity ought to matter. A constitutional system with a single unitary-executive election will do a better job than a system with several coexecutive elections in faithfully and completely

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140. Berry & Gersen, *supra* note 6, at 1387 (“Unbundling executive authority enhances democratic accountability and government performance . . .”).

141. Part II.H, *infra*, specifically discusses the constitutional choice between voting rules, but this applies with equal force to the decision of bundling or unbundling decisions on government action.

142. The argument then becomes similar to Clark's argument against voter initiatives. Clark, *supra* note 130, at 467–73.

aggregating the preferences of voters. Counterintuitive though it may be, policy bundling actually leads to a more sophisticated sampling of the popular will.

The natural response is to note that preference intensity must be dropped at some point in a fair electoral process: it cannot ultimately be taken account of in a unitary-executive election on the final vote between Candidate *A* and Candidate *B*. The response to this is to note that plurality elections for one President have a dynamic aspect to them because candidates will always have an incentive to try to poach on one another's issue bundles. This is what keeps candidates in such elections close to the preferences of the median voters.<sup>143</sup> Remove a plank that voters care about, and the party loses support. In this way and over time, a bundled unitary-executive election will give candidates an incentive to consider the strength of voter preferences over the whole universe of policies. Candidates will respond to that incentive, and the party that ignores the intensity of voter preferences will do so to its detriment over the long run.

This raises another point about preference intensity and the advantages of a unitary executive which pertains to the mechanics of the way in which unbundled elections might be held. Such elections might be held at the same time in one election cycle or they might be held concurrently in a series of elections.<sup>144</sup> Simultaneous election of coexecutives would hurt strongly held minority positions, while concurrent election of coexecutives would so privilege strongly held minority positions that the result would be special-interest capture.

The explanation for this grows out of a weighing of the marginal cost of casting a vote for any of the various coexecutives. Just as voters must incur a cost in getting information, they must incur a cost in voting.<sup>145</sup> Registration, travelling to the polls, waiting in line, waking up early on election day, and similar acts are all direct costs of voting.<sup>146</sup> For many voters, the costs are simply not worth the value of their votes.<sup>147</sup> This

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143. See RIKER, *supra* note 66, at 85–88.

144. The analysis that follows does not change substantively if multiple coexecutives are elected in each of a series of elections. Indeed, such a system would create additional opportunities for strategic manipulation regarding which of the coexecutives share elections.

145. HINDMOOR, *supra* note 48, at 28.

146. See DOWNS, *supra* note 46, at 265.

147. *Id.* at 260; MUELLER, *supra* note 53, at 305 (“[I]n deciding whether to vote, a rational voter must calculate the probability that her vote will make or

portion of the electorate forfeits their votes by failing to cast a ballot. This is a frequent occurrence in midterm elections, where voter turnout drops substantially and where those most opposed to the administration in power in the White House disproportionately turn out to vote.<sup>148</sup>

The simultaneous election of several coexecutives together reduces the marginal cost of voting for any additional coexecutive candidate to nearly zero. Voters will have an incentive to vote on all candidates once they are in the voting booth since the major costs of voting will have already been incurred in getting to the voting booth, and the savings of a few additional seconds to cast an extra vote is trivial. Even if the voter knows nothing about the candidates and has weak preferences in the policy dimension in question, uninformed and uninterested voters will still be able to vote along party lines and get a small benefit for almost no additional cost.<sup>149</sup>

Voter turnout is likely to be higher in simultaneous elections than in concurrent elections. Any member of the electorate who gets value from voting for any or all of the coexecutives will turn out to vote. And once in the booth, he will vote for them all. This substantially hurts minorities with strong policy preferences on issues. Unlike the situation under a unitary-executive presidential system, the strength of voter preferences will not be reflected in their votes. As such, any weak preference suffices to motivate a vote once at the polls. A plurality of these weak preferences in each separate policy dimension will suffice to elect its candidate, regardless of the strength of the opposition.<sup>150</sup> This would be a bad thing, compared to the unitary-executive presidential elections we now have, because intensely held preferences will get less weight, so the simultaneous election of coexecutives is undesirable.

The problem is that the concurrent election of multiple coexecutives in separate elections in different years has exactly the opposite effect. Rather than driving the marginal cost of voting to zero, concurrent elections, like midterm elections, drive the marginal cost of voting up substantially. A higher marginal cost of voting will discourage those with either high

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break a tie . . . . This probability . . . becomes infinitesimal as [the number of voters] becomes large.”).

148. Calabresi & Lindgren, *supra* note 32, at 2619–20.

149. See HINICH & MUNGER, *supra* note 91, at 208 (“[I]deology serves as a means of reducing the costs of gathering information.”).

150. See Clark, *supra* note 130, at 434–36.

costs or with low value from voting. The only voters who will find it worth the costs of going to the polls in such elections will be those who care a lot about the outcome of the election. This is a characteristic of midterm elections, where voter participation plummets as the ratio of value to cost declines.<sup>151</sup>

Lower turnout in midterm or concurrent elections has the advantage of screening out those voters who have only weak preferences, but it has the disadvantage that it drives out voters with high costs of voting and so facilitates special-interest capture.<sup>152</sup> Separate concurrent elections, like midterm elections, would be a bad thing because they would over-represent the preferences of minorities.<sup>153</sup> Thus, neither simultaneous nor concurrent election of Berry-Gersen style coexecutives would work as successfully as has election of our one unitary executive.

#### G. THE UNITARY EXECUTIVE AND CYCLING

Seventh, Berry and Gersen's coexecutive proposal is flawed because it overlooks the fact that the creation of a unitary executive is desirable because it helps ameliorate the problem of cycling. All voting systems are plagued by the fact that they must attempt to construct the "will of the people" out of the revealed preferences of many voters. The very idea that there is such a thing as the popular will may be a useful theoretical construct, but it is actually something of a mirage. Anything we could call the popular will must, in reality, be some aggregation of individual preferences.<sup>154</sup> While rational individuals have transitive preferences,<sup>155</sup> intransitive voting cycles, where policy *A* is preferred to policy *B* is preferred to policy *C* is preferred to policy *A* ( $A > B > C > A$ ), can arise as a result of aggregation.<sup>156</sup> Plurality voting leads to this cycle if there are three voters with the following preferences:  $A > B > C$ ,  $B > C > A$ , and  $C > A > B$ . Thus, although each policy either wins or loses against every other policy in pair-wise comparison, this preference distribution does not have any policy that defeats all oth-

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151. See Calabresi & Lindgren, *supra* note 32, at 2619.

152. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12 (1971) (noting that small minorities with strong preferences find the costs of procuring favorable regulation lowest).

153. See *id.*

154. RIKER, *supra* note 66, at 31.

155. *Id.* at 17. Transitivity requires that if  $A > B$  and  $B > C$ , then  $A > C$ .

156. *Id.* at 18.

er policies (known as a Condorcet winner).<sup>157</sup> Such voting cycles have distressed political scientists for centuries,<sup>158</sup> but the prospects of a perfect voting system famously became infinitely bleaker with the publication by Kenneth Arrow of *Social Choice and Individual Values*.<sup>159</sup> This work set out a mathematical proof that no voting system simultaneously satisfies “certain natural conditions” that are desirable in any democratic voting system.<sup>160</sup> This result came to be known as Arrow’s Impossibility Theorem.<sup>161</sup> Arrow’s own work was highly mathematical, but it gained prominence following William Riker’s explanation in *Liberalism Against Populism*.<sup>162</sup>

Following Riker, Arrow’s Impossibility Theorem states that no method of voting can satisfy four basic conditions: universal domain (*U*),<sup>163</sup> Pareto optimality (*P*),<sup>164</sup> independence of irrelevant alternatives (*IIA*),<sup>165</sup> and non-dictatorship (*D*).<sup>166</sup> An outcome is Pareto efficient if there is no other alternative that could make at least one voter better off without making any voters worse off.<sup>167</sup> Suppose voters have the following preference orderings:  $A > B > C$ ,  $B > C > A$ , and  $B > A > C$ . In this example, *C* is not Pareto optimal because  $B > C$  for every voter. The same result would hold if any of the voters were indifferent among any of the alternatives. The theorem further assumes that a voting mechanism actually chooses some outcome.<sup>168</sup> The problem is that there is no outcome among *A*, *B*, and *C* that will satisfy a majority of the voters when voting cycles exist. Accordingly, if pair-wise votes can be held over and over again, cycl-

157. See HINDMOOR, *supra* note 48, at 80–81.

158. *Id.* at 81 (noting that the problem has been independently considered by the Marquis de Condorcet, Charles Dodgson, and Kenneth Arrow).

159. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951).

160. *Id.* at 2.

161. HINDMOOR, *supra* note 48, at 83.

162. RIKER, *supra* note 66, at 115–36.

163. Condition *U* requires that voter preferences must be free to span the universal domain of all possible rankings of alternatives. *Id.* at 116–17.

164. Condition *P* is the powerfully simple requirement that any outcome of the voting mechanism must be Pareto optimal. *See id.* at 117–18.

165. Condition *IIA* precludes the outcome from depending on changes in other alternatives that are not relevant to the decision. *Id.* at 118.

166. Condition *D* requires that no individual voter has controlling preferences. *Id.*

167. RIKER, *supra* note 66, at 270.

168. *See id.* at 119–20. Additional technical details are left out for clarity and convenience. A thorough analysis of this theorem would require a good deal more space and qualified statements, but it would add little value to the present discussion.

ing will occur as there is a majority to reject any of the possible outcomes *A*, *B*, or *C*.

It is important to note that voting cycles cannot occur when there are two alternatives, so Arrow's Impossibility Theorem is solved in such cases.<sup>169</sup> In unitary-executive presidential elections, there are typically only two such alternatives whereas in Berry-Gersen elections for multiple coexecutives, there would be more than two such alternatives. Thus, a unitary-executive election would seem to reduce cycling. Unfortunately, Riker reminds the prematurely optimistic that arbitrarily narrowing the field to two candidates simply pushes the problem back one stage.<sup>170</sup> Thus, if general elections are free of cycling, it is only because primary elections have arbitrarily narrowed the field. However, the narrowing of the field in primary elections is not entirely arbitrary. A party that constantly runs candidates too far from the median voter will find itself perpetually out of office, which is why plurality voting in geographically specified districts produces a two-party system.<sup>171</sup> Riker himself, for this reason, endorsed plurality voting as a response to the problem of Arrow's Impossibility Theorem,<sup>172</sup> and election of one President and Vice President by national majority vote does seem in practice to work reasonably well in representing the median voter and in satisfying the conditions of Arrow's Impossibility Theorem.

Elections are only the beginning. The policy choices of elected officials (be they coexecutives or representatives in the legislature) are also susceptible to exactly the same problem. This is obviously true with respect to legislatures since they actually vote on policy decisions and can cycle as easily as voters themselves. Legislatures respond to the problem of cycling through agenda control, which somewhat arbitrarily removes Pareto-preferred alternatives in early rounds of voting.<sup>173</sup> As with legislatures, the substitution of coexecutives for a unitary executive could lead to Pareto-inefficient outcomes and to cycling. A unitary executive elected by plurality vote is a uniquely elegant solution to the problem of Arrow's Impossibility Theo-

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169. ARROW, *supra* note 159, at 46–48.

170. *See* RIKER, *supra* note 66, at 65.

171. This result is known as Duverger's Law. *See id.* at 145.

172. *Id.* at 113.

173. HINDMOOR, *supra* note 48, at 88.

rem. Strong dynamic effects serve to keep the choices offered in the general election fairly close to the median voter.<sup>174</sup>

#### H. A PUBLIC CHOICE PERSPECTIVE ON THE UNITARY EXECUTIVE DEBATE

Eighth, Berry and Gersen's coexecutive model is less desirable than having a unitary executive for reasons spelled out in Buchanan and Tullock's masterpiece *The Calculus of Consent*.<sup>175</sup> Buchanan and Tullock model constitutional voting rules as a simple cost-minimization problem<sup>176</sup> that considers two costs faced by all the voters in a society: (1) external costs and (2) decision costs.<sup>177</sup> External costs are all the expected costs of government actions that could in theory produce a net harm to the individual.<sup>178</sup> Thus, for example, special-interest projects that divert general tax revenue for the benefit of others would be examples of external costs. External costs decrease as the percentage of votes needed to take a governmental action rises since each voter has greater power to block harmful government actions.<sup>179</sup>

Decision costs, in contrast, are those costs involved in reaching an agreement on any given beneficial government action.<sup>180</sup> These include the costs of coordination and bargaining.<sup>181</sup> Decision costs increase as the percentage of votes needed to take action rises because a smaller number of voters suffices to block government actions.<sup>182</sup> The goal of constitutional design is thus to choose the voting rule that minimizes the total expected costs to all voters.<sup>183</sup>

Socially optimal voting rules need not be majority voting or plurality voting. In fact, supermajorities are commonly required for amending constitutions.<sup>184</sup> At one end of the spec-

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174. RIKER, *supra* note 66, at 85–88.

175. BUCHANAN & TULLOCK, *supra* note 135.

176. *Id.* at 70.

177. *Id.*

178. *Id.* at 64.

179. *Id.*

180. *Id.* at 68–69.

181. *Id.*

182. *Id.* (stating that strategic bargaining becomes a major problem as the rule approaches unanimity).

183. *Id.* at 70.

184. *See, e.g.*, 1958 CONST. art. 89 (Fr.) (requiring three-fifths approval when the government submits an amendment to both Houses of Parliament convened in Congress instead of to the Houses acting separately, in which case

trum, in America, Article V of the Constitution sets a high requirement for amendment,<sup>185</sup> indicating a greater concern with external costs. At the opposite end of the spectrum is Britain. There the doctrine of parliamentary supremacy allows Parliament to amend the constitution by majority vote,<sup>186</sup> indicating a greater concern with decision costs.

Institutional structures can also be used to minimize the costs of government, especially external costs. Buchanan and Tullock point out that bicameralism is one such structure.<sup>187</sup> Dividing the legislature into two houses with different districts increases the number of voters necessary to acquiesce in special-interest acts.<sup>188</sup> By differentiating the constituencies of members of the houses, the bicameral system effectively requires a double majority for legislation. Such a double majority is easily found for actions of broad benefit to the nation, but it increases the costs of special-interest projects.<sup>189</sup> The bicameral legislature thus acts as a filter for special-interest legislation. It reduces external costs without substantially raising decision costs.

A strong unitary executive also lowers both external costs and decision costs just as bicameralism does. The President must answer to the entire nation and must consider all the effects and penumbras of executive actions.<sup>190</sup> Coexecutives must likewise consider the entire nation but will likely only consider the direct effects of their policies in their own policy-making dimension. Presidents, in contrast, will weigh all direct and indirect effects of policies, and they will better protect minority interests. The unitary executive thus reduces both costs of gov-

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simple majority approval must be followed by referendum); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (Federal Constitution) art. 79, §§ 2–3 (F.R.G.) (requiring two-thirds approval of both houses to amend the Basic Law, although certain provisions are not amendable).

185. U.S. CONST. art. V.

186. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 84 (8th ed. 1915).

187. BUCHANAN & TULLOCK, *supra* note 135, at 236 (“[I]f the basis of representation can be made significantly different in the two houses, the institution of the bicameral legislature may prove to be an effective means of securing a substantial reduction in the expected external costs of collective action without incurring as much added decision-making costs as a more inclusive rule would involve in a single house.”).

188. *Id.* at 242.

189. See *id.* at 247–48 (noting the possibility that a bill supported by a geographically concentrated House majority could fail in the Senate).

190. *Id.* at 248.



ernment—making it more efficient—while the coexecutive system increases both costs of government—making it less efficient.

Minorities with strong interests will lobby unitary executives to implement preferred policies.<sup>191</sup> Because a President must accept both the praise and blame for such policies, he must weigh the relative value of such policies to their proponents and opponents.<sup>192</sup> This reduces external costs because if a policy produces great harm to some voters without offsetting value to others, those harmed will be able to prevail on the executive for some relief. A unitary executive, which is responsive to strong minority preferences as to which the majority is almost indifferent, will thus reduce the expected external costs of government without adding to decision costs, just as bicameralism does.

Creation of a unitary executive as opposed to Berry-Gersen style coexecutives also decreases decision costs in two ways. First, at the election stage, the costs of electing one executive are obviously less than the costs of electing several. Second, at the stage of policy implementation, a unitary executive will have lower coordination costs. For these reasons, a unitary executive can be expected to reduce overall both the external costs and the decision costs of government action, leading to greater efficiency under the Buchanan-Tullock model.

#### I. PRESENTMENT AND THE COEXECUTIVE VETO

A ninth problem with Berry and Gersen's proposal is that it is hard to square with retention of the presidential veto. The veto is desirable both because it reinforces the separation of powers and because it adds a national perspective to lawmaking.<sup>193</sup> The veto power gives the executive branch a vital weapon with which to counterbalance Congress's power of the

191. See *id.* at 135–40 (presenting a model of logrolling that allows minorities to obtain some of their preferred policies by agreeing to support others); HINDMOOR, *supra* note 48, at 168–69 (describing the benefits to minorities with strong preferences from logrolling).

192. BUCHANAN & TULLOCK, *supra* note 135, at 134–35 (describing implicit logrolling by which politicians offer policy combinations that appeal in different degrees to different voters).

193. See THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 2, at 411 (“The primary inducement to conferring the power in question upon the executive, is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design.”).

purse. The veto's protection of the national interest is, of course, subject to override by two-thirds of both houses of Congress,<sup>194</sup> but this supermajority requirement itself promotes a national focus on legislation by increasing the size of the minimum winning coalition necessary to enact a law.<sup>195</sup> Legislation Congress enacts over a veto must benefit at least two-thirds of the states and two-thirds of the people,<sup>196</sup> which in turn increases the amount of "logrolling" that must go on to enact a bill over a president's veto.<sup>197</sup> Thus, the requirement of presentment adds a national perspective to the lawmaking process.

The veto has, in fact, proven to be so successful, even though it was originally controversial,<sup>198</sup> that all of the states have emulated the federal system and given their governors vetoes.<sup>199</sup> Many states have gone even further by giving their governors a line-item veto,<sup>200</sup> which our president lacks.<sup>201</sup> Berry and Gersen say that the presidential veto could be retained in a system of coexecutives, but we do not see how this is possible. The veto would have to either be given to one coordination coexecutive, who would then be a first among equals, or it would have to be shared by each coexecutive in his own policy dimension. Both these ideas are highly problematic.

The states, of course, have opted for one coordination coexecutive, the governor, who alone has a veto.<sup>202</sup> As a result, this

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194. U.S. CONST. art. II, § 7.

195. See MUELLER, *supra* note 53, at 281.

196. Strictly speaking, it need only benefit half the voters of those states and half the population of each congressional district of the supporting representatives. However, it is conventional to speak of the districts and states as discrete units, adding clarity without substantively changing the underlying logic.

197. HINDMOOR, *supra* note 48, at 172.

198. THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 2, at 411-12 (rejecting arguments against the veto power).

199. *Last Governor Without Veto Could Get It: Legislature Overcomes Colonial-Era Fears*, N.Y. TIMES, Feb. 12, 1995, at 27 (noting that North Carolina was the last state without a gubernatorial veto).

200. Only six states have refused their governors the line-item veto entirely. See IND. CONST. art. V, § 14; NEV. CONST. art. IV, § 35; N.H. CONST. pt. 2, art. 44; N.C. CONST. art. II, § 22; R.I. CONST. art. IX, § 14; VT. CONST. ch. II, § 11.

201. *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (holding that the Line Item Veto Act violated the Presentment Clause).

202. See, e.g., MASS. CONST. pt. 2, ch. I, § 1, art. II ("No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revision . . . ."); N.Y.

“veto coexecutive” governor exerts substantial control over all policy dimensions, which makes the state-executive systems in some ways a lot like the presidential-executive system, as noted above. The coexecutive or governor who has the veto power controls the other coexecutives to a substantial degree.

Such a hybrid system of coexecutives with a coordinator coexecutive will suffer from both coordination and accountability problems that neither a unitary executive nor a Berry-Gersen system of coexecutives, each armed with vetoes in their own area, would face. Although the coexecutive with the veto would have no power to enforce coordination among the other coexecutives, he would have the power to hinder coordination by vetoing bills another coexecutive might want passed. As a result, the sharp and distinct allocations of policy dimensions which Berry and Gersen concede are essential for their scheme to work would be lost. All of the problems we associate with executive councils thus return when there is one coexecutive with the veto power.<sup>203</sup>

What then about giving each coexecutive a coequal veto in his own policy dimension? The problem with this division of the veto power is that it destroys executive-branch independence. The veto power is vital because it protects the executive from encroachments by Congress.<sup>204</sup> Giving the coexecutives veto powers over their respective policy dimensions would create a problem even if the policy dimensions were clearly distinct. Either Congress would have the power to pick which coexecutive to send a bill to or the judiciary would have to be harnessed to make that decision. Both of these alternatives are manifestly implausible on their face. Dividing the veto will inevitably

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CONST. art. IV, § 7 (“Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor . . .”).

203. How have the states persevered with such hybrid systems for so long? The answer is that they have not. The state constitutions do not remove entirely any substantial portion of the executive power from their governors. While the coexecutives in state governments are independently elected, they still report to the governor—in whom alone the executive power is vested. *See, e.g.*, ILL. CONST. art. V, § 8 (“The Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws.”); MICH. CONST. art. V, § 1 (“The executive power is vested in the governor.”); PA. CONST. art. IV, § 10 (“The Governor may require information in writing from the officers of the Executive Department, upon any subject relating to the duties of their respective offices.”). Exactly how much independence these subordinate, independently elected officials actually have is an interesting empirical question, but one that is beyond the scope of this paper.

204. *See* Calabresi, *Some Normative Arguments*, *supra* note 1, at 81.

greatly weaken the executive branch relative to Congress, and we think that is a bad thing.<sup>205</sup>

J. THE LESSON FROM THE STATES FOR THE FEDERAL EXECUTIVE

And the tenth and final flaw with the Berry and Gersen model is that Berry and Gersen defend their system of coexecutives by claiming it has worked in the states,<sup>206</sup> but they overlook the fact that the experience in the states has been far from universally positive.<sup>207</sup> They also overlook vital differences between the federal government and the states. Thus, it is true as Berry and Gersen claim that many states have successfully used elective coexecutive systems since the nineteenth century.<sup>208</sup> It must be remembered, however, that they have done so in a polity where the stabilizing influence of a federal government with a unitary executive prevented the complete breakdowns of government which could follow from the unbundling of executive power. There are big differences between the states and the federal government which suggest that a system of coexecutives might work in the one but not in the other.

First, it is not nearly as critical that state executives be able to act with great energy, dispatch, and force as it is with the federal executive. Governors do not engage in diplomatic and trade negotiations with foreign nations, nor must they safeguard their states' very existence from foreign and domestic threats. The federal executive must do all of these things. As President Harry S. Truman said famously of the federal executive branch, "the buck stops here."<sup>209</sup>

Second, the federal government's responsibility for foreign relations almost requires by itself a unitary executive at the federal level. In a system of plural coexecutives, each coexecutive would essentially be able to make decisions with foreign affairs consequences. A trade or environment or social issues coexecutive could easily make decisions that would hobble the foreign policy coexecutive's management of external relations.

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205. *See id.*

206. Berry & Gersen, *supra* note 6, at 1399.

207. *See* Arthur Ludington, *Progress of the Short Ballot Movement*, in Horace E. Flack, *Notes on Current Legislation*, 5 AM. POL. SCI. REV. 70, 79–83 (1911) (discussing early twentieth-century efforts in a number of states to convert most statewide elective offices into positions appointed by the governor).

208. *See* Marshall, *supra* note 74, at 2452.

209. Truman: The Buck Stops Here, Harry S. Truman Library and Museum, <http://www.trumanlibrary.org/buckstop.htm> (last visited Apr. 7, 2009).

Finally, the greatest potential for danger would surely be in the command of the military. It is obvious that any division of the commander-in-chief power among coexecutives would place the nation in as precarious a position as it did the Roman Republic.<sup>210</sup> Even if a single coexecutive were put in charge of the armed forces, disputes might well arise during moments of national crisis and danger. And, of course, these are precisely the moments that most demand executive unity and energy. Imagine the *Youngstown Steel*<sup>211</sup> scenario if we then had a system of coexecutive power. A war coexecutive might have claimed that the threatened strike would harm the war effort. A labor coexecutive might have claimed that interference with such a strike violated the division of coexecutive powers. Which coexecutive would have prevailed and how would the question have been decided? Each coexecutive would have had in effect a veto over the effective use of resources for the national defense. Whatever the wisdom of such a structure at the state level, these unique problems faced by the federal government suggest that a system of coexecutives would never work at the federal level. Could Franklin D. Roosevelt have waged and won World War II if he had an elected republican attorney general breathing down his neck? Our answer: no way.

#### CONCLUSION

We have sought in this Article to present normative arguments in favor of the unitary executive and to expose the costs of Berry-Gersen style unbundling. By accounting for preference intensity, the presidential unitary executive system offers a more sophisticated sampling of the popular will. Such a system also promotes informed voting and energy by focusing accountability on one official. As the proponents of the short ballot movement argued long ago at the state level, a unitary-executive presidential system leads to better government by making coordination easier. Energy and coordination are especially vital in the federal government, where the threats faced by the executive branch are very different from those faced by the states. Finally, a unitary-executive presidential system

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210. See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 2, at 391 (“Every man . . . knows how often [Rome] was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator . . .”).

211. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–83 (1952) (rejecting the claimed power to seize a steel mill for the purpose of avoiding a strike during the Korean War).

promotes the separation of powers by providing a strong check to the legislature. In contrast, a Berry-Gersen style coexecutive system would tend toward a parliamentary system of governance by the invisible and unaccountable congressional committees. There would be high costs to going down that road.<sup>212</sup> Such costs were thought too high in 1789,<sup>213</sup> and they have not gone down in the last 220 years. A plural executive—be it a council or a Berry-Gersen system of independent coexecutives—neither promotes nor protects democracy to the degree that a unitary executive system does.

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212. See generally Calabresi, *The Virtues of Presidential Government*, *supra* note 1.

213. THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 290–91 (noting the need to fortify the executive against the legislative authority, which “necessarily predominates” in a republican government).